



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04633/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2013

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

CHUN LONG LIN
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Parry, Counsel instructed by Messrs K & G Legal Consultants Ltd
For the Respondent: Mr J Parkinson, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of China born on 8 April 1975 against the decision of the Respondent dated 26 April 2013 to refuse to him the grant of asylum

under paragraph 336 of HC 395 (as amended) and to refuse him leave to remain in the United Kingdom.

The Proceedings

2. This was the resumed hearing of the Appellant's appeal, the matter having come before Upper Tribunal Judge Kebede following a grant of permission to the Appellant to appeal against the decision of the First-tier Tribunal dismissing his appeal.
3. In a determination promulgated on 1 November 2013, a copy of which I have attached to this determination marked "Appendix A", Upper Tribunal Judge Kebede noted that permission to appeal to the Upper Tribunal was sought on the grounds that the judge had erred by finding, contrary to the principles in Chikwamba [2008] UKHL 40 and MA (Pakistan) [2009] EWCA Civ 953, that the Appellant's removal was proportionate on the basis that the Appellant could apply for entry clearance and that he had erred in his assessment of where the best interests of the children lay and further that the First-tier Tribunal Judge had erred in his approach to the requirements of Appendix FM to the Immigration Rules.
4. In summary, Upper Tribunal Judge Kebede concluded, firstly, that the First-tier Tribunal Judge erred in his interpretation of paragraph S-LTR.1.7 (a) in that the Appellant's claim did not fall for mandatory refusal under that provision (a failure to attend an interview) that she found applied to a failure that occurred in a previous application and thus was not a provision that related to the current proceedings).
5. Secondly, that the First-tier Judge was "plainly in error" in his finding that the Appellant's inability to meet the English language requirement in E-ECP.4.1 was relevant to his ability to meet the requirements under Appendix FM, that the judge had failed to consider the relevant provision at paragraph R-LTRP.1.1(d) in which the only requirements to be met in cases in which paragraph EX.1 applied were those in paragraphs E-LTRP.2.1-1.12 and E-LTRP.2.1 that did not include the English language requirement.
6. Thirdly, the Upper Tribunal Judge found, that on the basis of the First-tier Tribunal Judge's findings, the judge did not go on to consider EX.1 of Appendix FM. It was plain that consideration ought to have been given to whether the Appellant could benefit from EX.1. Whilst the Upper Tribunal Judge accepted that the First-tier Judge's findings could be said to address the requirements of paragraph EX.1. (a) there were "plainly no equivalent findings with respect to EX.1. (b).
7. Upper Tribunal Judge Kebede further concluded that it was plain that the First-tier Tribunal Judge did not accept that the Appellant had a genuine and subsisting parental relationship with his partner's children but she considered that the judge's findings in that regard were adequate in that he had given detailed reasons for so concluding that were open to him and supported by the evidence and thus sustainable in law.

8. Insofar as the judge's consideration of paragraph EX.1.(b) was concerned, the Tribunal Judge noted that the First-tier Tribunal Judge had accepted that the Appellant's relationship with his partner was genuine:

"...He went on to find that the relationship was nothing more than boyfriend and girlfriend, a finding, reflected also at paragraph 32 of his determination. There was no specific finding on whether the Appellant's relationship with his partner was a 'genuine and subsisting' one for the purposes of paragraph EX.1.(b) and I consider that this is accordingly a matter that still needs to be addressed."

9. The Upper Tribunal Judge continued, that in relation to the principles in the cases of Chikwamba, Hayat and MA, were concerned, it seemed to her that this was:

".. very much dependent upon the findings to be made with respect to EX.1. (b). In any event, as I indicated to Ms Revill, the merits of that ground are substantially reduced in the light of the recent judgment of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192".

10. The Upper Tribunal Judge concluded that in light of the errors of law that she had found to be established, the judge's determination could not stand and must be set aside. She proceeded to establish the parameters of the resumed hearing as follows:

"Further evidence will be considered at a resumed hearing in order for findings to be made in relation to the Appellant's relationship with his partner and for a decision to be made with respect to his ability to meet the requirements of EX.1.(b) and R-LTRP.1.1."

11. The Upper Tribunal Judge did however point out that she saw no reason why the First-tier Tribunal Judge's finding with respect to the Appellant's relationship with his partner's children should not be preserved.

12. At the outset of the resumed hearing before me, the parties agreed that the sole issue for my consideration was whether the Appellant met the requirements of paragraph EX.1.(b) that in light of Upper Tribunal Judge Kebede's determination, would be determinative of this appeal. Ms Parry further informed me that in the circumstances she would not be pursuing issues relating to Chikwamba and other related cases with any vigour and indeed it is right to say she made no further reference to this particular issue, within her closing submissions. Further it was not a matter to which Ms Revill's skeleton argument dated 12 June 2013 before the First-tier Tribunal and upon which Ms Parry relied, referred.

The Secretary of State's Letter of Refusal dated 25 April 2013

13. In the Respondent's Letter of Refusal dated 25 April 2013 and insofar as it is relevant to the present appeal, reference was made inter alia, to Appendix FM EX.1 that inter

alia applied where the applicant had a genuine and subsisting relationship with a partner. The Secretary of State continued in that regard:

“You have stated that you have a girlfriend in the UK and that she has two children. Your past history in the UK shows that you have resided unlawfully in the UK and therefore the Home Office is entitled to regard your relationship as not being a genuine and subsisting relationship with your partner or children in the UK. However, even if you had evidenced a genuine and subsisting relationship with your girlfriend and her two children, as already stated above, you have not complied with the requirements under S-LTR.1.7 of Appendix FM of the Immigration Rules.

Therefore you do not qualify for Article 8 under Appendix FM (family life).”

14. The Secretary of State considered whether the Appellant qualified for leave under private life (276ADE). It was noted that the Appellant had claimed to have arrived in the UK in June 2002 as an illegal entrant. He claimed to have resided in the UK for approximately eleven years but there was no evidence that he was in the UK before October 2007. Either way he had failed to fulfil the requirements of the Immigration Rules as he had failed to demonstrate that he had had twenty years’ residence in the UK as required in Immigration Rule 276ADE(iii).
15. The Appellant’s claim in this regard was thus refused under Appendix FM and Rule 276ADE of the Immigration Rules by virtue of Rule 326B and it was considered that his removal was proportionate in pursuit of a legitimate aim under Article 8(2) of the ECHR.

The Law

16. There were major changes in July 2012 in the Immigration Rules covering applications for entry clearance and leave to remain as a family member. However, in that regard Appendix FM is the route for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British citizen, is settled in the UK or is in the UK with limited leave as a refugee or person granted humanitarian protection.

17. GEN.1.1. explains the purpose of the Appendix as follows:

“It sets out the requirements to be met and, in considering applications under this Rule, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK.”

18. Section R-LTRP.1.1 of Appendix FM contains the requirements for limited leave to remain as a partner. The child of the applicant and their partner must be in the United Kingdom; the applicant must have made a valid application for limited or indefinite leave to remain as a partner; the applicant satisfied the suitability

requirements; and either the applicant meets all of the requirements of Section E-LTRP, or the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12 and E-LTRP.2.1 and paragraph EX.1 applies.

19. I pause there, because at the outset of the hearing, Mr Parkinson raised a preliminary issue that in such circumstances, as the present Appellant had not made a valid application for limited or indefinite leave to remain as a partner, it would follow that consideration of paragraph EX.1 would not apply. Mr Parkinson did not however pursue that submission any further, it having rightly been drawn to his attention by Ms Parry, that under GEN.1.9. the requirement to make a valid application would not apply when the Article 8 claim was raised as part of an asylum claim, in an appeal.
20. Section FM1.0 of the October 2013 Immigration Directorate Instructions (IDI's) is headed "Partner and ECHR Article 8 Guidance" and concerns family members who make applications after 9 July 2012 under Chapter 8, Appendix FM of the Immigration Rules and provides the Guidance for caseworkers in their approach to decision-making under the new Rules. The Guidance makes clear that caseworkers must consider first, whether the applicant meets the requirements of the Rules. If the applicant does not meet those requirements then the caseworker must move on to a second stage:

"Whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, paragraph 3.2.7(c) concerns assessing whether there are insurmountable obstacles in EX.1 (b)".
21. "Insurmountable obstacles" are dealt with in paragraph 3.2.7(c) of the Guidance and requires the decision-maker to consider the seriousness of the difficulties which the applicant and his/her partner would face in continuing their family life outside the UK and whether they entail something that they could not (or could not be expected to) overcome, even with a degree of hardship for one of more of the individuals concerned. The approach should be whether it would be 'reasonable to expect' the applicant's partner to join them overseas. Thus, a British citizen partner who has lived in the UK all of his/her life and spoke only English, might not wish to travel across the world to a country, culture and language with which he/she is unfamiliar. The Guidance makes clear however that "a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle". Thus the decision-maker should look at whether there is an inability to live in the country concerned. The focus should also be on the family life that would be enjoyed in the country to which the applicant would be returned, not a comparison to the life they would enjoy were they to remain here.
22. Paragraph 3.2.8 of the Guidance relates to "exceptional circumstances" where an applicant does not meet the requirements of the Rules under Appendix FM. If that is

the case, refusal of the application will normally be appropriate, but leave can be granted outside the Rules where exceptional circumstances apply.

