Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12566/2010**

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 17 May 2013	**On 29 July 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MS MEI CHEN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ibrar Hussain, with Lei Dat & Baig, solicitors
For the Respondent: No appearance or representation

DETERMINATION AND REASONS

1. The appellant is a citizen of the People's Republic of China, from Hubei province, who has two daughters, living with their grandparents in China, and a son, born in the United Kingdom in 2008. Her husband has been in the United Kingdom since April 2006, and the appellant joined him here in May 2007, after a five month journey from China. This appeal was identified as one in which the outcome was likely to be determined, or substantially affected, by the Upper Tribunal's decision in relation to the risk on return to China arising out of the Chinese family planning policy. That determination has now been promulgated as *AX (family planning scheme) China CG* [2012] UKUT 97 (IAC).

2. The appellant was one of those affected by the failure of the Immigration Advisory Service, which went into administration in August 2012. Since then she has been represented by a firm of experienced immigration solicitors, Lei Dat & Baig.

The First-tier Tribunal determination

3. In a determination made on 12 October 2010, First-tier Tribunal Judge Sykes set out the appellant's account. She was 29 years old when she came to the United Kingdom and is now 35 years old. Before coming to the United Kingdom, she lived with her parents-in-law in Yi Chang city in Hubei province. Her husband worked away from home, returning from time to time. Her first daughter was born in 2000, when the appellant was 22 years old. She did not have an IUD fitted, as expected; she 'kept out of the way' because her husband and parents-in-law wanted a second child. They were hoping for a son.

4. In September 2004, she was pregnant again. She had not applied for a birth permit and the child, a daughter, was born at home. Her mother in law wanted the appellant to give the child to her own childless sister; the appellant refused. The second daughter was not registered and was kept out of sight. The appellant still did not have an IUD fitted and neither she nor her husband was sterilised.

5. In August 2005, just three months after the birth of her second daughter, the appellant's father paid for her to leave China. She travelled to France, where she was detained. She suffered a miscarriage in detention and was very ill. Two months later, her father paid RMB 50,000 to bring her back to China. Once home, the appellant kept out of the way of officials.

6. Her husband left China for the United Kingdom in 2006. Without his support in China, things were difficult for the appellant, especially with her mother in law, who still wanted a grandson. Her second daughter was not living at her parents-in-law' home and the appellant was allowed to see her only occasionally, which distressed her, but without the correct paperwork, she could not keep her daughter.

7. The appellant left China again in January 2007, travelling through various countries, arriving in May 2007 in the United Kingdom. Her husband had formed another relationship but they resumed marital relations and she became pregnant by him almost immediately: she had a son in March 2008. The relationship failed and he returned to his girlfriend. The appellant claimed asylum in November 2007, when she was about five or six months pregnant.

8. The appellant's claimed husband, Feng Lin, was a Chinese citizen born in 1975. He is therefore about two years older than the appellant. He was in the United Kingdom unlawfully and without status, and was not treated as a dependant in these proceedings.

9. The appellant did not know where he was living and had no way of contacting him, though occasionally he contacted her and came to her home. He sometimes stayed at a friend's house but she did not know where. He had made no effort to support her application or provide a witness statement and no evidence of the marriage was available. The First-tier Tribunal Judge found that there was no extant family life between the couple, though, if the child born in the United Kingdom was his son, family life of course existed between father and son, however sparse their contact. That family life could be maintained if the appellant's husband returned to China with his wife and family.

