Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13207/2017**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 1st October 2018	**On 22nd October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MAO [W]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Faryl, Counsel, instructed by AGI Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. No anonymity direction is made.

2. The appellant is a national of China. The appellant entered the United Kingdom clandestinely on August 7, 2009. He was detained and served with Form IS151A as an illegal entrant on March 21, 2012. He claimed to have formed a relationship with [LZ] and stated that they had three children aged six, five and one at the date of the original hearing. He claimed asylum on September 27, 2017 and this was refused by the

respondent on November 30, 2017 under paragraphs 336 and 339M/339F HC 395.

3. The appellant lodged grounds of appeal on under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 13, 2017. His appeal came before Judge of the First-tier Tribunal Heatherington (hereinafter called "the Judge") on January 23, 2018 and in a decision promulgated on January 29, 2018 the Judge dismissed his appeal.

4. The appellant appealed this decision arguing the Judge erred in his approach to the appellant's claim under articles 3 and 8 ECHR.

5. Permission to appeal was granted by Judge of the First-tier Tribunal Brunnen on February 16, 2018 in relation to (a) whether the Judge had given sufficient consideration to the best interests of the children and (b) whether returning the appellant would leave him destitute and thereby engage article 3 ECHR.

6. A Rule 24 response dated March 12, 2018 was filed by the respondent. In the response the respondent submitted that there were no inconsistencies in the Judge's findings and there was nothing in the grounds of appeal to suggest that there was any evidence of destitution on return to China given his asylum claim had been rejected. It was open to the appellant to return to his former home and/or demonstrate it would take too long for him to reregister thereby leaving him destitute.

SUBMISSIONS

7. Ms Faryl adopted the grounds of appeal together with the views of Judge of the First-tier Tribunal Brennan who had granted permission to appeal. She referred to the inconsistency that existed in the Judge's decision between 9.13 and 9.23. She argued that the Judge had accepted that removing the appellant would have an impact on his partner and more importantly his children, especially [J], and she submitted that the Judge had failed to have full regard to the letters from the hospital and the evidence provided by the parties as to the level of involvement the appellant had with his children. She submitted that it was in the children's best interests to have their father in the United Kingdom and she submitted that [J]'s best interests, as an autistic child, had been given insufficient weight by the Judge.

8. Ms Faryl made reference to a second error by the Judge on the basis the Judge had failed to consider article 3 in circumstances where the appellant had stated that returning him would leave him destitute.

9. Mr Tan adopted the Rule 24 letter dated March 12, 2018 and submitted that with regard to the best interests of the children there was no inconsistency in the decision. The Judge had accepted the appellant had played a role in the children's upbringing and recognised this in paragraph 9.13 of the decision. However, the Judge had then gone on to assess all

the evidence and more importantly what effect his removal would have on the children. Having looked at the documents (in particular, the medical letters) the Judge concluded that removing the appellant would be proportionate and consequently the finding in paragraph 9.23 was open to the Judge. With regard to the second ground of appeal the Judge had no evidence before him that the appellant would face destitution. His whole claim had been rejected and the Judge made findings open to him.

FINDINGS

10. This was an appeal brought initially on protection grounds but in the alternative the Tribunal was invited by the appellant to allow his appeal on human rights grounds.

11. The Judge did not accept his protection claim and I note that the current grounds of appeal take no issue with the Judge's conclusion on this issue. At paragraphs 8.3 and 8.6 the Judge set out reasons why his credibility had been damaged. At paragraph 8.4 the Judge concluded that the appellant's fear amounted to a fear of "prosecution" as against "persecution". At paragraph 8.5 the Judge noted the appellant had made no reference to any fear of the state when he was detained in 2012.

12. Since being in the United Kingdom the appellant had struck up a relationship they now had three children. Both the children and their mother were Chinese nationals with limited leave to remain in this country until 2020.

13. Ms Faryl did not dispute the appellant's relationship and all his private life commenced at a time when the appellant was here unlawfully.

14. The fact the appellant never had any immigration status in this country meant his immigration status was always precarious. Neither he nor the children's mother spoke English and the appellant was not financially independent. Due to the children's status the appellant did not have the benefit of either Section EX.1 of Appendix FM of the Immigration Rules or section 117B(6) of the 2002 Act.

