



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/30512/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29<sup>th</sup> July, 2015  
Given extempore**

**Decision & Reasons Promulgated  
On 4<sup>th</sup> August, 2015**

**Before**

**Upper Tribunal Judge Chalkley  
Upper Tribunal Judge Ward**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS MARIA MARLENE BOTH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer  
For the Respondent: No Appearance by the respondent but her son was present.

**DECISION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department and to avoid confusion I shall refer to her as being the "claimant". The respondent, Maria Marlene Both, is a citizen of Brazil who was born on 26<sup>th</sup> February, 1956. She originally arrived in the United Kingdom on 7<sup>th</sup> August, 2003, on a six month visitor's visa. She had come

to visit her son and while here she decided to study the English language. She was granted subsequent student visas until 31<sup>st</sup> May, 2006.

2. The respondent's son was married to a Portuguese national and before the expiry of her student visa, the respondent applied for a residence card as confirmation of her right to reside in the United Kingdom as a non-European Economic Area national family member of her daughter-in-law. She was granted a residence card valid from 9<sup>th</sup> January, 2007 to 9<sup>th</sup> January, 2012. She subsequently made application for a permanent residence card, but her application to the claimant was refused. She appealed and her appeal was heard by First-tier Tribunal Judge O'Flynn sitting at Hatton Cross on 24<sup>th</sup> February, 2014. In the judge's determination promulgated on 4<sup>th</sup> March, 2014 the judge accepted that the respondent's appeal should be allowed under the EEA Regulations.
3. The claimant challenged the decision for reasons explained below and the matter came for hearing before Upper Tribunal Judge Chalkley first on 21<sup>st</sup> May, 2014. At that stage it was accepted by Mr Deller on behalf of the claimant and Mr Ferrarini, a representative on behalf of the respondent that the determination did contain an error of law. He adjourned the hearing very briefly for the representatives to have the opportunity of discussing the matter further as a result of which the appeal was adjourned in order that the claimant's representative might make further enquiries. In a letter addressed to me dated 28<sup>th</sup> July, 2015 Mr Peter Deller, the Presenting Officer who appeared before me in May, 2014, has written explaining that he has now concluded that the claimant is entitled to the documents she sought confirming permanent right of residence under the EEA Regulation 15(1)(b). His letter says, and we quote:

“This is because from the evidence on file I am content that:

1. Mrs Both became the family member of her son and daughter-in-law (dependent relative in the ascending line of Mrs Costa and Mr Both) from the date of her arrival in 2003 and
2. Mrs Costa herself acquired right of permanent residence in 2006 such that no further evidence was required thereafter that she was exercising treaty rights under Regulation 6. Accordingly
3. Mrs Both accumulated five years' qualifying residence sometime in 2008 and has not lost that right since she has not been absent for two years. Her residence as a family member prior to 30<sup>th</sup> April, 2006 can be aggregated with that afterwards.

This approach differs significantly from the basis on which the application was made, refused and litigated. It means that the issues become academic of:

- Whether the P60 evidence properly demonstrated that Mrs Costa was working at the date of the application;
- Whether the FTT erred by not considering the situation at date of hearing and after divorce;
- Whether Mrs Booth could remain a family member when her son and Mrs Costa became estranged and her continuing dependence on Mrs Costa became uncertain;
- Whether Article 8 could successfully be deployed in an EEA appeal; and

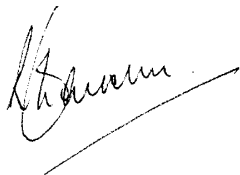
- Whether the FFT ought to have considered the assertion that Mrs Both was now eligible for indefinite leave to remain on ten years long residence (and what the outcome might have been).”

4. We are content to allow this appeal and do so with the agreement of Mr Tarlow, who appears for the claimant. We are very grateful to Mr Deller for taking the time to investigate the matter and we can only apologise to Mrs Both for the length of time that this has taken. The respondent’s appeal was allowed by the First Tier Tribunal Judge. The error on his part was not material to the outcome of the appeal and we uphold the decision which shall stand.

**Notice of Decision**

The appeal on the part of the Secretary of State for the Home Office is dismissed. The determination of the First Tier Judge shall stand.

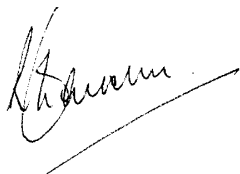
No anonymity direction is made.



Upper Tribunal Judge Chalkley

**TO THE RESPONDENT**  
**FEE AWARD**

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of any fee which has been paid.



Upper Tribunal Judge Chalkley