10. On the question of the credibility of the appellant's account, the First-tier Tribunal Judge said this:

> "25. I do have some reservations about the credibility of her account. This because although she says she is now reconciled with her husband who apparently attended the appeal hearing in order to look after the child, there is no statement from him and he did not give evidence at the hearing. Mr Reyaz [for the appellant] confirmed that it was her husband who was in the courtroom and I asked him on more than one occasion to confirm that it was not the intention to call him to give evidence; if he had been called, it would have been appropriate to ask him to leave the courtroom during the appellant's own oral evidence.
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> 26. Mr Reyaz confirmed that that was the case and reasserted that decision when the appellant was being pressed in cross-examination to explain why her husband was not being called; she was ready to have him give evidence. This seems to me to be a serious gap in the evidence from which I would be entitled to draw the conclusion that it undermined the credibility of the appellant's account. Mr Jones in his submissions [for the respondent] asked me to do so.
>
> 27. I have now however determined the asylum appeal on that basis. This is partly because the refusal letter itself does not take any serious issue with a factual basis of the claim, and partly because at the CMR the respondent's rep confirmed that the facts were largely not in dispute and that it was the operation of the one child policy that was the issue. I have therefore confined my determination of the appeal to that policy."

11. The appeal was dismissed on asylum, humanitarian protection and human rights grounds. The appellant appealed.

Permission to appeal

12. The First-tier Tribunal Judge had set out very full reasons and argument on the family planning policy in China. In granting permission to appeal, Upper Tribunal Judge Allen indicated that he considered it arguable that the First-tier Tribunal Judge had made a perverse decision as to the risk of forced sterilisation for this appellant if she were to be returned to China.

Error of law

13. In finding that there was indeed an error of law, and setting aside the determination for remaking, First-tier Tribunal Judge Lever on 19 May 2011 noted that there was no country guidance on the point and that the decisions of senior courts interest he United Kingdom, Canada and Australia were divergent. He found that it had been an error of law for the First-tier Tribunal Judge to have derived evidence from his own research conducted after the hearing, and to base conclusions on that research, without giving the parties an opportunity to comment on it.

The Upper Tribunal proceedings

14. The case was identified as one of a number which might be suitable for country guidance on the Chinese family planning policy. In the event, another appeal formed the basis of the country guidance given in *AX* and the Upper Tribunal must now apply that decision to this appellant's circumstances. On 19 September 2012, I directed the parties to assist the Tribunal further, in the light of that decision, as follows:

> "**Directions**
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> 1. The appellant shall state, not later than 28 September 2012:
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> (a) Whether she has been granted any type of leave to remain, and if so, what leave was granted; and
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> (b) Whether she wishes to pursue her case before the Upper Tribunal in this appeal.
>
> 2. If the appeal is pursued:
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> (a) the appellant shall, not later than 5 October 2012, file and serve written submissions setting out clearly her case in relation to the *AX* guidance;
>
> (b) the respondent shall state, not later than 19 October 2012, whether she maintains her opposition to the grant of international protection under the Refugee Convention, humanitarian protection, or on human rights grounds, and if so, on what basis.
>
> 3. **The parties are on notice that:**
>
> (a) the Upper Tribunal will consider everything received by it in response to these directions, before deciding under rule 34 whether it is necessary to have an oral hearing of any aspect of the appeal; and
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> (b) a failure by a party to comply with any of these directions may lead the Upper Tribunal to proceed on the basis that nothing (or nothing further) is to be said or advanced in support of that party's case before the Upper Tribunal."

15. The appellant's representatives complied and filed a small supplementary bundle, including written submissions on *AX*, the UKBA form IS.96 (a document granting temporary admission but indicating that he remains liable to detention) issued to the appellant's partner on 7 December 2012, evidence relating to the appellant's son's schooling in the United Kingdom, and various materials relating to circumstances in China, in particular the 'one child policy', abortion, family planning, and the enforcement of sterilisation in Guangdong and Fujian. I will return to those materials when considering my decision. There was an updated statement from the appellant, but there is still no evidence from her claimed husband.

May 2013 witness statement

16. The appellant's updated witness statement stated that she was living with her husband, Feng Lin, and their son, at an address in Liverpool. She had waited over two years for her appeal to be re-heard. She and her husband had reunited and recommenced living together after the birth of their son in March 2008 and were very happy together.

17. Their son was now over five years old. He was attending Lister Infant School. He loved his school, had made many friends, and had taken part in school events, such as the Olympics, and the Christmas Nativity play. He spoke more English than Chinese; when she spoke to him in Chinese he would ask 'what does that mean?'. He was very British in his culture. Early problems with his hearing had been resolved after he attended hospital for them.