23. However “exceptional” does not mean “unusual” or “unique”. An example is given in a case which is not exceptional just because the criteria set out in EX.1 of Appendix FM had been missed by a small margin. The Guidance continues that ‘exceptional’ means:

“...Circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely. In determining whether there are exceptional circumstances, the decision-maker must consider all relevant factors, such as:

- (a) the circumstances around the applicant’s entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the application of putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious, should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK.
- (b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the Rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account.

If the applicant falls to be granted because exceptional circumstances apply in their case, they may be granted leave outside the Rules for a period ofand on a 10 year route to settlement.”

24. In Nagre [2013] EWHC 720 (Admin) Sales J considered the relationship between the 2012 Immigration Rules in relation to claims for leave to remain and Article 8 and he held that since the new Guidance recognised the discretion to grant leave to remain outside the Rules, the new Rules thus contemplated that there would be cases falling outside in which a right to remain could be established. His Lordship continued at paragraph 29 of his judgment as follows:

“29. Nonetheless, the new Rules do provide better explicit coverage of the factors identified in case law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it would be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave.”

25. His Lordship proceeded to review relevant Strasbourg Guidance and concluded that where such family life relationships arose when it was known to both parties as to the precarious immigration status of the applicant, it would only be in exceptional circumstances that removal of the non-national family member would constitute a violation of Article 8. Thus and in relation to Section EX.1 (family life), it was possible to envisage cases where the new Rules did not completely cover every conceivable case in which a foreign national might have a good clean claim for leave to remain under Article 8, in that there might be individual cases in circumstances where leave to remain should be granted under Article 8 even though there may not be insurmountable barriers to family life continuing outside the United Kingdom, in the applicant's country of origin. However, for the purposes of thus establishing that the applicant's removal would be disproportionate, it would be necessary to show other non-standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh.
26. His Lordship in Nagre concluded that the gap between the test for leave to remain under EX.1 (b) and that within a consideration of Strasbourg case law in precarious family life cases was likely to be small. In the majority of such cases where the Secretary of State concluded that a family member applying for leave to remain could not satisfy the test in Section EX.1. (b) (insurmountable obstacles) in the new Rules, it was unlikely that there would be a good arguable case that Article 8 would require that leave to remain should be granted outside the Immigration Rules.
27. His Lordship continued that Section EX.1 was not unlawful and thus held that the Secretary of State was entitled to refuse the Appellant Nagre (an overstayer) leave to remain as the unmarried partner of a British citizen under EX.1 without going outside the Rules.
28. The decision in Nagre has since been approved in MF (Nigeria) [2013] EWCA Civ 1192 where the Court of Appeal held that the Immigration Rules of 2012 as they apply to a foreign national criminal were a complete code. In that the new Rules spoke of "exceptional circumstances", exceptionality was a likely characteristic of a claim that properly succeeded rather than a legal test to be met. Their Lordships also remarked obiter that the term "insurmountable obstacles" were not obstacles that were impossible to surmount, but concerned the practical possibilities of relocation, as held in Nagre. In the absence of such insurmountable obstacles if removal was to be disproportionate it was necessary to show other non-standard and particular features demonstrating that removal would be unjustifiably harsh.
29. Finally it would be as well for the sake of completeness to set out the provisions of Section EX.1 (b) that applies if:
 - "(b) The applicant has a genuine and subsisting relationship with a partner who is in the United Kingdom, who is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

The Evidence of the Appellant

30. In oral evidence before me, the Appellant adopted his statements of 6 June and 12 August 2013 as true and to be relied upon as part of his evidence-in-chief.
31. So far as those statements are relevant to the issue I have to decide in the present appeal, in his statement of 6 June 2013 the Appellant stated that he was married when he was in China and had a child with his previous wife. Their marriage broke down. He had not been in touch with his previous wife for many years.
32. In October 2008, he met Ms Gan, his partner who had also come from a failed marriage. Their relationship grew slowly "as our previous relationship setbacks had given each of us our own doubts". As their relationship grew stronger they "made many plans for our future together". The couple fell in love and their relationship "grew into something that became a big part of my life".
33. Ms Gan had two daughters from her previous marriage, both born in the UK. The Appellant maintained that the children approved of him and his relationship with their mother and looked up to him as a father figure.
34. I pause there to remind myself, that Upper Tribunal Judge Kebede in her error of law determination upheld the finding of the First-tier Tribunal Judge, who did not accept that the Appellant had a genuine and subsisting parental relationship with his partner's children.
35. The Appellant continued that the couple did not take the decision to introduce his partner's daughters to him lightly and only did so after two years "when we knew that our relationship was a permanent one and one that we knew we would be in for the long run".
36. The Appellant claimed that he was baptised on 3 August 2008. It was demonstrated by his pastor in a letter, that he was not a dishonest person "naturally". He maintained that when he absconded, he had not fully understood the gravity of his actions until recently and he was now an active and participating member of his church and its community.
37. The Appellant considered himself an integral part of his partner's family "as I can see from her daily life that she has a lot of burden on her shoulders. Every day she has to manage her business as well as look after her two daughters. I have tried my best to take the weight off her shoulders by doing as much as possible for her by taking care of her two daughters".
38. The Appellant's statement of 6 June concluded that he had been living in the United Kingdom for over ten years for which he had established his "whole personal life in the UK" and that the Respondent's refusal had "jeopardised my entire life and future plans as well as my family".

39. In his subsequent statement of 12 August 2013 and again insofar as it is relevant to the present appeal, the Appellant stated that he continued to live with his partner and her children "as a close family for the past three years".

40. His statement detailed the manner in which his relationship with his partner's children had developed. It would be as well for the purposes of this appeal to refer to paragraphs 8 and 9:

"8. At present, it is very difficult for my partner; her two children are young and she needs to earn a living for herself and them. She runs a business which naturally suffers when she takes time away for paternal matters. We have got to know each other well, and care for one another. Her health is not good and she suffers from back pain. I often help by applying lotions and massaging the affected area. Even minor things like lifting or routine trips like doing the shopping together remind me of how much we operate as a family and need each other. To us, our meeting is a matter of fate. My partner and I care so much for each other and the arrangement works so well for all four of us that we have continued in this way for three years now.

9. My partner has suffered a lot in the past, so I am thankful that I can step in and help her now. I won't forget the day she told me that I was the only man she needed and that she would never look for another if I were to be removed. I remember when I was arrested she cried for days few days and became ill. In just the few months that we were separated, we both looked visibly weak and she had grey hairs. My partner just wants a simple life with someone to take care of her and support her family. If I am returned, this will of course be impossible."

41. When cross-examined, the Appellant stated that his wife was in China and that they had been separated for more than ten years. When asked if he had sought to divorce his wife he answered:

"Yes. If I decide to stay with my current partner, then I will".

42. The Appellant when further pressed accepted that he had not in fact started the divorce proceedings, but that he had:

"tried to contact somebody because I don't know how to proceed. Another thing is she is over there and I am here and so I need to get some advice regarding the issue".

43. The Appellant continued that he had been with his partner for more than three years "since 2010". When asked if during that period he had made any attempt to get advice as to how to proceed to divorce his wife in China, the Appellant initially replied that he had. When asked what steps he had actually taken he responded:

"I jut have this kind of thought, because my girlfriend is doing this process and I have to wait until she finishes this process then I will know how to proceed".

