



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

Appeal Number: IA/46975/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 May 2015**

**Decision & Reasons Promulgated  
On 19 May 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS YIDAN CHEN  
(NO ANONYMITY DIRECTION)**

Claimant

**Representation:**

For the Appellant: Mr P Nath (Home Office Presenting Officer)  
For the Claimant: Mr C Lam (Counsel instructed by Christine Lee & Co  
Solicitors)

**DECISION AND REASONS**

1. The appellant in this matter is the Secretary of State. For convenience I shall refer to the parties in this decision as the Secretary of State and the Claimant.
2. This is an appeal against the decision and reasons of First-tier Tribunal (Judge Beach) who allowed the Claimant's appeal against a refusal of leave to remain under Article 8 outside of the Rules and a decision to

remove her under paragraph 10 of Schedule 2 of the Immigration Act 1971, in a determination promulgated on 13 January 2015.

3. The Claimant is a citizen of China. She is married to a Chinese national. They have a daughter born in or around 2012. The Claimant has lived in the UK since 12 July 2002 continuously and lawfully for a period of nearly thirteen years. She was absent from the UK over the last period of ten years for 502 days for holiday and for 153 days pursuing an internship.
4. The Secretary of State refused the Claimant's application for long residence under paragraph 276B Immigration Rules HC 395 (as amended). The Secretary of State decided that discretion was not exercisable as to the periods of absence from the UK. The Secretary of State also refused the application on the basis of private and family life under Appendix FM and paragraph 276ADE, which it concluded did not apply. The Secretary of State found no exceptional circumstances for consideration of Article 8 ECHR outside of the Rules.
5. The Tribunal concluded that the claimant did not meet the long residence Rules on the grounds that the periods of absence exceeded the allowed number of days (22).
6. The Tribunal agreed that the Claimant could not come within Appendix FM – family life and or under paragraph 276ADE. The Tribunal found insufficient evidence to show the Claimant had lost ties with China and or that she would face significant obstacles in re-establishing herself in China (24).
7. In considering Article 8 ECHR the Tribunal found exceptional circumstances in the length of residence and the Claimant's strong private life in the UK (25).
8. The critical issue for the Tribunal was proportionality. The Tribunal pursued the step-by-step process as set out in **Razgar** and in addition had regard to public interest considerations under Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended)(2002 Act). The Tribunal found no factors that weighed in favour of the public interest in removal of the Claimant. The Claimant spoke English, was integrated and established in the UK and she and her husband were financially self-sufficient. There was no evidence of any countervailing factors.
9. At [32] the Tribunal weighed up the factors and conducted a balancing exercise concluding that the decision made was disproportionate. The Tribunal relied in particular on the length of residence and the strong family life which was evidenced in oral evidence and in letters of support and references submitted to the Tribunal. The Tribunal in considering proportionality at [32] stated  
“There is no principle of ‘near-miss’ in respect of the ten year lawful residence Rule (or indeed any other Immigration Rule) but I must still take account of the spirit of the law and the basis for it when assessing the

length of time that the appellant has lived in the UK. ... the spirit of the ten year Rule is to recognise that people who have lived lawfully in the UK have established themselves in the UK to a degree.”

### **Grounds of Application**

10. In her grounds the Secretary of State argued that the Tribunal had in fact relied on the near-miss principle in reaching its decision at [32] quoted above. Further it was asserted that the Tribunal failed to follow the **Nagre** threshold of unjustifiably harsh consequences.

### **Permission to Appeal**

11. Permission to appeal was granted on 24 February 2015 on the grounds that it was arguable that the Tribunal allowed the appeal on a near-miss basis by reference to “the spirit of the ten year Rule” whilst acknowledging that the Claimant did not meet the Immigration Rules for long residence.

### **Error of Law Hearing**

12. I heard submissions from both parties. Mr Nath relied on the grounds submitted in the application and expanded on the same. Mr Lam produced and relied on a skeleton argument. In short he submitted that the grounds relied on amounted to a disagreement with the decision made by the Tribunal. He relied on the Court of Appeal judgment in **Mukarkar [2006] EWCA Civ 1045** at paragraph 40

“Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system or for an order for reconsideration under the new.”

### **Discussion and Decision**

13. In my view the arguments before me are finally balanced. It is unfortunate that the First-Tier Tribunal referred to and used the language quoted from paragraph 32 of the determination with reference to “the spirit of the law”. This appears to form part of the Tribunal’s reasoning for allowing the appeal and which certainly initially gave the impression that the Tribunal viewed the matter in the near-miss category. However, having regard to the decision as a whole, I am satisfied that the Tribunal clearly considered those principles and specifically discounted the application of a “near-miss” as the basis for her Article 8 decision. What is clear from the determination is that the Tribunal placed weight on not only the considerable length of residence (nearly fifteen years) but also the evidence of a strong private life that was adduced before the Tribunal and which the Tribunal took into account as weighing in favour of the Claimant. In the event that the reference to “the spirit of the law” could be perceived

as an error of law, I am nevertheless satisfied that it was not a material error. This was a carefully considered decision in which the Tribunal in particular had regard to the absence of any public interest factors under Section 117 (2002 Act) and placed weight on the Claimant's private life which it found to be of significance. The Tribunal did not solely rely on the fact that the Claimant was unable to meet the requirements of the long residence Rule, the Tribunal looked at the totality of the Claimant's particular circumstances. Following **Patel and Others 2013 UKSC 72** the Tribunal must consider under Article 8 the degree to which an appellant fails to meet the Rules, and this will amount to a proper consideration relevant to proportionality. I accept the submission made by Mr Lam relying on **Mukarkar**. I find no material error of law in the Tribunal's decision. The only failing was the Tribunal's approach to discussion of the near-miss principle and the reference to the spirit of the law. However, in the context of the decision as a whole and the evidence that was before the Tribunal, I find that this does not amount to any material error of law. The decision was sustainable on the evidence before the Tribunal whose approach to the law overall was sound.

### **Notice of Decision**

I find no material error of law in the determination.

The decision shall stand.

No anonymity order made.

Signed

Date 14.5.2015

Deputy Upper Tribunal Judge G A Black

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

No fee award made.

Signed

Date 14.5.2015

Deputy Upper Tribunal Judge G A Black