18. The appellant was studying ESOL Basic English at Stonycroft Children's Centre, since after six years in the United Kingdom, she felt it was important to integrate fully into British life. The three of them had a close and loving family life together in the United Kingdom.

19. The appellant's understanding was that she would be unable to register her son in China; she already had an unregistered daughter, whom she could never see, and the authorities would force her to be sterilised since it was not permitted to have three children in her home area. She had left China illegally and would be unable to afford the fines for her third unregistered child. Having to hide her daughter had been a heartbreaking situation and she would not wish to have to do the same with her son.

Upper Tribunal hearing

20. The appeal came before me as an oral hearing on 17 May 2013 at Manchester Hearing Centre. The respondent did not arrange representation. The appellant

gave oral evidence, it having been over two years since the last factual assessment of her situation.

Appellant's evidence

21. The appellant confirmed her name and address and adopted her new witness statement. It had been translated to her and she had checked it. It contained the evidence she wished to give to the Tribunal. She gave further evidence, answering questions from her representative and from me to clarify her history.

22. The appellant clarified that her daughters were living with her mother in law in China. She seldom spoke to her mother in law; her children seemed very distant on the infrequent occasions when the appellant called there; they had been apart for a long time. The elder girl was 13 years now and had lived without her mother since she was seven; the younger was eight and had never really lived with her mother at all. She had spoken to them last about a month before the hearing (so in April 2013) but it was clear that the girls did not really like their mother any more. Her husband had a better relationship with his mother; he spoke to her and received news of the girls, but they seldom wanted to talk to either of their parents.

23. The elder girl was registered and attended school, including fee paid 'cram' school, in which she got additional learning in the 6th grade to help her with national examinations taken at 11 or 12 years old. She passed on her learning to the younger one, who was unregistered and not attending school. The younger one could not really go out; if she was ill and needed a doctor, she used her elder sister's name. Fortunately she had only had a few minor illnesses such as colds and rarely needed to see a doctor.

24. The family in China were always afraid that the authorities would take the younger girl away. She could not be registered because of the 'one-child' policy, and she needed to be registered in order to attend school. Parents had to register children personally, but both the girls' parents had been in the United Kingdom for many years now.

25. The appellant's Chinese identity card had expired while she had been away and if she returned she would have to go and renew it. How could she do that, when she was in breach by having three children? Internal relocation was not an option; that would require government sponsorship and in seeking that, the appellant would risk arrest.

26. Her son had been at primary school in the United Kingdom for almost two full years (it was two years in July 2013). He was integrated, refusing to speak Chinese and speaking to her in English. He was in good health and happy in his schooling. He liked dancing and Christmas parties a lot, and had friends in his school.

27. Neither the appellant nor her husband had worked in the six or seven years they had spent in the United Kingdom. They were living on NASS benefits, receiving £96.90 weekly. She had managed to save about £200-300 in her Lloyds TSB account. They had no cash savings other than that and had been unable to send any money back to China to repay the snakehead fees her father had incurred for her abortive departure from China in 2005, her return, and her second departure in 2007.

28. The appellant's younger brother and her parents were still in China. She was estranged from them all.

29. Her departures from and return to China had put her father in a very difficult financial position. Her father had borrowed a lot of money for her travel. Her father had telephoned the appellant in 2012 to ask when she would send back the money she owed him; the appellant could not remember which month that had been, but it was around the time of the Chinese New Year, when every Chinese person goes back home to celebrate with their families, but the appellant had no money so she had been unable to go home. It was hard for her to reach him now, because he was on the run from the people from whom he had borrowed the money. She did not know where he had gone.

30. Her younger brother blamed the appellant for what had happened to the family and was no longer speaking to her. He was an interior designer, with a wife and child of his own, and worked in other provinces.

31. The appellant explained her marital difficulties. After the birth of their second daughter, she and her husband had been quarrelling because they had no son. The appellant was not living at home with her parents-in-law; they had been living with friends and hiding, since the birth of the first child in 2000, because she did not wish to have an IUD inserted.