44. The Appellant continued that Ms Gan had “just started the process, a while ago. Not a very long time ago – just by the time I started my case”. It was the Appellant’s understanding that his partner had started the divorce “process” around April or May of this year, but he was not quite sure about that - “she is the person who is doing this process I didn’t ask too much”. The Appellant continued that he had “just heard my partner mentioning that she is looking for a solicitor to do the divorce”.
45. The Appellant claimed that his daughter in China lived with his mother. He spoke to her rarely and when he telephoned to speak to his mother.
46. When asked if he had enquired of his daughter in the course of any telephone conversation with her, if she was in contact with her mother and as to her mother’s current whereabouts, the Appellant responded that when he left China his daughter was 2 years old.
47. He described her feelings towards him as “quite strange”. If he spoke to his daughter he would just ask about her studies and her life but did not wish to mention anything about her mother or the relationship between her mother and himself because he did not wish such matters to affect her studies. His daughter was born in 2000 and would now be 13 years old. The Appellant did not know why his daughter was living with his mother rather than his wife and he speculated that it might be because his wife “goes to other cities”. The Appellant telephoned to speak to his mother “every few weeks or once a month” and he would speak to his daughter on such occasions “maybe about a few times a year. She really talks to me. Even when I make a phone call home and ask for her she doesn’t want to talk to me”.
48. The Appellant had asked his mother if she knew anything about the whereabouts of his wife but “she just only knows that she goes to other cities. He did however confirm when asked, that he understood his wife did visit their daughter at his mother’s home. He had not asked his mother to make enquiries about how to go about getting a divorce in China. As she did not have any schooling she would not have known how to go about it.
49. When it was put to the Appellant, that he could have suggested to his mother that she ask other people, he confirmed that he did not ask her to do so but when asked if he had made any direct enquiries in China as to how to go about getting a divorce from his wife, the Appellant responded “not yet – because I still have not been able to contact my wife”. The Appellant maintained that his daughter did not have much contact with her mother, maintaining that she had not received a visit from her mother “in a long period of time”.
50. The Appellant hoped that he and Ms Gan would be able to remain together “and build a happy family”. When asked if the couple had made any particular plans he responded that it was “just to try to live every day happily” but they had not “thought about this part of the issue”. When it was put to the Appellant that at page 5 of his statement of 6 June, he had maintained that the couple had made plans for their future, the Appellant responded that the couple “chat to each other and also mention marriage later”.

51. When asked if he had asked his partner to marry him the Appellant responded:

“I haven’t asked my girlfriend to marry me yet. We just talk about it”.

52. The Appellant stated that he first met Ms Gan “about May or June 2009”. He had met Ms Gan’s daughter “also 2009”. He had moved in with her in 2010 “close to Christmas time”.

53. The Appellant confirmed that Ms Gan had not visited him when he was in detention in Scotland from August 2012 until April 2013, although she did attend the Glasgow Hearing Centre in support of his immigration bail application.

54. The Appellant was aware that Ms Gan had relatives in China and that she had visited them this year in July 2013. Normally she visited her family in China every two years, more particularly to see her parents. She always took her children. The Appellant confirmed both he and Ms Gan were from the same province in China, namely Fujian. The couple spoke in the Fujian dialect with each other and with Ms Gan’s two children.

The Evidence of Min Qing Gan

55. Ms Gan began her evidence by adopting as true and as part of her evidence-in-chief her statements dated 21 March and 12 August 2013 respectively.

56. In her statement of 21 March 2013 she confirmed that her date of birth was 30 May 1980 and that she had resided in the United Kingdom since August 1996. As with my consideration of the statements of the Appellant, I have focused my attention on those passages relevant to the present appeal. That of course takes into account the findings of the First-tier Judge that there were “substantial reasons to doubt the strength and depth of the Appellant’s relationship with the partner’s daughters” that was upheld by Upper Tribunal Judge Kebede in her recent Error of Law determination. Ms Gan had first met the Appellant in October 2008 and they had started living together “after knowing each other for a short time”. Ms Gan ran a Chinese takeaway with her business partner, Mr Chen, with whom they had jointly purchased a property at 81 Hyde Park Road, Plymouth in June 2009. During the busiest period of the takeaway in the evenings Mr Lin would “always come down to give a hand. As he was living with me, I felt the burden on my shoulders becoming less and less. Unfortunately all the wonderful prospects of my future life broke up when Mr Lin was arrested by the Immigration Officer on 23 August 2012”.

57. Ms Gan’s statement, made at a time when the Appellant remained in detention in Scotland, continued:

“Life was extremely difficult as I am the sole financial provider for my family. I have to run a business, manage the staff at said business and keep tabs on all financial matters of my domestic life as well as the business side of things. In addition to this I also had to look after my children during this difficult time without my boyfriend, Mr

Lin. I have no other trusted people in this country who are able to help me out. As a result I am unable to help them with their homework or take them to their frequent gatherings with their school friends making them feel very isolated from their school community... I find myself crying every night because of the situation we are in and becoming increasingly depressed with each passing day."

58. Notably, later in her statement, Ms Gan had this to say:

"If I want to keep our relationship I have to go back with him to China. However I am unable to do so as I have two children who were born in the UK and have been living in the UK as well as receiving education in the UK. Both of them are over 14 years old and are **only able to speak English**. They have become accustomed to life here and that is all they have known and to uproot them and move to a country completely foreign to them would be too much of a shock to their system" [emphasis added].

59. In her subsequent statement of 12 August 2013, Ms Gan described the circumstances of her marriage in 1997 which resulted in the birth of her two daughters and the events that led to the break-up of that marriage. She stated that her husband was eventually deported back to China.

60. When Ms Gan first met the Appellant, she had never entertained the idea of the relationship being more than one of friendship but "slowly things began to become better when he was around". She continued that "bit by bit he integrated into our lives and slotted himself into our family unit comfortably".

61. Ms Gan had "tried many times to divorce (her husband) and sought advice regarding it but never could because I am not able to provide his contract address. I have no contact since he was sent back to China".

62. Her statement concluded that after everything that had happened to her family, the Appellant had "been one of the best things. When he is gone, it is like a part of our family unit is missing and when he is here; it honestly feels like a complete jigsaw puzzle".

63. When cross-examined, Ms Gan was closely questioned about what steps she had taken in terms of divorcing her estranged husband, going into some considerable detail as to the steps that she had recently taken to employ a solicitor to provide insofar as she was able, the information sought for the purposes of instituting divorce proceedings in this country on the basis of five years' continuous separation, She had forwarded to the solicitor, the court fee of £410. She had been unable to fully complete the necessary form in support of the petition and was waiting to hear from her solicitor for that purpose.

64. I was also handed by Ms Parry, correspondence relating to and supporting Ms Gan's evidence as to the steps that she had tried to take in July 2007 to commence proceedings against her husband and I am able to say now, as indeed I made clear in the course of the hearing, that I was satisfied that her evidence with regard to the steps that she had taken to divorce her estranged husband, was credible.

65. A notable aspect of her evidence in this regard was supported by the 2007 correspondence that showed that she had been trying to divorce her husband since 2007 and that then, as now, and as she confirmed to me, her reasons for so doing had nothing to do with her subsequent relationship with the Appellant. For the avoidance of doubt she confirmed that whether she had formed a relationship with the Appellant or not, she would still have been seeking to pursue her divorce.
66. When asked as to her reasons for failing to visit the Appellant whilst he was in detention from Scotland between August 2012 and April 2013, Ms Gan maintained that she “couldn’t take the long haul coach or train and my back was aching. Every time when I come back from long distance travel I feel sick”. Ms Gan maintained that she had medical evidence to support this claim but she had not brought it with her. She did however point out that she attended the Appellant’s bail hearing.
67. Ms Gan had telephoned her mother in China the previous week. She had flown out at the end of July 2013 and stayed in China until 22 August, about four to five weeks. She had taken the children with her.
68. She had previously gone with her children to visit family in China in 2011 for a period of three weeks, more specifically to see her parents and younger sister in Fujian province.
69. She said that as the Appellant spoke little English and as they both came from Fujian province they spoke to each other in the same dialect. It was more convenient for them to speak in that dialect and indeed between themselves and the children who also spoke the language fluently.
70. It was put to her, that in her statement of 31 March 2013, she had unequivocally stated that the children only spoke English. Ms Gan responded that she assumed “there was a problem with the translation as my English is not fluent”.
71. She had taken her children with her to China about four times since they were born always for periods of about three weeks but the last visit in July was the longest.
72. When not visiting China she spoke to her mother on the telephone “always at weekends”.
73. Ms Gan agreed that the children had a strong connection with China because of their visits; the relationship with Ms Gan’s family in China; their cultural experience and; the fact that they spoke the language. They had formed a very strong relationship with their grandparents since they were small. Mr Gan explained “it was a very difficult time, my parents supported me during the period so the children have grown close to their grandparents”.
74. When asked as to why she had come to the United Kingdom in 1996, her response was somewhat vague. She initially stated it was “for some reason...”. When asked as to the nature of that reason, Ms Gan responded “I used to take part in some

activities in China and at the time the environment was not very open-minded. These activities were not all welcome". When further questioned as to the reason why she left China Ms Gan stated it was due to "religion".

