



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/08977/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 July 2018

Decision & Reasons Promulgated  
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MR TIAGO DE LIMA ALBUQUERQUE  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms R Popal, counsel on Direct Access

For the Respondent: Mr D Clarke, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Brazil, date of birth 16 November 1987, applied on 18 July 2017 for a residence card as a family member of his wife and Sponsor, Amy O'Connor a British national. The application was made with reference to the 2016 Immigration (European Economic Area) (The Regulations 2016). The application was refused on 26 October 2017 and an appeal against that decision came before First-tier Tribunal Judge

Anstis whose decision promulgated on 19 January 2018 dismissed the appeal by reference particularly to whether or not the Appellant had met the requirements of the 2016 Regulations with particular reference to Regulation 9. The Judge set out correctly the relevant provisions of the Regulations as they stood at the date of decision and still stand although I have been informed of an intended change to the Rules which may materially affect how future applications fall to be considered. At present they are not currently applicable law although Ms Popal argued that they reflect the view taken by the European Commission and a proper consideration of the case of O and B reference C-456/12 a decision of the Grand Chamber of 12 March 2014 which is made particularly with reference to the Directive 2004/38/EC which will be more than familiar.

2. The matter was presented to the Judge as a paper appeal which is indeed most unfortunate. The papers were no more or less than, a grounds of appeal (a copy of which nobody now has), a bundle of documents and a very short statement by the Appellant rather than his Sponsor concerning the activities that had taken place when they lived together in the Republic of Ireland; for whatever was the period that was involved. It is true to say that the Judge, doing the best he could with the material he had been presented with, in the manner it was, dealt with fact specific issues and made findings essentially driven by the absence of the proper explanation as to what had been going on. Whether or not it was a genuine residence that had taken place in the Republic of Ireland and on the face of it it would be difficult to say with any certainty that the Sponsor wife was at all material times a qualified person. As explained to me it now looks like that certainly was the fact but one may forgive the Judge for being less than certain about the extent to which they had met the requirement in Regulation 9(3) namely the factors which were to be taken into account.
3. For my purposes it is not necessary to set those all out and enter into an analysis but plainly the critical issue was whether or not the Judge could properly find on the information before him that their residence in the EEA state (the Republic of Ireland) was genuine. It may be that part of the criteria contained within Regulation 9(3) is or

may no longer be in force but at the material time he was looking at the evidence he had in the context of the Regulations that he was dealing with and there was nothing to indicate other than by reference to the case of O and B if it was actually provided or if the Judge looked it up which might give rise to concerns about the outcome of the assessment that he was expected to make.

4. It seemed to me having heard extensive argument the position was that on the material as provided without any clear pathway, shown to the Judge as to why the case of O and B applied or the fact specific findings that he would need to be making on a paper case to show the Appellant met the requirements of the Regulations.
5. Be that as it may, with hindsight perhaps, had he thought about it he might have concluded that it was no longer a case appropriate to be dealt with on the papers and to give the parties an opportunity to attend and make representations to more properly clarify and explain what it was they relied upon.
6. It seems to me therefore that the Original Tribunal did the best it could, somewhat in the dark and it may well be that there was a sustainable argument to show on the evidence that was provided that there was a genuine transfer of residence or if the material factors that the Secretary of State highlights as indicators were met. The reasons the Judge gave it seemed to me on the evidence he had, as revealed by the grounds of appeal, simply left him substantially in the dark about the matter. Therefore the criticisms that might be otherwise made really are not sustainable.
7. Nevertheless I conclude that the Original Tribunal's decision raises significant levels of doubt about the understanding of the case and the evidence that was advanced. The Judge's decision demonstrated the necessary findings of fact and conclusions were not reached so as to provide a reliable decision. I therefore find the Original Tribunal's decision constitutes an error of law and the matter will have to be wholly remade in the First-tier Tribunal. No anonymity order was made nor is one required.

## **DECISION**

The appeal is allowed to the extent that is to be remade in the First-tier Tribunal.

## **DIRECTIONS**

- (1) List for hearing at Taylor House not before Judge Anstis.
- (2) List for hearing one and a half hours to two hours.
- (3) No findings of fact to stand.
- (4) Any further evidence to properly clarify these matters should be filed not less than ten working days before the resumed hearing.
- (5) The case law relied upon and any indicative guidance and or anything else must be entirely copied and provided so that the Judge who looks at this matter again has all the relevant case law and any draft or published alterations to the Rules with any supporting Parliamentary paper which explains the basis of the change in the Rules and/or any statement from the Secretary of State underlying how either by way of indicative guidance to case workers or alternatively with any other form by published policy what stance the Secretary of State takes to the application of the amended Regulation 9 of the 2016 Rules.

Signed  
Deputy Upper Tribunal Judge Davey

Date 20 August 2018