



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

Appeal Number: IA/40315/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 6 January 2015**

**Determination Promulgated
On 7 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

**Luisa Ximena Lira Jimenez
[No anonymity direction made]**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Not represented

For the respondent: Mr P Duffy, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Luisa Ximena Lira Jimenez, date of birth 14.2.81, is a citizen of Mexico.
2. This is her appeal against the determination of First-tier Tribunal Judge Dickson promulgated 2.10.14, dismissing her appeal against the decision of the respondent, dated 3.10.13, to refuse her application made on 1.2.13 for a permanent residence card as confirmation of a permanent right to reside in the UK, pursuant to the Immigration (EEA) Regulations 2006. The Judge heard the appeal on 22.9.14.
3. First-tier Tribunal Judge Macdonald granted permission to appeal on 18.11.14.

4. Thus the matter came before me on 6.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Dickson should be set aside.
6. The grounds of application for permission to appeal contend that the judge made a material error by considering that the phrase "residing with" meant that the appellant had to be living together with her husband, from whom she was separated in 2010.
7. In granting permission to appeal, Judge Macdonald noted that the First-tier Tribunal Judge found that the appellant and her EEA spouse had not lived together for a continuous period of 5 years, which approach was an arguable error of law.
8. Mr Duffy conceded that the judge was in error. As held in the case of PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC) and the European case of Diatta v Land Berlin, resided with means in the same EEA state whilst the marriage is continuing. She can acquire a permanent right of residence under regulation 15(1)(b) if her husband keeps on working in the UK during the requisite period of five years, without having to reside with him. But if her husband stops working, or she cannot prove that he has been exercising Treaty rights, her five years' residence will not lead to a permanent right of residence, even if she has herself been working.
9. It follows that the decision of the First-tier Tribunal cannot stand and must be set aside and remade. The application was refused primarily because the Secretary of State was not satisfied that the EEA spouse was economically active in the five year period between the marriage in 2008 and when he left for Israel in 2013. That issue was preserved in the Rule 24 response, relying on rule 24(3)(e), even though the First-tier Tribunal Judge found at §19 that the EEA spouse, Mr Soussan, had exercised Treaty rights as a self-employed worker for more than 5 years.
10. However, Mr Duffy conceded that the Rule 24 response had been drafted without sight of the appellant's 300-page bundle and only on the basis of the documents submitted with the application. We therefore took some time during the hearing to look through some of the bundle with the assistance of the appellant. I was able to see and point out to Mr Duffy that there are letters from the accountant enclosing HMRC self-assessment calculations including a profit and loss statement for each of the relevant tax years for Mr Soussan. In the circumstances, Mr Duffy did not resist the appeal against the original refusal decision.
11. It follows that I find that the appellant meets the requirements of the Regulations for the permanent residence card she sought and the appeal should be allowed.

Conclusion & Decision:

12. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I re-make the decision in the appeal by allowing it under the Immigration (EEA) Regulations 2006.



Signed:

Date: 6 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The appeal has been allowed.



Signed:

Date: 6 January 2015

Deputy Upper Tribunal Judge Pickup