75. Ms Gan stated that she had applied for and been granted asylum. Ms Parry informed me that unfortunately documentation had not been brought to the hearing to establish Ms Gan's status, but it was clear on the evidence that she was now a British citizen.
76. When asked if she had made any plans to marry the Appellant she replied that there were such plans but that she was awaiting her divorce.
77. When asked if the Appellant had asked her to marry him she replied "Yes. He told me so when we got together initially but at the time I hadn't divorced". When further asked, for the avoidance of doubt, whether the Appellant had actually asked Ms Gan to marry him she responded "Yes. We got together in 2010, maybe in 2011, I can't remember".
78. When asked whether the Appellant was getting a divorce from his wife Ms Gan responded "I am not sure about this one because I haven't seen the divorce certificate".
79. When asked if this meant that she did not know if Mr Lin was married or divorced Ms Gan responded, "I know he married in China but I don't know if they divorced after he came to the UK. I didn't ask him. I just know they married in China but he has been here for ten years. They are not together but I am not sure if they have separated by law. I know that they have been separated for a long time but I don't know if they have divorced or not".
80. When asked if she saw her estranged husband on her visits with her children to China, Ms Gan recalled that "their father returned to China in 2008. I believe they saw their father after that. I remembered they saw each other once after their father returned to China and then we lost contact. Their father returned to China for reasons of the law in the UK. They are not allowed to have any contact".
81. When further asked if Ms Gan's children had seen their father in China since his return, she stated that she believed they had met once "in a city close to my home". I can't remember whether it was 2008 or which year or Christmas time, I can't remember". She believed the meeting was arranged by her parents or her younger sister.
82. When asked as to who might have arranged the meeting between her children and her estranged husband, Ms Gan responded:

"The education I received in China was traditional and the people are not very open-minded - they consider if it is not the end of the marriage the couple should not separate. My parents don't know the reasons what happened in the UK. They thought we just had some arguments. The meeting was arranged by my parents."

Ms Gan continued that she did not believe that her parents were still in touch with her estranged husband.

83. Ms Gan was referred to paragraph 29 of the determination of the First-tier Tribunal Judge; Ms Parry having confirmed to me that she had no objection to my referring to any passages within that determination that had no bearing on the matters referred to therein that had led Upper Tribunal Judge Kebede to identify errors of law. In particular she had no objection to the reference to paragraph 29 of that determination. The relevant passage from that paragraph to which Ms Gan was referred, began with the First-tier Tribunal's finding that there were "substantial reasons to doubt the strength and depth of the Appellant's relationship with the partner's daughters". Within that paragraph the following was stated:

"The partner stated that her husband left to go to China in 2008 and that was the last that she saw of him. Lolynda Chen stated that she saw her father two years ago".

84. It was put to Ms Gan that it followed (given that the hearing before the First-tier Tribunal Judge took place in June 2013) that the children must have met with their father in China in 2011. It was in turn contrary to Ms Gan's claim, that they had only met with their father in or around 2008. Ms Gan replied that "If it happened it would have been arranged by my parents".
85. Ms Gan recalled that when they met with her husband in or around 2008, she accompanied them "for the safety of the children". She continued if they had subsequently met with their father on other visits, she assumed it would have been arranged by her parents and/or her younger sister and that they had not told her the children had met again with their father. She maintained that she would find this surprising because the children "actually hate him".
86. Ms Gan repeated that she would not be marrying the Appellant until "after the divorce". She continued:

"I run a takeaway restaurant with my business partner. I plan to end that business relationship and plan to take on Mr Lin as my business partner in that restaurant.

For the time being I have to do things step-by-step. If there are too many plans then I won't be able to cope with it."

87. Ms Gan continued that the children met with the Appellant in 2010. It was drawn to Ms Gan's attention, that at paragraph 6 of the Appellant's statement of 6 June 2013, he had stated:

"We did not take the decision to introduce her daughters to me lightly and only did so after two years when we knew that our relationship was a permanent one and one that we knew we would be in for the long run."

88. It was put to Ms Gan, that given that she claimed that the couple had met in May 2009 and had lived together in 2010 that amounted to a lot less than two years. Ms

Gan maintained that the Appellant “probably remembered wrong”. She continued, “I can confirm that I knew him in 2009 at that time I bought the restaurant on the ground floor. The first floor was for my business partner and the top floor was mine.”

89. When asked if there was any reason why Ms Gan and her two children could not return to China with the Appellant, she replied,

“They were born here and are educated here. They enjoy a British lifestyle, although they have a Chinese lifestyle as well. Half and half. When we visit China, my daughters and I stay in my parents’ home. My younger sister got married and is living with her husband about half an hour away.”

90. When asked as to what Ms Gan’s children would do if Mr Lin was returned to China she responded:

“They will be hurt one more time. We make a lot of effort and time to build up a happy family. If in the end we have to be separated then we will feel sorry about that. We are simple and kind people. We just long for simple happiness and an intact family.”

91. When asked did this mean, regrettable though it might be, that if the Appellant was returned to China, Ms Gan’s choice would be to remain in the United Kingdom with her children she replied:

“Maybe. For this relationship I would keep the contact. It would be hard for me but I would keep the contact. I am not sure.”

92. When asked if this meant that Ms Gan was not entirely sure that she would join the applicant in China she responded:

“The children are still young. It doesn’t mean I won’t want to join him but I don’t want my children to live in China.”

93. When asked as to how the Appellant’s removal to China would affect her business Ms Gan responded:

“My life would be a mess. If he is allowed to remain here we would have very good plans very good family. If he is returned to China then it means this family is broken. There is no meaningful way of talking about future plans. **If he can stay here, he can look after the children and I can look after my business but if he goes back to China I am only able to do one thing at a time.**” (Emphasis added)

94. Having then listened with care to the parties’ respective closing submissions I reserved my determination.

Assessment

95. The Respondent has addressed the Article 8 family aspects of her position through the medium of the Immigration Rules, in particular EX1 and the family and private life Rules therein and under paragraph 276ADE-DH.
96. Appendix FM1.0 of the October 2013 IDIs (“Partner and ECHR Article 8 Guidance”) is about family members after 9 July 2012. Chapter 8 of Appendix FM of the Immigration Rules sets out the Guidance for caseworkers in their approach to decision-making under the Rules, to which I have earlier referred. I have paid careful attention to the Guidance. The Secretary of State’s conclusion under EX.1, did not go so far as to consider whether there were any insurmountable obstacles preventing the continuation of the relationship between the Appellant and Ms Gan outside the UK, because it was her view, maintained by Mr Parkinson before me in his closing submissions, that given not least the Appellant’s past history in the UK, that showed that he had resided here unlawfully, the Respondent was entitled to regard his relationship with Ms Gan as not being a genuine and subsisting one in the UK.
97. As I mentioned to the parties in the course of their closing submissions, I was mindful in the present case, that we were dealing with an Appellant and his partner and as to whether the Appellant has established a genuine and subsisting relationship with Ms Gan. I referred the parties’ to the guidance in the starred Tribunal decision of GA (“Subsisting” marriage) Ghana* [2006] UKAIT 00046, that whilst in the context of a married couple and as to whether they intended to live permanently with each other, was of relevance, notwithstanding that the Appellant and his partner were not married. In GA, the Tribunal made clear that such requirement went to the substance of the relationship rather than the form and was looking at the future of that relationship from the perspective of the present intentions of the parties. I have asked myself whether on the evidence in its totality, I am able to find that the Appellant has a genuine and subsisting relationship with Ms Gan. Certainly other aspects of EX1 (b) are not in dispute. Ms Gan is in the UK and she is a British citizen.
98. It was submitted to me by Ms Parry, that the First-tier Tribunal Judge had in his determination made a finding as follows:
- “25. Mr Richards conceded that the Appellant has developed a private life in the UK. The relationship with the partner is not accepted by the Respondent but appears to be genuine.”
99. Ms Parry’s initial submission was that this was an unequivocal finding that the Appellant and his partner were in a genuine relationship. I suggested to her, that a reading of paragraph 25 as a whole, rendered it unclear as to whether those opening sentences refer to the view of the Presenting Officer before the First-tier Judge that the relationship appeared to be genuine, or whether that was the Judge’s expressed view.

