071945034 [2008] RRTA 146 (28 March 2008)

DECISION RECORD

RRT CASE NUMBER:	071945034
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Nicole Burns
DATE DECISION SIGNED:	28 March 2008
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REACHILDS

APPLICATION FOR REVIEW

This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The second named applicant mother, who claims to be a citizen of China (PRC) arrived in Australia in the early 2000s and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.

The delegate refused the visa application on the basis that the first named applicant child is not a person to whom Australia has protection obligations under the Refugees Convention

The applicant mother applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant mother has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

> outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reason enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicants The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

According to the protection visa application the applicant child was born in Australia in the early 2000s His ethnicity is Han. He has no religion. The applicant's mother was born in Province X, China, in the late 1900s and speaks, reads and writes Cantonese and Mandarin. She is a Buddhist. Her ethnicity is Han. In China she worked in sales. She is currently married to an Australian citizen (Partner I) and they have a child born in the early 2000s. Her first marriage, to a Chinese national (Partner II), ended in divorce in the early 2000s. She has a child from that marriage, born in the late 1900s, who lives with her/his father in China. When the child was born, the applicant mother was single, and to date his biological father (also a Chinese national, purportedly living in America) does not know he has a child to the applicant mother. Her parents live in China, as does her Sibling WX and Sibling YZ and their respective families.

The applicant mother submitted the protection visa application on behalf of her child. In it she said she fears that they will be discriminated against and ostracised on account of the fact that she is a woman who has had more than one child, out of wedlock, to such an extent that she will never be able to find employment. She said that life would be even more difficult if she had to pay exorbitant fines and because she would be living without a husband (as her husband would have to stay working in Australia). When pregnant with her child she was scared that she would be forced to undergo an abortion. She is also afraid of being sterilised without her consent if she returns to China. She said that her mother had been sterilised, and suffers from health complications to this day as a result.

The applicant mother said in her application that if her child was born in China he would be considered a 'black child' and subsequently their lives would be so difficult and they 'would not survive' She fears her child, born in contravention of the one-child policy would not be registered on the official *'hukou'* system (i.e household registration system) and therefore be unable to access education, health care, employment and housing opportunities. She fears that she would be unable to pay the exorbitant fines required to get her child registered (and, subsequently, throughout his life), and she was uncertain that the authorities would accept her child's birth certificate from Australia.

The applicant mother said that she fears that if she returns to China she would be arrested, detained, made to have an abortion, and forcibly sterilised. She also fears that she will be

imputed with an 'anti-government political opinion' because she has not returned to China since the early 2000s and had more children, in open disregard of the one-child policy.

The applicant mother said she had sought advice from her Sibling WX (who, in turn, sought advice from local authorities and private lawyers in China) about possible consequences if she returned to China with her applicant child. Her Sibling WX was advised by the local Family Planning Bureau that the applicant mother would be automatically fined 90,000 yuan (AUD15,000) as well as other charges if there were 'additional complications' – for example if the child was born out of wedlock. Paying these fines did not necessarily lead to the child being registered. The status of the applicant mother's registration was also uncertain, given her divorce immediately preceding her departure to Australia, and long absence from China. The applicant mother said that she fears that the authorities may make it difficult for her to re-register.

In the early 2000s DIAC told the applicant mother to obtain a passport for her child in order to return to China. [Information about the applicant's child's history deleted in accordance with s.431 as it may identify the applicant].

Two articles were included with the applicant mother's protection visa application: one stating that the authorities in Province X have raised the fine for a second child to eight times a couple's annual income (and that some people with additional children will have to pay an annual social levy), and the other detailed the Chinese Government's plans to strictly implement the one-child policy from 2006 to 2010.

In the early 2000s Tribunal received a submission from the applicant mother's representative in support of the applicant child's claims for a protection visa. In it she argued that the applicant mother fears that her child will suffer persecution if they return to China through the 'accumulation of a number of forms of harm, which…are sufficiently serious in combination as to constitute persecution'. Specifically, she argued that the applicant child would be denied the right to education, health care, work, government benefits or government employment. As well, she/he would suffer 'severe discrimination and ostracism and serious harm including the possibility of being removed from his mother's care, at the hands of the Chinese authorities'. It was argued that this would be the case because the applicant child is a member of a particular social group of:

- 'black children', being born to Chinese citizen parents in breach of China's one-child policy; and/or
- his status as an 'illegitimate child' born out of wedlock; and/or
- his status as an 'illegitimate' 'black child' who was also born overseas.