15. The Judge was aware of the medical evidence and in particular the evidence relating to [J]. The evidence given by both the appellant and the children's mother was that they did not live together with both claiming the appellant would visit her and the children and stay up to 5 days a week. It is against this background that the Judge considered the article 8 claim.

16. Ms Faryl submitted that there was an inconsistency between paragraphs 9.13 and 9.23 of the Judge's decision and permission to appeal was granted on this point. However, I am satisfied that at paragraph 9.13 the Judge made a finding on the evidence presented that removing the appellant would have the potential of interfering with the current visiting

arrangements. This is of course one of the questions posed in the case of Razgar [2004] UKHL 00027.

17. As I indicated to Ms Faryl during the hearing the issue ultimately was one of proportionality and more importantly whether the Judge had taken into account all the evidence.

18. At paragraph 9.14 of the decision the Judge quite properly set out the statutory matters that had to be taken into account and all the findings made were both correct and open to the Judge.

19. The Judge then made the point that precariousness can in certain circumstances apply not only to private life but also family life although this was probably somewhat of an academic point because the appellant's private and family life had been created whilst here unlawfully. The Judge also found that there had been a burden to the public purse and taxpayers because the appellant had received free NHS treatment.

20. Having made those findings, the Judge then went on to consider the fourth question in Razgar. It is not suggested they met the Immigration Rules. The grounds of appeal do not take issue with the finding in paragraph 9.17 and it therefore follows that the finding at paragraph 9.20 was both correct and open to the Judge.

21. Ms Faryl argued the Judge's approach in paragraphs 9.2 to 9.26 of the decision was flawed. However, the appellant could not come within Appendix FM so far as his children were concerned because they neither had settled status in the United Kingdom nor were they British citizens.

22. Ms Faryl referred me to letters provided by the Rotherham MBC which appeared in the main appellant's bundle. Some of these documents referred to the appellant living with his children and others referred to the difficulties experienced by [J].

23. The information provided to the doctors would have been based on what they had been told. The fact some of the letters record the family lived together was clearly inconsistent with the actual evidence given by the appellant and the children's mother. Both told the Judge they did not live together although the appellant did spend periods of time at the family home.

24. Looking at the letters from Rotherham MBC I note in January 2013 (see page 88 of the bundle) the appellant was reported to be living with his family whereas on September 1, 2016 (See page 83 of the bundle) the appellant was not living in the property with the family.

25. The letter from Rotherham MBC dated March 29, 2017 referred to a meeting that took place at the clinic and whilst it seems both the appellant and the children's mother attended this meeting the report ends by pointing out [J] had been discharged from Child Development Centre Service.

26. Mr Tan pointed out that there was very little evidence of the appellant's involvement with the children and the Judge concluded that the children's best interests were being met by their mother. The consequence of refusing the application did not mean the children would have to leave the United Kingdom. Both they and the mother had leave to remain and this would continue

27. Whilst the Judge did not go into any real detail about each child's medical condition I am satisfied that the Judge was fully aware of the respective medical problems because the information was set out in the decision.

28. This was not an appeal where section EX.1 of Appendix FM of the Immigration Rules applied and it was not an appeal where the appellant could rely on section 117B(6) of the 2002 Act.

29. The Judge considered all the evidence in the round but ultimately concluded in paragraph 9.25 that there were reasons why the appellant should leave the United Kingdom outweighed allowing him to remain. Those findings were open to the Judge and I therefore reject Ms Faryl's submissions that there was an error in this assessment.

30. The second ground of appeal related to the purported failure by the Judge to deal with an article 3 claim. The Judge made reference to article 3, as a claim, in paragraphs 4.2 and 8.1 of the decision.

31. The Judge rejected the appellant's account of what happened in China and as Mr Tan pointed out no documentary evidence of possible destitution was included in any documentation.

32. The appellant has the burden, to the lower standard, to demonstrate that returning him would breach article 3 but he failed to provide any supporting evidence that this was the case.

33. The Judge considered whether the appellant would encounter any significant problems in China and concluded at paragraph 9.24 that he would not. I am satisfied there is also no error on this issue.

DECISION

34. There is no error in law and the original decision shall stand.

Signed Date 01/10/2018

Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I do not make a fee award as I have dismissed the appeal.

Signed Date 01/10/2018

Deputy Upper Tribunal Judge Alis