32. She had not resumed menstruating after the birth of her second daughter, and people told her that she was pregnant again, so the appellant had travelled to Europe in 2005, hoping to get to Ireland. She was detained in France, where she lost the baby, and became very ill. She went home. Her husband left her and went to the United Kingdom the following year. The appellant followed him in 2007, travelling without her daughters because the route was illegal, involving climbing mountains, and quite unsuitable for children. She left the girls with her mother in law, and sometimes they lived at their paternal aunt's house. Her mother in law also feared arrest, so the children could not live in her parents-in-law' house.

33. When the appellant reached the United Kingdom, she found that her husband had a girlfriend and it had taken some time for things to go right between them. They were all living together now, and things were fine again. He had not given evidence on their solicitors' advice. He was not at court for the Upper Tribunal hearing because the child was at school. She could not explain why there was no

witness statement from her husband. He had claimed asylum in his own right in 2010; until then, he had been working as a chef. His application had been refused and she did not know what was happening about it now because the solicitors firm had closed down.

34. There were no criminal charges against either of them. They both had rural *hukous* in China. If the appellant were returned to China, she would wish to live with all three of her children but she feared that all of the family would be arrested because of her illegal departure from China. Her unregistered children would be sent to an orphanage.

35. The appellant had not worked in China either. Her literacy was low, since she had only completed primary school in China, so she could not find employment. Her husband had worked on building sites, because he also was uneducated. In their day, secondary education was not available to all as it was now; it was necessary to achieve a good grade in primary school in order to progress to secondary education, whereas now, children all received nine years' education.

36. The appellant and her brother were both registered without difficulty since the one child policy had only started in 2008; he had done better, completing two years of high school as well as primary school. Her mother in law had a younger sister, who was registered and was in her fifties.

Submissions

37. The appellant's solicitors, Lei Dat & Baig, provided an undated skeleton argument. In that document they argued that the delay from May 2011, when an error of law was found in this appeal, to the hearing in May 2013, entitled the appellant to leave to remain on the principles set out in *Hb (Ethiopia) and ors v SSHD* [2006] EWCA CV 1713.

38. Regarding the Tribunal's country guidance decision in *AX,* the skeleton argument noted that this decision had not been in existence at the date of hearing. The appellant relied particularly on paragraphs 81-82 of *AX,* paragraph 87, paragraphs 92-95, paragraphs 102-107, paragraph 124, and the independent country evidence produced by the appellant, all of which, except one document from LifeNews.com, predates the evidence considered in *AX.*

39. In relation to Article 8 ECHR, the skeleton argument notes that the third child is foreign-born. Relying on paragraphs 148, 172 and 187 of *AX,* the appellant contends that registration is complex and there is no guarantee that the appellant's third child will be registered. They rely on a report, 'Birth Registration in China: Practices, Problems and Policies' compiled by the Institute for Population and Developmental Studies, Xian Jiaotong University, Xian Shaanxi Province 710049.

40. In applying *Razgar, R (on the Application of) v. Secretary of State for the Home Department [*2004] UKHL 27, the appellant argues that there is private and family life between the appellant, her son and her husband in the United Kingdom. In relation to the best interests of the child pursuant to s.55 Borders, Citizenship and Immigration Act 2009, she relies on *E-A (Article 8 - best interests of child) Nigeria* [2011] UKUT 315 (IAC), *MK (best interests of child) India* [2011] UKUT 00475 (IAC) and *LD (Article 8 best interests of child) Zimbabwe* [2010] UKUT 278 (IAC) but does not say what in particular she draws from those decisions. Similarly, she relies on the Enforcement Guidance and Instructions on the former paragraph 395C of the Rules as to cases which should be sympathetically considered, where the delay has been caused by the respondent.

41. Finally, she relies on *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 which deals principally with spouses who enter into their relationship while one of them is awaiting a decision.