100. I find that this was not the expressed and unequivocal view of the First-tier Tribunal Judge because later in the same paragraph he had this to say:

“The Appellant was working in the take away when the partner purchased it in 2009. I find that the relationship remains at the boyfriend-girlfriend stage although the parties do live together. They are both married to other people and have had children from those marriages. They do not have any children together. The Appellant has a 13 year old daughter in China and confirmed in oral evidence that he is still in contact with her every now and then” [emphasis added].

101. Indeed at paragraph 21 of Upper Tribunal Judge Kebede’s determination, whilst concluding that the judge’s findings at paragraph 25 were not sufficient to address paragraph EX.1. (b), she observed that, whilst he accepted the Appellant’s relationship with his partner as genuine:

“...he went on to find that the relationship was nothing more than boyfriend and girlfriend, a finding reflected also at paragraph 32 of his determination. There was no specific finding on whether the Appellant’s relationship with his partner was a “genuine and subsisting” one for the purposes of EX.1. (b) and I consider that that is accordingly a matter that still needs to be addressed.”

102. Mr Parkinson submitted that there were significant inconsistencies between the evidence of the Appellant and Ms Gan. Ms Parry submitted upon a consideration of the evidence as a whole including the statements of the Appellant and Ms Gan, that it was open to me to conclude that such inconsistencies were “minor and peripheral in terms of whether they are in a genuine and subsisting relationship”. It was notable that Ms Parry did not seek to challenge the inconsistencies identified. They included in no particular order, the Appellant’s oral evidence when asked whether he had sought to divorce his wife responded “yes if I decide to stay with my current partner then I will”. (Emphasis added).

103. Bearing in mind that one is looking at the substance of the relationship rather than the form and the future of that relationship from the perspective of the present intentions of the parties, such a response is not I find, consistent with that of a couple in a genuine and subsisting relationship.

104. Further, the Appellant has not as yet sought to divorce his wife in China and as he made in clear in evidence before me, he would only do so, if he decided to stay with Ms Gan.

105. When pressed further in cross-examination, he claimed that he had “tried to contact somebody because I don’t know how to proceed. Another thing is she is over there and I am here and so I need to get some advice regarding this issue”. He never specified in evidence as to whom he had tried to contact in order to get advice as to how to divorce his wife in China and despite his expression of a need to get such advice “regarding the issue” his oral evidence did not demonstrate that he had in fact made any serious if any attempt to do so.

106. Indeed later in his evidence, he confirmed he was in regular touch with his mother on the telephone in China and on such occasions occasionally spoke with his daughter when she was inclined and willing to speak to him. He claimed that he had not asked his mother to make enquiries about how to go about divorcing his wife in China because she was not educated and not sophisticated in such matters. He did however confirm that his wife, his daughter's mother had attended his mother's home on occasions to visit her daughter and one would have thought that if he had any serious intention to divorce his wife despite his mother's shortcomings, it would not have been beyond his wit to ask his mother to ensure that the next time his ex-wife visited, he should endeavour to ascertain his wife's whereabouts for the purposes of such proceedings and also get some indication as to her intentions in that regard. I find that he did not do so, because he has had no past and no present intention to institute such proceedings.
107. The Appellant gave a further explanation for the delay, maintaining that he first needed to await the finalisation of Ms Gan's divorce proceedings before he commenced his own. I struggle even to the lower standard of proof let alone that of a balance of probabilities, to regard as acceptable or plausible, that if the Appellant genuinely sought to divorce his wife, he would not choose to await the outcome of his partner's divorce proceedings. He told me in evidence that he was now aware that she had commenced such proceedings but yet this had not triggered any present intention on his part to do likewise. I would thus agree with Mr Parkinson who submitted there was clearly some "reticence on (the Appellant's) part as to the future of the relationship".
108. It was also apparent that the Appellant was somewhat vague in his understanding as to the progress of the steps that Ms Gan had taken to divorce her husband even though on Ms Gan's evidence, evidence that I accept, she had restored that process as recently as November 2013. The Appellant stated he was aware that Ms Gan had "just started the process" but knew nothing more. When asked when she had "started the process" he responded "a while ago". It was his understanding that it was "not a very long time ago - just by the time I started my case". He thought it was "around April or May this year" although he was "not quite sure about that - she is the person who was doing this process. I didn't ask too much".
109. I would have thought that if the Appellant had serious intentions to give permanence to his relationship with Ms Gan, not only would he have long before, taken active steps to make every effort to divorce his wife in China and in similar vein, he would have been anxious to ascertain the progress that his partner was making in her divorce proceedings. The fact that he was vague about these matters and did not do so was, I find, because it was not a matter of particular importance to him.
110. In oral evidence the Appellant was asked whether he had directly proposed marriage to Ms Gan and whether the couple had made any particular plans in that regard. The Appellant responded that whilst the couple tried to live every day happily they had not "thought about this part of the issue". It was drawn to the Appellant's attention that this contrasted with his witness statement of June that the couple had made plans for their future. The Appellant sought to explain that whilst the couple

chatted to each other they “also mentioned marriage later”. The Appellant was clear that “I haven’t asked my girlfriend to marry me yet. We just talk about it”.

111. Such a claim is not consistent with Ms Gan’s evidence before me. She said, when asked if they had made any plans to get married, that they had made such plans but that she had not yet divorced. She was then asked quite clearly “Has he asked you to marry him?” to which Ms Gan unequivocally replied “Yes”. When asked when the Appellant did so, she claimed that he had told her “when we got together initially, but at the time I hadn’t divorced”. Ms Gan was asked again “Has he actually asked you to marry him?” She again replied “Yes”. When asked when the Appellant had done so, she stated “We got together in 2010 – maybe in 2011 – I can’t remember”.
112. One would have thought the question as to when a marriage proposal was put would not result in such a vague recollection. One would surely remember whether it was in one year or another. Ms Gan could not remember whether it was when the couple got together in 2010 or whether it perhaps was in 2011.
113. The vagueness as to when according to Ms Gan, the Appellant proposed marriage to her is not limited to simply that issue. Ms Parry rightly invited me as of course I have done, to carefully consider all the evidence including not just the evidence of the Appellant and his partner but their respective witness statements. In that regard I have noted that in Ms Gan’s witness statement of 21 March 2013 she stated that she first met the Appellant in October 2011 and that “we started living together after knowing each other for some time”.
114. The First-tier Judge in his determination recorded the evidence that the Appellant was working in Ms Gan’s takeaway when it was purchased in 2009. Further at paragraph 29 of the determination it was recorded that the Appellant and Ms Gan both stated that the Appellant moved in with the family in the winter of 2010, although that in itself contrasts with the evidence of one of Ms Gan’s daughters, Helen Chen, who stated in her letter before the judge that she knew the Appellant as a friend of her mother until “only just last year when he became a member of my family and now lives with us”. That would have placed the Appellant having moved in with Ms Gan sometime in 2012. Ms Gan had stated in oral evidence that the couple had got together in 2010. The Appellant in his evidence stated that he had met Ms Gan “about May or June 2009” whereas at paragraph 5 of his statement of June 2013 he had stated that they had met in October 2008.
115. The uncertainty of both the Appellant and his partner in their recollection as to when they first met deepens, when despite the fact that in both the Appellant’s and Ms Gan’s first statement it was claimed that the couple met in October 2008, in oral evidence before me, Ms Gan said “I met Mr Lin in 2009”.
116. So here we have a couple who are unclear between them, as to when they first met and more particularly whether it was in October 2008 or sometime in 2009, perhaps May or June; although the Appellant is clear that despite their years together he has not as yet directly proposed marriage of Mr Gan whilst in contrast, her recollection is clearly that he had.