The applicant mother's representative argued that these fears were well-founded and provided extensive country information and case law in support of her argument.

In the early 2000s the Tribunal received a submission from the applicant mother's representative in support of the applicant mother's specific claims for a protection visa. In it she argued that the applicant mother fears that if she returns to China she will suffer persecution in the form of sterilisation, severe economic hardship, and discrimination because she is a woman who has breached China's one-child policy, had a child out of wedlock, and of her imputed political opinion against the Chinese authorities on account of her breaches of their family planning policies, and because of her long absence from China. She argued that

these fears were well-founded and provided extensive country information and case law in support of her argument.

Hearing:

The applicant mother appeared before the Tribunal in the early 2000s to give evidence and present arguments. The applicant mother was represented in relation to the review by her registered migration agent. An interpreter in Cantonese assisted. The family were present.

At the hearing the applicant mother said that she first came to Australia in the early 2000s. A few weeks later she found out she was pregnant She was afraid to return to China pregnant with her additional child, conceived out of wedlock, and against Chinese policies and laws. She was afraid that she would have to pay a large penalty to the authorities, that she would be unable to find a job, and therefore be unable to support her child. She was also afraid that she would be forced to have an abortion, against her religion

The applicant mother said that she was unable to contact her child's father (a friend from China) and to this day he does not know that he has a child The applicant mother's immediate family in China advised her against giving birth because she would have no financial support and would face discrimination in China Her parents and siblings helped support her financially whilst pregnant in Australia, and she lived with a friend in Suburb AB.

The Tribunal asked about the applicant mother's family in City Y, China. She said they live on the fringes of the urban area, and are therefore influenced by more conservative views. She said that she maintains regular contact with her child who lives with her ex-husband in City Y. Her ex-husband is unemployed, and receives money from his parents. Her parents are retired. Her Sibling WX and her Sibling YZ work in different industries and have families of their own.

The applicant mother said she met her current husband in City P in the early 2000s, soon after her child was born. They married in the early 2000s. Her husband now works in the hospitality industry in the city. They live together, with their children in Suburb CD. They do not receive any other income.

The applicant mother said that in the early 2000s she discovered that she was unable to apply for a valid visa. At this time DIAC advised her to obtain a passport for her child in preparation for their departure. [Information about the applicant's child history deleted in accordance with s.431 as it may identify the applicant].

The applicant mother described her fear of returning to China at this time, with her child born out of wedlock (and additional children outside China's one-child policy). She was concerned that she would be unable to support her children, that her families' expenses would be prohibitively high, including to cover private education. When asked, the applicant mother said that she would not be able to receive any financial support from her ex-husband on return. As well, her parents were poor, old, and their health was failing. Her siblings had limited means and had their own families to look after.

The applicant mother said that she asked her Sibling WX in China what might happen to her and her children if she returned. Following advice from relevant Chinese authorities (i.e. the National Registry of Births) and private lawyers, her Sibling WX said that she would have to

pay exorbitant fines (of about 8 times the average income in Province X). Even if she were able to pay these fines, there was no guarantee that her applicant child would be registered. Given this scenario, her Sibling WX advised her not to return to China.

The applicant mother said that if she was forced to return her husband would not be able to accompany her because he would need to keep his job in Australia as the sole breadwinner for the family.

The applicant mother talked about her fear of discrimination and her concern about being able to survive if she returned to China due to the fact that she bore a child out of wedlock. When asked if there were other reasons, the applicant replied that she was also scared for herself and her child because she/he would be considered a 'black child'. As well, because she has a few children, she was scared of being forcibly sterilised (through tubal ligation). She added that her fear was compounded by the fact that her mother had suffered health complications ever since she had been forced to have this procedure.

The Tribunal put to the applicant mother that some country information indicated that 'black children' are unlikely to suffer ostracism or ill-treatment as a direct consequence of their status. She replied that if they do return to China it will be very difficult to register her applicant child, and without this she will not be able to afford private schools. She said that she does not have the financial capacity now or in the future to address such a financial burden.

With regards to children born out of wedlock, the Tribunal put to the applicant that some country information indicates that being a child born out of wedlock still attracts some degree of social stigma in Province X, but whilst children might be subject to bullying or teasing at school, they are unlikely to suffer serious social disadvantage. As well, attitudes to divorce in China are changing and the divorce rate has increased, especially in urban areas. In response the applicant mother said that the situation varies, depending on the geographical area where one lives. She said that she used to live near a rural area, which was more conservative.