42. In addition, Mr Hussain made the following submissions at the hearing. The appellant and her husband were not a double-single couple since she had a sibling; they were from the majority Han ethnic group and from a strict province, Hubei. Their fear of repercussions and in particular of forced sterilisation was a genuine fear. In the post-2010 structure, he argued that there remained a risk of forced sterilisation in Hubei because it was a strict province. The second daughter had been born in breach of the Hubei family planning Regulations, although he accepted that the third child, the couple's son, who had been born in the United Kingdom, would not be treated as born in breach of the policy.

43. He argued that there had been insufficient real change in China and that paragraph 339K of the Immigration Rules applied. Internal relocation would be unduly harsh for these parties, especially with three children of whom the middle child was not registered and had been born in breach of the family planning policy. In order to renew her Chinese identity card, the appellant would have to contact her hukou area and there was a reasonable likelihood that she would come to the adverse attention of the authorities and face a real risk of forced sterilisation.

44. He asked me to allow the appeal.

45. I reserved my decision.

Findings of fact and credibility

46. I remind myself that the standard of proof of the facts and matters relied upon by the appellant is the lower standard of real risk or reasonable degree of likelihood, appropriate to the international protection conventions, but that to that lower standard, the burden of proof is upon her.

47. There is no doubt that the appellant has been unlawfully in the United Kingdom for six years and has a male child aged 5 born here. Her relationship

with her claimed husband concerns me, as it did the first judge in 2010. There continues to be a puzzling lack of support for this application by him. The application was made in November 2007, and the determination in 2010 made it clear that there were concerns about the husband's lack of support and the lack of evidence from him, but at the latest hearing he was not present and no witness statement appeared. His temporary admission document is dated 2012, not 2010; that suggests that he may have left the United Kingdom and returned.

48. There is very little evidence about the girl children in China. Taking the appellant's evidence at its highest, it appears that they are estranged from her and that they may be living with their paternal aunt, at least some of the time.

49. The evidence is that the appellant and her husband are not educated people; neither of them qualified for secondary education at a time when it was not freely available to children in China. Before 2010, there was no legislation and the situation in China was much more unpredictable. Nevertheless the appellant's father is said to have borrowed and tried to pay huge sums on three occasions, to enable her to leave China for Ireland in 2005 while pregnant; to repatriate her when she lost the baby; and to enable her to leave China for the United Kingdom in 2007. The amounts borrowed would have been more than sufficient to pay any fines which were due in China for the unlawful birth. By concealing the birth of the second daughter, the family has been able to continue to access free schooling and healthcare for the older daughter.

50. For the purposes of this decision, having regard to the lower standard of proof, I accept that the appellant has the three children she claims to have and that their legal status is as claimed, in that the elder daughter is registered, the second daughter is not, and their son was born in the United Kingdom and has a United Kingdom birth certificate but is a Chinese national.

51. Photographs of the appellant's child at his school, and school documents, confirm that he is enjoying school, but he is still very young. There is no indication of any particular friendships or links outside the home. His hearing difficulties have resolved: I note that Alder Hey Children's Hospital saw the child 'with his mum' and there is no mention of any other parent.

52. I do not accept that the appellant has family life with her claimed husband Feng Lin. Her account in 2010 was that he turned up occasionally at her home but that she was unable to contact him. Her account in 2013 is that they were fully reunited and have been living together since 2008. I do not believe that, to any standard. There is a curious letter at p116 of the bundle before me from a Fang Lin, who says he has known the appellant's son since he was born as a 'long family friend' and that the child is a 'bright happy little boy who enjoys going to school and to learn new things'. I am unable to tell whether that is the same person as the Feng Lin whom the appellant claims is the child's father.

The *AX (China)* guidance

53. The Upper Tribunal gave guidance on the Chinese family planning policy in April 2012 in *AX (family planning scheme) China CG* [2012] UKUT 97 (IAC). The judicial head note summarises our findings as follows:

> ***Chinese family planning scheme:***
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> *(1) In China, all state obligations and benefits depend on the area where a person holds their 'hukou', the name given to the Chinese household registration system. There are different provisions for those holding an 'urban hukou' or a 'rural hukou': in particular, partly because of the difficulties experienced historically by peasants in China, the family planning scheme is more relaxed for those with a 'rural hukou'.*
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> *(2) It is unhelpful (and a mistranslation of the Chinese term) to describe the Chinese family planning scheme as a 'one-child policy', given the current vast range of exceptions to the 'one couple, one child' principle. Special provision is made for 'double-single' couples, where both are only children supporting their parents and their grandparents. The number of children authorised for a married couple, ('authorised children') depends on the provincial regulations and the individual circumstances of the couple. Additional children are referred as 'unauthorised children'.*
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> *(3) The Chinese family planning scheme expects childbirth to occur within marriage. It encourages 'late' marriage and 'late' first births. 'Late' marriages are defined as age 25 (male) and 23 (female) and 'late' first births from age 24. A birth permit is not usually required for the first birth, but must be obtained before trying to become pregnant with any further children. The Chinese family planning scheme also originally included a requirement for four-year 'birth spacing'. With the passage of time, province after province has abandoned that requirement. Incorrect birth spacing, where this is still a requirement, results in a financial penalty.*
>
> *(4) Breach of the Chinese family planning scheme is a civil matter, not a criminal matter.*
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> ***Single-child families***
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> *(5) Parents who restrict themselves to one child qualify for a "Certificate of Honour for Single-Child Parents" (SCP certificate), which entitles them to a range of enhanced benefits throughout their lives, from priority schooling, free medical treatment, longer maternity, paternity and honeymoon leave, priority access to housing and to retirement homes, and enhanced pension provision.*
>
> ***Multiple-child families***
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> *(6) Any second child, even if authorised, entails the loss of the family's SCP certificate. Loss of a family's SCP results in loss of privileged access to schools, housing, pensions and free medical and contraceptive treatment. Education and medical treatment remain available but are no longer free.*
>
> *(7) Where an unauthorised child is born, the family will encounter additional penalties. Workplace discipline for parents in employment is likely to include demotion or even loss of employment. In addition, a 'social upbringing charge' is payable (SUC), which is based on income, with a down payment of 50% and three years to pay the balance.*

(8) There are hundreds of thousands of unauthorised children born every year. Family planning officials are not entitled to refuse to register unauthorised children and there is no real risk of a refusal to register a child. Payment for birth permits, for the registration of children, and the imposition of SUC charges for unauthorised births are a significant source of revenue for local family planning authorities. There is a tension between that profitability, and enforcement of the nationally imposed quota of births for the town, county and province, exceeding which can harm officials' careers.

(9) The financial consequences for a family of losing its SCP (for having more than one child) and/or of having SUC imposed (for having unauthorised children) and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not, in general, reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3.

(10) There are regular national campaigns to bring down the birth rates in provinces and local areas which have exceeded the permitted quota. Over-quota birth rates threaten the employment and future careers of birth control officials in those regions, and where there is a national campaign, can result in large scale unlawful crackdowns by local officials in a small number of provinces and areas. In such areas, during such large scale crackdowns, human rights abuses can and do occur, resulting in women, and sometimes men, being forcibly sterilised and pregnant women having their pregnancies forcibly terminated. The last such crackdown took place in spring 2010.

Risk factors

(11) In general, for female returnees, there is no real risk of forcible sterilisation or forcible termination in China. However, if a female returnee who has already had her permitted quota of children is being returned at a time when there is a crackdown in her 'hukou' area, accompanied by unlawful practices such as forced abortion or sterilisation, such a returnee would be at real risk of forcible sterilisation or, if she is pregnant at the time, of forcible termination of an unauthorised pregnancy. Outside of these times, such a female returnee may also be able to show an individual risk, notwithstanding the absence of a general risk, where there is credible evidence that she, or members of her family remaining in China, have been threatened with, or have suffered, serious adverse ill-treatment by reason of her breach of the family planning scheme.

(12) Where a female returnee is at real risk of forcible sterilisation or termination of pregnancy in her 'hukou' area, such risk is of persecution, serious harm and Article 3 ill-treatment. The respondent accepted that such risk would be by reason of a Refugee Convention reason, membership of a particular social group, 'women who gave birth in breach of China's family planning scheme'.