117. The matter does not end there. Whilst it was the Appellant's evidence that he was still married to his wife in China and had yet to start any divorce proceedings, it was Ms Gan's evidence that she did not know whether the Appellant was married or divorced. One would have thought that if Ms Gan was as claimed, in a serious relationship with the Appellant that was intended to eventually lead to marriage, that at the very least, she would be interested and indeed anxious to establish her partner's current marital status. She told me that she had not asked the Appellant. She knew that he was married in China but given that he had been in the UK for ten years, and no longer living with his wife, she was not sure if the couple "had separated by law". Ms Gan continued, "I know that they have been separated for a long time but I don't know if they have divorced or not?"
118. It thus follows that not only was the Appellant somewhat vague as to what stage had been reached in Ms Gan's divorce proceedings, but his partner Ms Gan, despite their claim to be in a genuine and subsisting relationship, had no idea as to whether the Appellant was married or divorced. Such is simply not conduct consistent with the behaviour of a couple who in terms of the guidance in Gen1.2 are in a relationship akin to marriage for at least two years.
119. My findings in this regard has been further reinforced by Ms Gan's evidence in terms of the explanation that she offered, for failing to visit the appellant throughout the period of his detention in Scotland over a period of some nine months between August 2012 and April 2013. She said that she had not done so because she "couldn't take the long haul coach or train" because of back pain. She continued: "Every time I come back from long distance travel I feel sick". She did not produce medical evidence in support of the claim although she informed me that she had such medical evidence. I note however, that such difficulties did not prevent her from attending the appellant's subsequent bail hearing. More particularly, it does not appear to have prevented her from visiting her family in China in 2011 and as recently as July 2013. Indeed no significant evidence, if any of contact at all between the couple during that period has been advanced by either of them. Further, there was no evidence before me that Ms Gan, who has a business partner, would have been unable to maintain the restaurant and her family life with their children, by arranging several if not at least one visit to see her partner throughout that 9 month period, but she chose not to do so.
120. It cannot be said as submitted by Ms Parry, that the inconsistencies that I have above identified, viewed upon a consideration of the evidence in its totality, can but only be regarded as peripheral in terms of whether this couple are in a genuine and subsisting relationship.
121. In that regard I am mindful of Ms Parry's submission that one had to bear in mind, that the Appellant is an illegal entrant who claims to be unaware as to the present whereabouts of his wife in China. She refers to "obvious logistical difficulties" in the Appellant's ability to start divorce proceedings against her. I find on the evidence this is not a case of an Appellant who has tried to start divorce proceedings against his wife but has been unable to do so due to such "logistical difficulties". I find that

he has not made the slightest attempt to do so, because he has no present intention to divorce his wife. Indeed I find that he has no present intention to marry Ms Gan even if her present divorce proceedings prove to be successful.

122. Whilst it is right to say that they both expressed the wish to live a happy life together, it was however notable that when Ms Gan was told of the Appellant's evidence that he had made plans for their future, she responded as follows:

"Right now I apply for a divorce. We will get married after the divorce.

I run a takeaway restaurant with my business partner. I plan to end that business relationship and plan to take on Mr Lin as my business partner in that restaurant."

123. When asked if she had made any other plans she responded:

"For the time being I have to do things step-by-step. If there are too many plans then I won't be able to cope with it."

124. That evidence of course, is in contrast to what she had earlier said, as to her plans for the couple to get married after she obtained a divorce. Apparently it had not occurred to her that even after she had obtained a divorce, the couple would not be able to get married unless or until the Appellant was divorced and surprisingly for someone claiming to be in a serious relationship with a view to marriage, she was wholly unaware as to the Appellant's current marital status.

125. Ms Gan was asked whether, if the Appellant was returned to China she would join him there with her children. In fairness to her, Ms Gan's response was that her children would be hurt by the Appellant's removal because of the effort that had been made to build up a happy family and quite understandably, and very properly, she pointed out that her children were British citizens, born and educated here who enjoyed a British way of life, although she acknowledged they had a Chinese lifestyle and so "half and half" and spoke the Fujian dialect, it would not be right to remove them from the benefits they enjoyed in the United Kingdom.

126. Ms Gan was however also asked how she would feel about the Appellant being removed to China. She responded that she would keep in contact with the Appellant, that it would be hard for her "but I will keep the contact. I am not sure". When asked if that meant that Ms Gan was not entirely sure whether she would join the Appellant in China, she responded that would not be the case whilst her children were still young but it did not mean that she would not want to join him at a later stage although "I don't want my children to live in China". Ms Gan also notably stated as follows:

"My life would be a mess. If he is allowed to remain here, we would have very good plans very good family. If he is returned to China then it means this family is broken. There is no meaningful way of talking about future plans. **If he can stay here, he could look after the children and I can look after my business but if he goes back to China I can only do one thing at a time**" [emphasis added].

127. Those remarks are indeed consistent with what Ms Gan had to say in her statement of 21 March 2013 at a time when the Appellant was detained in Scotland. She said that her day-to-day life was extremely difficult because she was the sole financial provider for a family. She continued:

“I have to run a business, manage the staff at said business and keep tabs on all financial matters of my domestic life as well as the business side of things. In addition to this I have also had to look after my children during this difficult time without my boyfriend. Mr Lin. I have no other trusted people in this country who are able to help me out.”

128. A consideration of the couples' evidence in the round and bearing in mind not least, those aspects of their evidence as above identified, has caused me to question, the true nature of their relationship. I have reached the conclusion that in common with the First-tier Tribunal Judge who described the couple's relationship as one that remained "at the boyfriend-girlfriend stage although the parties do live together" that their relationship is one of mutual convenience, rather than one akin to marriage.
129. I find, looking at the future of this couple's relationship from the perspective of their present intentions, that it cannot be described as a relationship that is both genuine and subsisting. I find that the Appellant has not at the time of the hearing the slightest intention of seeking a divorce from his wife nor has he made any attempt to do so in the past.
130. I find that Ms Gan had formed the intention to divorce her husband following a very unhappy marriage, before she met the Appellant and as she confirmed to me in evidence, her intention to divorce him had nothing to do with her subsequent relationship with the Appellant. She would be seeking to divorce her husband whether she was with the Appellant or not.
131. I find it telling that on the Appellant's part, he was clear at the outset of his oral evidence before me, that he would seek to divorce his wife if he decided "to stay with my current partner, then I will".
132. In consequence, I find that the Appellant has failed to discharge the burden upon him to show whether to the lower standard of proof relevant to asylum appeals or to that of a balance of probabilities in terms of immigration appeals, to show that he enjoys a genuine and subsisting relationship with Ms Gan.
133. For the avoidance of doubt, even if on the evidence I had concluded to the contrary, I would still have had to satisfy myself that there were no insurmountable obstacles to family life with Ms Gan continuing outside the UK.
134. As I have mentioned earlier "insurmountable obstacles" are dealt with in paragraph 3.2.7(c) of the Guidance. That states that the decision-maker should consider the seriousness of the difficulties that the applicant and their partner would face

continuing their family life outside the United Kingdom whether they entail something that could not (or could not be expected to) be overcome even with a degree of hardship for one or more of the individuals concerned. It is said to be a different and more stringent test than whether it would be "reasonable to expect" the applicant's partner to join him overseas but it is stated that "a significant degree of hardship or inconvenience does not amount to an insurmountable obstacle". One has to look at whether there is an inability to live in the country concerned and the focus should also be on the family life which would be enjoyed in the country to which the applicant would be returned and not a comparison of the life they would enjoy were they to remain in the United Kingdom. As for cultural barriers the Guidance states it must be a barrier which either cannot be overcome or would present a very high degree of hardship to the partner such that it amounted to an insurmountable obstacle.

