Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42763/2013

THE IMMIGRATION ACTS

Heard at Sheldon Court, Birmingham	**Determination Promulgated**
On 10 July 2014	**On 22 July 2014**

Before

The President, The Hon. Mr Justice McCloskey

Between

CHING-I-YANG

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr D Lawrence (of Counsel), instructed by Walters Solicitors.

Respondent: Mr Smart, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is a condensed version of the judgment given orally, in the presence of the parties and their representatives, at the conclusion of the hearing of this appeal on 10 July 2014.

2. The appeal originates in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 08 October 2013, whereby the Appellant's application for settlement in the United Kingdom as a Tier 1 Highly Skilled Migrant was refused. The focus

of the decision was whether the Appellant had demonstrated a period of five years continuous residence in the United Kingdom as required by paragraph 245 CD(c) of the Immigration Rules. It was concluded that she had not satisfied this requirement. On appeal to the First-tier Tribunal (the "*FtT*"), it was argued that a short period of absence of approximately one month's dimensions, in August/September 2009, should be disregarded for the purposes of the requisite calculation. The FtT rejected this argument on the basis that the Appellant's lawful presence in the United Kingdom had expired before this departure occurred, as she had become an "overstayer" almost two months previously. Hence the Judge considered the decision under the Immigration Rules to be correct. Secondly, the Judge dismissed the appeal under Article 8 ECHR.

3. Initially, the Appellant's application for permission to appeal was refused. This contained an acknowledgement by the permission Judge that the FtT "*was wrong in fact to conclude that there would be no problem in Mr Evans* [the Appellant's British spouse] *living in Taiwan with her.*" This, however, was offset in the proportionality assessment by the Judge's recognition that it would be open to the Appellant to apply for entry clearance, *qua Mr Evans spouse,* from abroad. The initial refusal of permission to appeal was challenged successfully. Permission was granted by a Judge of the Upper Tribunal in the following terms:

> "*It is arguable that the First-Tier Tribunal Judge's error of fact as to the possibility of the Appellant's husband settling in Taiwan could have significantly impacted upon the findings as to the proportionality of the decision to remove the Appellant from the United Kingdom.*"

Permission to appeal was, therefore, granted at the second attempt.

4. The passage in the FtT's determination to which the grant of permission to appeal relates is the following:

> "*The Appellant maintains strong links with Taiwan, for both family and business purposes. I find that she would have no problem in re-establishing herself there.* ***She has not offered any evidence to suggest that there would be any problem in Mr Evans living there with her.***"
>
> [Emphasis added.]

In my judgment, the first permission Judge erred in characterising this an erroneous finding of fact. *Ditto* the second permission Judge. Properly analysed, this was a predictive evaluative assessment on the part of the FtT. Moreover, having regard to the evidence adduced, this assessment plainly lay within the range of reasonable options available. This, accordingly, did not entail any arguable error of law and I consider that permission to appeal should not have been granted.

5. Significantly, upon the hearing of this appeal, Mr Lawrence (of Counsel) did not develop any argument based on the grant of permission. Rather, the centrepiece of his submissions was that the conclusion of the FtT gave rise to a disproportionate interference with his client's right to respect for private and family life under Article 8 ECHR. His submissions focused on those passages in the determination in which the FtT balanced the legitimate aim in play (on the one hand) and the factors on the other side of the scales favouring the Appellant (on the other). The outcome of this balancing exercise was to give determinative weight to the public interest in maintaining firm immigration control. I consider that this conclusion is unimpeachable. There was no suggestion that the Judge had considered inappropriate factors or had left out of account any material evidence or considerations. The question for this Tribunal is whether the FtT committed any material error of law in performing the proportionality exercise or reached a conclusion vitiated by irrationality. I am satisfied that no such error has been demonstrated.

DECISION

6. It follows that the appeal must be dismissed. I affirm the decision of the FtT.

Signed:

THE HON. MR JUSTICEMCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 12 July 2014