(13) Male returnees do not, in general, face a real risk of forcible sterilisation, whether in their 'hukou' area or elsewhere, given the very low rate of sterilisation of males overall, and the even lower rate of forcible sterilisation.

Internal relocation

(14) Where a real risk exists in the 'hukou' area, it may be possible to avoid the risk by moving to a city. Millions of Chinese internal migrants, male and female, live and work in cities where they do not hold an 'urban hukou'. Internal migrant women are required to stay in touch with their 'hukou' area and either return for tri-monthly pregnancy tests or else send back test results. The country evidence does not indicate a real risk of effective pursuit of

internal migrant women leading to forcible family planning actions, sterilisation or termination, taking place in their city of migration. Therefore, internal relocation will, in almost all cases, avert the risk in the hukou area. However, internal relocation may not be safe where there is credible evidence of individual pursuit of the returnee or her family, outside the 'hukou' area. Whether it is unduly harsh to expect an individual returnee and her family to relocate in this way will be a question of fact in each case.

October 2012 UKBA Country of Origin Report

54. The respondent in October 2012 issued a revised Country of Origin Report for China which has the following material information extracted from the 2011 United States Congressional-Executive Committee on China report in relation to Hubei province:

> "26.15 Adding to this the US-CECC report 2011 stated:
>
> "The Commission noted that this year, in official speeches and government reports from a wide range of localities, authorities also used the phrase "spare no efforts" (*quanli yifu*) to signify intensified enforcement measures and less restraint on officials who oversee coercive population planning implementation measures. Between November 2010 and June 2011, county and township governments in at least eight provincial-level jurisdictions (Shandong, Anhui, Gansu, Guangdong, Hunan, Guangxi, Hubei, and Jiangxi) urged officials to "spare no efforts" in implementing family planning campaigns including, in some cases, the "two inspections and four procedures" (*liangjian sishu*) - or intrauterine device (IUD) inspections and pregnancy inspections (the two inspections), IUD implants, first-trimester abortions, mid- to late-term abortions, and sterilization (the four procedures)." "

Discussion

55. The appellant's skeleton argument was not expanded upon at the hearing. There was some delay by the respondent in these proceedings: the appellant sought asylum in November 2007 and the decision to refuse to grant asylum was made on 20 August 2010. During that period the appellant's expected baby had been born in May 2008 and she may or may not have reconciled with the husband to whom she was married in China seven or eight years earlier. Delay from August 2010 to date was caused by the appeals process. There has been no change in the appellant's situation in that period, save that her child has begun infant school. This is not a case in which the delay is such that the United Kingdom's ability to control migration by a firm and fair immigration policy should be regarded as of lesser weight by reason of the respondent's conduct.

56. As regards the best interests of the children, there was no expansion in oral argument of the list of cases relied upon in the skeleton argument. In *E-A,* the Upper Tribunal held that:

> "*(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up*

by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.

(ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.

(iii) During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being."

57. This appellant's child is very young. The evidence of ties outside the family was not strong. The decision in *MK (India)* cites *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 and *E-A (Nigeria)* as the leading decisions on this question and adds nothing to the reasoning on the facts of the present appeal. *LD*'s case was that of a settled child, which is not the case here.

58. The passages relied upon in *AX* do not engage with the guidance given at paragraph 191 of the decision, which is repeated in the italic words set out above. Regarding the Tribunal's country guidance decision in *AX,* the skeleton argument noted that this decision had not been in existence at the date of hearing. Paragraphs 81-82 , 87, 92-95 come from the summary of Dr Sheehan's evidence, paragraphs 102-107 from the summary of Professor Fu's evidence, and paragraph 124 from the respondent's submission in that case. The remaining paragraphs come from the Tribunal's assessment of the evidence but omit, in each case, its conclusions.

