



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08566/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2019

Decision & Reasons Promulgated
On 12 March 2019

Before

**THE HONOURABLE MRS JUSTICE MAY DBE
UPPER TRIBUNAL JUDGE GLEESON**

Between

**NARA NES SARKIS DO NASCIMENTO
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs A Kouma, Solicitor instructed by Migrant Legal Action
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge N M K Lawrence who dismissed her appeal against the respondent's decision to refuse her a permanent right of residence by reference to Regulation 19 of the Immigration (European Economic Area) Regulations 2016. The appellant is a Brazilian citizen and her husband is an EEA national because he is a Portuguese citizen.

2. The parties met in 2006 but did not become a couple until they began cohabiting on 28 August 2009. They have two children born in 2010 and 2015. The appellant's permanent right of residence application was submitted on 20 April 2017 and refused on 9 October 2017. The couple are still married but now estranged due to claimed domestic violence.
3. The First-tier Judge dismissed the appellant's appeal. At [13] in the First-tier Tribunal Judge's decision he said that the evidence before him was that no income was declared by the sponsor in 2008/2009 and 2009/2010. From 2011/2014 there was income ranging from £3000 to £14000, which he described as 'hardly an income to support oneself, let alone a family of four'. There was no evidence of income in 2014/2015 and no income declared in the following 2 years.
4. The appellant nevertheless claims that the sponsor, whom she has not divorced, has demonstrated that for five years of the time that he has spent in the United Kingdom since 1998 he was working and that he therefore acquired a right of permanent residence in accordance with the Regulations. Accordingly, the five years and more that the parties have been married give the appellant a right of permanent residence also.
5. At [15], the First-tier Judge said that if the five continuous years were said to start with 1998/1999 through to 2002/2003 the appellant 'could claim that [the sponsor] had exercised Treaty rights for a continuous 5 years' but noted at [16] that the appellant did not meet the sponsor until 2006, beginning to cohabit in August 2009 and marrying him on 28 January 2013. At [24], he noted that there was no evidence of the sponsor's claimed employment in the 5 years to 2002/2003. It is impossible to tell from the decision, in particular at [15], [17] and [24], whether the Judge concluded that the sponsor did have a permanent right of residence.
6. The Judge considered that Regulation 10(5)(d)(iv), the domestic violence provision, was not applicable to the factual matrix in this appeal, because that is only triggered where the marital relationship has ended, and an appellant is no longer a family member. We think he was right to do so: following *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088, Regulation 10(5) is not engaged unless divorce proceedings have been lodged, which is not the case here.
7. In relation to the issue of permanent right of residence, however, we consider that the First-tier Judge's reasoning is unclear and we are satisfied that it discloses a material error of law by reason of the contradictory and inadequate findings of fact therein. It must be set aside.
8. We have considered whether we could proceed to remake the decision today but have reluctantly concluded that we cannot do so. The remaking of this decision requires further findings of fact.
9. Accordingly, we set aside the decision in this appeal with no findings of fact or credibility preserves, and we remit it for rehearing afresh before a judge other than Judge N M K Lawrence.

DECISION

10. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law

The decision of the First-tier Tribunal is set aside and will be remade in the First-tier Tribunal on a date to be fixed.

Signed

Judith AJC Gleeson

Upper Tribunal Judge Gleeson

Date: 8 March 2019