135. I have reminded myself that in Sanade & Others [2012] UKUT 468 (IAC) it was held it was not reasonable to expect a spouse to leave the EU or require a mother to leave her British minor children. The UKBA continue to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom although contends with good reason, this is to be distinguished from a case where an independent adult can choose between continued residence in the United Kingdom or continued cohabitation abroad.
136. It follows that in terms of the present case, there is no basis upon which Ms Gan and her children can be compelled to leave the United Kingdom to join the Appellant in China. Whilst one understands and accepts Mr Gan's reasons for so stating, not least because her priority is that of the best interests of her children and their educational needs amongst other things, that of course is a matter of choice on her part. Indeed in common with the Appellant, she is also from Fujian province and on her evidence her children are immersed "half and half" between British and Chinese culture, and at home, the couple and Ms Gan's children converse with each other in a Fujian dialect that they all understand. Further, both the Appellant and Ms Gan have family in Fujian province. Ms Gan visited her parents and her younger sister in Fujian province in 2011 and as recently as last July when she stayed for four to five weeks together with the children who enjoy a very close relationship with their maternal grandparents. The Appellant's mother continues to live in Fujian province, indeed his daughter also lives with her.
137. It cannot therefore be said, that returning to China as a family unit would result in unjustifiably harsh consequences for them individually and as a family. As the Guidance states it would only be in very rare circumstances that the removal of the Appellant in such circumstances would not be proportionate and I do not find such circumstances to be present in this case.
138. As I earlier pointed out, paragraph 3.2.8 continues that in determining whether there are exceptional circumstances the decision-maker must consider all relevant factors. These would include the circumstances around the applicant's entry to the UK and the proportion of the time he had spent in the UK legally as opposed to illegally. Further, as to whether the relationship was formed with the applicant's partner was

at a time when the applicant had no immigration status or this was precarious. The Guidance continues:

“Family life, which involves the applicant putting down roots in the UK in the full knowledge that their stay here is unlawful or precarious should be given less weight when balancing against the factors weighing in favour of removal than family life formed by a person lawfully present in the UK.”

139. Applying that Guidance to the present case, it is not in dispute that whilst the Appellant claimed to have arrived in the UK on 9 June 2002 he did not apply for asylum until 25 October 2007. He then failed to turn up to his asylum interview on 9 April 2008 as a result of which his claim was withdrawn. He was treated as an absconder. As recorded by Judge Kebede at paragraph 3 of her determination:

“On 25 August 2012 he was encountered working in a Chinese takeaway [that no doubt being the takeaway of Ms Gan] and was arrested on suspicion of illegal entry and detained. Following his acquittal on 23 January 2013 on charges of attempted murder, removal directions were made for his removal on 9 February 2013 but he claimed asylum on 3 February 2013. His claim was refused on 25 April 2013 and a decision was made on 29 April 2013 to remove him from the UK.”

140. It is thus clearly the case that the Appellant’s entry to the UK and the proportion of time he has spent here has been largely spent illegally. Further his relationship with Ms Gan if I were to accept it (which I do not) as being genuine and subsisting would have been formed when he had no immigration status that indeed could but only be regarded as precarious.
141. I have reminded myself of the conclusion of Sales J in Nagre, that in a precarious family life case only in exceptional circumstances would removal of a non-national family member constitute a violation of Article 8. To show that removal was disproportionate it would be necessary to show other non-standard and particular features of the case of a compelling nature demonstrating that removal would be unjustifiably harsh. Further in the majority of such cases where the Secretary of State concluded that the family member applying for leave to remain could not satisfy the test in Section EX.1 (b) (insurmountable obstacles) of the new Rules, it was unlikely that there would be a good arguable case, let alone a case ultimately found to be established, that Article 8 would require that leave to remain should be granted outside of the Immigration Rules. I further remind myself that Sales J also held that Section EX.1 was not unlawful.
142. For the reasons I have set out above, I find that the Appellant has not established any particular features of his case of a compelling nature demonstrating that his removal from the United Kingdom would be unjustifiably harsh either to the Appellant or his partner such that refusal would not be proportionate under Article 8.
143. I find for the sake of completeness, that the seriousness of the difficulties that the Appellant and his partner and her children would face in continuing their claimed family life outside the United Kingdom would not entail something that they could

not or could not be expected to overcome even with a degree of hardship for one or more of the individuals concerned.

144. It is apparent to me for the reasons that I have above identified, that neither the Appellant nor Ms Gan have given credible evidence as to the true nature of their relationship or as to the true nature of their relationship in the future.

Conclusions

145. The determination of the First-tier Tribunal involved the making of an error on a point of law.

146. I set aside the determination.

147. I re-make the decision in the Appellant's appeal by dismissing it.

Signed

Date 13 January 2014

Upper Tribunal Judge Goldstein



ANNEXE A

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

Appeal Number: AA/04633/2013

THE IMMIGRATION ACTS

**Heard at : Field House
On : 30 October 2013**

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

**CHUN LONG LIN
(NO ANONYMITY DIRECTION)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Revill, instructed by K & G Legal Consultants
For the Respondent: Ms E Martin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me following a grant of permission to the appellant to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to remove him from the United Kingdom.

2. The appellant is a citizen of China born on 8 April 1975. He arrived in the UK on 9 June 2002. He applied for asylum on 25 October 2007 but failed to turn up to his asylum interview on 9 April 2008, as a result of which his claim was withdrawn and he was treated as an absconder. On 25 August 2012 he was encountered working in a Chinese take-away and was arrested on suspicion of illegal entry and detained. Following his acquittal on 23 January 2013 on charges of attempted murder, removal directions were made for his removal on 9 February 2013, but he claimed asylum on 3 February 2013. His claim was refused on 25 April 2013 and a decision was made on 29 April 2013 to remove him from the UK. His appeal against that decision was heard before First-tier Tribunal Judge Archer on 13 June 2013 and was dismissed.

The Appellant's claim

3. The basis of the appellant's claim was that he was at risk of persecution in China as a result of his challenge to the decision of the local authorities to demolish his home in order to build a road and to offer him only limited compensation. He claimed to have been threatened and harassed by local government officials, although he was never arrested or detained. The appellant also claimed to have formed a relationship in the United Kingdom with a British national of Chinese origin, whom he had met in 2009 and with whom he had lived since 2010 together with her two daughters. He had a wife and 13 year old daughter in China whom he had last seen in 2002.

4. The respondent did not accept that the appellant was genuinely in fear of persecution or that the Chinese authorities would have any adverse interest in him and considered that he would be at no risk on return to China. With regard to his Article 8 claim, it was considered that as a result of his failure to attend his asylum interview and of the breach of the terms of his temporary admission he had failed to comply with the requirements under S-LTR.1.7 of Appendix FM of the immigration rules. Furthermore, the respondent did not regard his relationship with his partner and her children as genuine and subsisting and accordingly found that he could not meet the requirements of Appendix FM EX.1. He did not fall within the requirements of the immigration rules relating to private life. It was accordingly not accepted that the appellant's removal would breach his human rights under Article 8.

5. In the First-tier Tribunal, Judge Archer heard from the appellant, his partner and his partner's daughter. He found that the appellant was at no risk on return to China and dismissed his appeal on asylum and Article 3 human rights grounds. With regard to Article 8, he found that the appellant did not meet the requirements of Appendix FM of the immigration rules, since he did not meet the English language requirement in section E-ECP.4.1 and had failed to attend an interview when required to do so for the purposes of section S-LTR.1.7. He did not meet the requirements of the rules in regard to private life. The judge found further that the appellant's claim also failed under Article 8 outside the rules. He had doubts about the strength and depth of the appellant's relationship with his partner's daughters and did not accept that their best interests would be adversely affected by his removal from the United Kingdom. Although he accepted that the

appellant had established a private life here, he found that his removal would not be disproportionate. Accordingly he dismissed the appeal on Article 8 human rights grounds.

6. Permission to appeal to the Upper Tribunal was sought on the grounds that the judge had erred by finding, contrary to the principles in Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 and MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953, removal was proportionate on the basis that the appellant could apply for entry clearance; that he had erred in his assessment of where the best interests of the children lay; and that he had erred in his approach to the requirements of Appendix FM to the immigration rules.

7. Permission to appeal was granted on all grounds.

Appeal hearing

8. At the hearing the appellant was present but was not required to give oral evidence. I heard submissions in regard to the error of law.