59. There are two items in the country evidence produced by the appellant, all of which, require comment. The first is the document from LifeNews.com, dated 7 October 2012, attacking the United Nations Population Fund (UNFPA) for its support of the 'infamous one-child policy' pursued by the Chinese government in Beijing. It is prepared by an American pro-life organisation, and there is no clarity as to the date of the underlying research. However, the evidence recorded is broadly supportive of the Upper Tribunal's findings in *AX.* In particular, the researcher notes that an SUC is payable by those who have out of plan children or who illegally take in such a child (as the appellant's mother in law's sister may have done), the fine being between 5-7 times the annual income multiplier for a second child and between 7-9 times for a third child.

60. One woman and her husband had taken out a ten-year loan to pay the SUC for two out of plan daughters, and the husband had gone to work in the city to repay it. Sums of 20000-30000 RMB (about £2000-3000) are mentioned but not, presumably, for persons with no annual income in China or outside it, as is the case with this appellant and her partner.

61. The report, 'Birth Registration in China: Practices, Problems and Policies' compiled by the Institute for Population and Developmental Studies, Xian Jiaotong University, Xian Shaanxi Province 710049 was last revised on April 17 2009 and does not deal with the post-2010 regulatory system. The underlying research and materials contain nothing later than 2004 and cannot assist me very much on the situation now.

62. In relation to Article 8 ECHR, the skeleton argument notes that the third child is foreign-born. As already stated, Mr Hussain accepted that the third child would not be treated as born out of plan.

63. The appeal turns on its particular facts, which are that the appellant has three children, two daughters in China, one registered and one not, and one son born in the United Kingdom, and that she is estranged from her husband although she still has some contact with him. All members of the family are Chinese and none has any leave to be in the United Kingdom, although the appellant's claimed husband presently has temporary admission granted in December 2012, apparently to the same address as the appellant. There is no other documentary evidence of their residing at that address such as bills, bank statements and so forth.

64. The appellant has been outside China since before the major changes to the policy in 2010. The appellant and her claimed husband are not a double-single couple but they do have a rural *hukou*. She is not an educated woman and although her fears of forced sterilisation in her home area are partially borne out in the CECC evidence included in the Country of Origin Report, that may well have been a question of bringing the birth rate back within quota after the relaxation in 2008-2010 discussed in *AX*. There is no evidence of recent intensive enforcement in Hubei province after the middle of 2011.

65. It appears from the appellant's evidence that both her own family and that of her husband have rejected her because of the trouble she is perceived to have caused, and further, that she is estranged from her husband.

66. The appellant does not appear to be aware that officials are now required to register all children, whether regularly born or not; that schooling is available (for a fee) for unregistered children; that children born abroad are probably not regarded as having been born out of plan; and that millions of people live in cities away from their *hukou* areas and work there.

67. The appellant's income, both in and out of China, is zero. She has never worked. Her husband's income is low: in China he was a labourer; in the United Kingdom, he worked for a time in a restaurant but has not done so since their child was born in 2008. The multiplier for any SUC will be correspondingly low when she or they seek to register the second and third children, and I note that the appellant has managed to accumulate some savings. I also note from *AX* that couples registering children may be given several years to pay the SUC. They

have a birth certificate for the foreign-born child. They will of course lose the SCP Certificate benefits but presumably that was in the family's contemplation when they, at the urging of the appellant's parents-in-law, continued to try for a second and third child.

68. I find therefore that the appellant could return to China and register her son without difficulty and with only minimal SUC. Since her second daughter has managed to survive thus far without being registered, she may choose to leave things as they are, but if she seeks to register that daughter, she may have to pay further SUC. She will be given time to pay. It seems likely that a family arrangement has been made for the appellant's second daughter, in which case the SUC would fall on her mother in law's sister for having informally adopted the child.

69. If the appellant is at risk of forced sterilisation in Hubei province in 2013, which is not established by the evidence before me, I do not consider that it would be unduly harsh for her to go to live with her son in a large city such as Shanghai or Beijing. She would have to work; if her husband accompanied her, he could work and support them. Paid education is available for second children in the large cities. The appellant and her child are in good health and both speak English, he better than she, which would be an advantage.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

I re-make the decision in the appeal by dismissing it on asylum, humanitarian protection and human rights grounds.

Anonymity
The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Date: 18 September 2013 Signed:

Judith Gleeson
Judge of the Upper Tribunal