Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/06772/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2019	**On 8 March 2019**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr JIA REN CHEN
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Ostadsaffar, Counsel (instructed by Lisa's Law Solicitors)
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Davidge on 1 February 2019 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge Mayall in a decision and reasons promulgated on 1 February 2019.

2. The Appellant is a national of the Peoples' Republic of China ("China"). He entered the United Kingdom illegally during 2009. He claimed that he was the partner of Ms Hong Yun Chen and that they had two

children, respectively born in the United Kingdom on 6 July 2010 and 22 November 2011. The Appellant had lived with them continuously since January 2018, following earlier periods of discontinuity. The partner and the children had discretionary leave to remain in the United Kingdom. On 12 July 2017 the Appellant applied for leave to remain on human rights grounds, after he had been arrested and detained as an illegal entrant.

3. Judge Mayall found that the Appellant and his partner's relationship had been stormy but that the Appellant had been a regular visitor to the family home and had played a large part in the lives of the children, who were "qualifying children". The judge found that the children had a good knowledge of Mandarin, which was spoken in the home. They were capable of adapting to different education system and of making new friends. The requirements of Appendix FM of the Immigration Rules were not met. Similarly, paragraph 276ADE(1)(iv) of the Immigration Rules was not satisfied. The judge went on to consider Article 8 ECHR family life outside the Immigration Rules, guided by KO (Nigeria) [2018] UKSC 53. The judge inadvertently cited that decision as "MA (Pakistan)" but the extensive quotation indicates that the decision was in fact KO (above). The judge found that on a "real world" assessment it was reasonable for the children to follow their parents to China, where their parents had lived previously. Any difficulties faced by the children in adapting to life in China could be overcome and it was in the children's best interests that they remained with their parents. There were no exceptional circumstances and there was no Article 8 ECHR disproportionality. Hence the appeal was dismissed.

4. Permission to appeal was granted because it was considered arguable that the judge had not correctly applied MA (Pakistan) [2016] EWCA Civ 705 when considering whether it was reasonable for the children to leave the United Kingdom. The judge had not explained why the best interests of the children, assessed to be to remain in the United Kingdom with both their parents, did not outweigh the public interest in removal. It was arguable that the judge had penalised the children for their parents' lack of immigration status. (It should be noted that MA (Pakistan) has been disapproved or at least doubted by the Supreme Court in KO (Nigeria) [2018] UKSC 53.)

5. Ms Ostadsaffar for the Appellant relied on the grounds submitted and the grant of permission to appeal. In summary, counsel argued that the judge had paid too much attention to the lack of status of the parents and was in effect punishing the children. MA (Pakistan) (above) indicated that there had to be powerful reasons for not allowing qualifying children to remain in the United Kingdom. The judge had not identified any such powerful reasons. The private life of the children had been insufficiently considered. They were qualifying children and their best interests assessment was inadequate. The appeal should be allowed and the decision remade in the Appellant's favour.

6. The onwards appeal was opposed by the Secretary of State for the Home Department. It was not necessary to call on Ms Holmes.

7. The grant of permission to appeal was in the tribunal's view a generous one. The determination was full and careful, prepared by a very experienced judge who applied KO (Nigeria) [2018] UKSC 53 and cited the key passages from Lord Carnwath's judgment. As the judge noted at [39] of his determination, the judge had been given no real details of the children's lives in the United Kingdom and by necessary implication there was nothing to mark them out. He found that they spoke Mandarin and could adapt to education and life in China, findings open to him on the evidence. The judge explained his "real world" assessment, bearing in mind "that the children of this age regularly follow their parents abroad for various reasons and that this will often entail a change of the schooling system." The judge continued "they are at an age when friendships are regularly disrupted for whatever reason and I have no reason to doubt that they would not readily adapt and make new friends." Those conclusions are unimpeachable.

8. The judge went on to find that the best interests of the children were to stay with both their parents, neither of whom had the right to remain in the United Kingdom permanently. The mother's status was precarious in law, the Appellant had no status at all. The judge had to look at the parents' status at the date of the hearing, not on the basis of a possible future decision by the Respondent. In no sense can it be sensibly suggested that the judge was "punishing" the children by sending them to China because of their parents. The children are Chinese nationals, brought up within a Chinese home and Mandarin speaking. Their education would continue

in China and neither child was at a critical stage in their education. The tests proposed in MA (Pakistan) have been overtaken or modified by that in [18] of KO (Nigeria) (above): "it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision [paragraph 276ADE1(iv], are expected to be, since it will normally be reasonable for the child to be with them." That is precisely what the judge found and that finding was open to him, following a thorough evaluation of the facts.

9. In the tribunal's judgment the First-tier Tribunal Judge reached sustainable findings, in the course of a full and balanced determination, which securely resolved the issues. The challenge to the judge's decision simply expresses disagreement. The tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated:** 5 March 2019

Deputy Upper Tribunal Judge Manuell