9. Ms Revill submitted that the judge, in requiring the appellant to make an application for entry clearance from outside the United Kingdom, failed to have regard to the principles in Chikwamba, MA (Pakistan) and Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 444. She submitted that the judgment of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 did not detract from those principles and could be distinguished since it dealt with deportation cases and those not involving children. With regard to his findings under the immigration rules, the judge was wrong to find that the reference in S-LTR.1.7 to a failure to attend an interview applied to a failure that occurred in a previous application. That provision had to relate to the current proceedings. There was nothing in the IDIs or in Hansard to suggest that the provision was to be applied to previous proceedings and that would, in effect, mean that the appellant would be permanently excluded from the United Kingdom, since it was a mandatory provision, which would be incompatible with Article 8. The judge also erred in failing to consider that the English language requirement was irrelevant in cases coming under EX 1. He did not consider whether the appellant could benefit from EX 1, particularly since he appeared to accept that he was in a relationship with a British citizen and that the relationship had lasted for over two years. The appellant also had a genuine and subsisting parental relationship with his partner's children and the judge failed to explore that properly. Ms Revill submitted further that the judge had failed to give proper consideration to the best interests of the children.

10. Ms Martin submitted that the appellant's current application was the same one as that made in 2007 and accordingly he fell within S-LTR 1.7. The rules were clear and the judge was entitled to conclude that he could not meet the requirements therein. The judge had considered the best interests of the children. He did not accept that family life existed between the appellant and his partner's children and so did not need to go further. The appellant's circumstances were distinguishable from those in the cases of Chikwamba, Hayat and MA. The judge went on to consider Article 8 in accordance with the principles

in R (Razgar) v SSHD (2004) UKHL 27 and therefore any failure to consider EX 1 was not material as the appellant could not succeed on the basis of the findings he made in that regard.

11. Ms Revill, in her response, submitted that the appellant fell within the requirements of EX. 1 as he was in a genuine and subsisting relationship and there were insurmountable obstacles to family life continuing outside the United Kingdom. She reiterated her earlier submissions in relation to the immigration rules and Chikwamba.

Consideration and findings.

12. In my view the judge made a material error of law in his assessment of the appellant's claim under the immigration rules.

13. The relevant rules governing the requirements for limited leave to remain as a partner, in so far as they relate to the appellant, are as follows:

Section R-LTRP: Requirements for limited leave to remain as a partner

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

- (a) the applicant and their partner must be in the UK;
- (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
- (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
- (ii) the applicant meets all of the requirements of Section E-LTRP:
Eligibility for leave to remain as a partner; or
- (d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
- (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and
- (iii) paragraph EX.1. applies.

Section S-LTR: Suitability-leave to remain

S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.

S-LTR.1.7. The applicant has failed without reasonable excuse to comply with a requirement to-

- (a) attend an interview;

- (b) provide information;
- (c) provide physical data; or
- (d) undergo a medical examination or provide a medical report.

14. At paragraph 26 of his determination, the judge found that the appellant's claim fell for refusal under Appendix FM of the rules because the appellant did not meet the suitability requirements in paragraphs S-LTR.1.7, having failed to attend an asylum interview in 2008. That reflected the grounds upon which the respondent refused the claim in their letter of 25 April 2013. In the absence of any interpretation or clarification in the rules, the Immigration Directorate Instructions or the Explanatory Memorandum to HC 184, it is submitted on behalf of the appellant that the correct interpretation of paragraph S-LTR.1.7 (a) has to be that it refers to an interview relating to the current proceedings and not to an interview that related to a previous claim.

15. That interpretation was rejected by the judge on the grounds that there could be a whole series of failures to attend interviews leading to claims being terminated and that S-LTR.1.7 would still not be triggered so long as there was a single fresh application. However, the contrary position, as put by Ms Revill, is that, owing to the mandatory nature of paragraph S-LTR.1.7 and its equivalent provision in relation to entry clearance, paragraph S-EC.1.6, the appellant would be put in the position of being excluded indefinitely from the United Kingdom with no prospect of ever being able to apply to join his partner. Such a position would be more severe than that imposed upon a foreign criminal deported from the United Kingdom who would be able to apply for entry clearance after a limited period of ten years. That position does not appear to have been considered by the judge and indeed was inconsistent with his own findings, at paragraph 32 of his determination, that "there is nothing to prevent him from making further applications to return to the United Kingdom within the immigration rules".

16. It seems to me that the sensible interpretation of paragraph S-LTR.1.7 (a) has to be that proposed by Ms Revill, namely that the failure to attend an interview has to be in relation to the current proceedings. That is particularly so given that the suitability requirements in Appendix FM relate to the specific circumstances of applications on the basis of family life. It cannot be the case, in my view, that those requirements relate to a different claim, namely an asylum claim made some five years earlier and subsequently treated as withdrawn, at a time when the appellant had not even formed the relationship with his partner.

17. In the circumstances, I find that the judge erred in his interpretation of paragraph S-LTR.1.7 (a) and that the appellant's claim did not fall for mandatory refusal under that provision.

18. In addition, the judge was plainly in error in his finding that the appellant's inability to meet the English language requirement in E-ECP.4.1 was relevant to his ability to meet the requirements under Appendix FM. In making that finding the judge failed to consider the relevant provision at paragraph R-LTRP.1.1 (d) in which the only requirements to be

met, in cases in which paragraph EX.1. applies, are those in paragraphs E-LTRP.1.2-1.12 and E-LTRP.2.1, which do not include the English language requirement. That is also made clear in the IDIs of October 2013 which state at paragraph 3.2.1:

“So, if paragraph EX.1 applies, they are not required to meet the immigration status requirements in paragraphs E-LTRP.2.1. (c) (on temporary admission or release) or E-LTRP.2.2 (overstayers) or any of the financial or English language requirements in paragraphs E-LTRP.3.1 to 4.2.”

19. On the basis of his findings that the appellant failed to meet the suitability requirements in S-LTR.1.7 and the English language requirements, the judge did not go on to consider EX.1 of Appendix FM. In the light of my findings above with respect to those provisions, it is plain that consideration ought to have been given to whether the appellant could benefit from EX.1. It was Ms Martin’s submission that the judge did in fact give consideration to the relevant requirements under EX.1, albeit in the context of his findings under Article 8 outside the rules. However I do not consider that to be the case. Whilst I accept that his findings at paragraphs 29 to 31 can be said to address the requirements of paragraph EX.1. (a), there are plainly no equivalent findings with respect to EX.1. (b).

20. Turning to the findings at paragraphs 29 to 31, it is plain that the judge did not accept that the appellant had a genuine and subsisting parental relationship with his partner’s children. Ms Revill submitted that those findings were inadequate and that the judge should have explored the matter further. I do not agree. He gave detailed reasons for concluding as he did, based on the evidence before him, and was entitled to reach the decision that he did. He did not make any errors of law in that respect and neither did he err in his findings on the best interests of the children. I find no merit in the grounds of appeal in that regard.

21. However I do not agree with Ms Revill’s submission that the judge’s findings at paragraph 25 were sufficient to address paragraph EX.1. (b). Although he accepted that the appellant’s relationship with his partner was genuine, he went on to find that the relationship was nothing more than boyfriend and girlfriend, a finding reflected also at paragraph 32 of his determination. There was no specific finding on whether the appellant’s relationship with his partner was a “genuine and subsisting” one for the purposes of paragraph EX.1. (b) and I consider that that is accordingly a matter that still needs to be addressed.

22. With regard to the first ground of appeal, referring to the principles in the cases of Chikwamba, Hayat and MA, it seems to me that that is very much dependant upon the findings to be made with respect to EX.1. (b). In any event, as I indicated to Ms Revill, the merits of that ground are substantially reduced in the light of the recent judgment of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192.

23. For all these reasons I find that errors of law have been established. I find that the judge’s determination cannot stand and must be set aside. Further evidence will be considered at a resumed hearing in order for findings to be made in relation to the

appellant's relationship with his partner and for a decision to be made with respect to his ability to meet the requirements of EX.1.(b) and R-LTRP.1.1. At present, however, I see no reason why the judge's findings with respect to the appellant's relationship with his partner's children should not be preserved.

24. I make the following directions for the resumed hearing.

Directions

No later than seven days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this Tribunal and served on the opposing party.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4) (i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. However I find no reason to continue that order and accordingly I lift the order, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Upper Tribunal Judge Kebede