The Tribunal noted that at the hearing the applicant mother talked primarily about her fears for her applicant child and therefore asked if she had any additional fears about returning to China She replied that she fears that she would be forced to undergo tubal ligation; that she would attract severe penalties; that she would be discriminated against and therefore be unable to find a job and support herself and her children. She added that these would, naturally, also affect the future development of her children to a significant degree.

Country Information

China's one-child policy

There are numerous reports detailing the history and implementation of China's family planning policies and practices. Whilst implementation differs from province to province, and from rural and urban areas, overall there is little evidence of a slackening of China's one-child policy (and enforcement) in the foreseeable future. Some reports suggest that the Chinese government's implementation of its one-child policy is, at times, coercive. For example, the US State Department's (USD) Human Rights Practices report on China, published in March 2008, states that:

The government continued its coercive birth limitation policy, in some cases resulting in forced abortion and sterilization.

… The government restricted the rights of parents to choose the number of children they will have and the period of time between births. While the national family planning authorities made some progress on maternal health issues and in emphasizing quality of care in family planning practices, the country's birth limitation policies retain harshly coercive elements in law and practice. The penalties for violating the law are strict, leaving some women little choice but to abort pregnancies.

The law standardizes the implementation of the government's birth limitation policies; however, enforcement varied significantly from place to place. The law grants married couples the right to have one birth and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations. The law requires couples that have an unapproved child to pay a "social compensation fee," which sometimes reached 10 times a person's annual disposable income, and grants preferential treatment to couples who abide by the birth limits. Although the law states that officials should not violate citizens' rights, these rights, as well as penalties for violating them, are not clearly defined. The law provides significant and detailed sanctions for officials who help persons evade the birth limitations.

*…All provinces have regulations implementing the national family planning law. …An additional 10 provinces--Fujian, Guizhou, **Guangdong**, Gansu, Jiangxi, Qinghai, Sichuan, Shanxi, Shaanxi, and Yunnan--require unspecified "remedial measures" to deal with out-of-plan pregnancies* [Emphasis added]

The same report provided more information about forced sterilisation as follows:

…The law prohibits the use of physical coercion to compel persons to submit to abortion or sterilization. However, intense pressure to meet birth limitation targets set by government regulations resulted in instances of local birth-planning officials using physical coercion to meet government goals. Such laws and practices required the use of birth control methods (particularly IUDs and female sterilization, which according to government statistics, accounted for more than 80 percent of birth control methods employed) and the abortion of certain pregnancies.

With regards to Guangdong province there are reports that women with 'unauthorised' pregnancies may be forcibly sterilised. According to news articles cited by the Canadian Immigration and Refugee Board in 2002, authorities in the Huaiji region of Guangdong were reportedly ordered to perform abortions and sterilisations. The report states that by the end of 2001:

Authorities were reported to have ordered that 20,000 abortions and sterilizations be performed by the end of 2001 in the Huaiji region of Guangdong (The Irish Times 5 Sept. 2001; NRO 16 Aug. 2001; The Telegraph 15 Aug. 2001). Although the one-child policy was reported to no longer be "strictly applied in many rural areas," the edict was issued "after census officials revealed that the average family in Huaiji has five or more children" (ibid.) According to a 5 August 2000 article, not only would abortions be performed on women with "unauthorised" pregnancies, but doctors had also been ordered to sterilize women immediately following officially approved pregnancies (ibid).

'Out-of-plan' births

The concept of 'out-of-plan' births in China refers to a variety of births that have not been officially approved by the Chinese authorities usually because they are not in accord with the government's family planning policies. Children born in breach of the one-child policy (i.e. 'black children'), as well as children born out of wedlock, fall within this category. Parents (and in the case of children born out of wedlock, mothers) are usually faced with severe penalties for 'out-of-plan' births, as well as ongoing difficulties accessing services for their 'out-of-plan' children.

According to advice from DFAT in 2004, 'out of plan birth' includes the concept of 'out of marriage birth'. A child born outside of the plan may be registered after the payment of a fee. DFAT states:

> *According the Family Planning Commission, women are required to obtain a birth permit prior to giving birth. Any child born without a birth permit attracts the same fee as a child born to parents below the legal age of marriage (20 for women and 22 for men). The fee is between 60 and 100 per cent of the family's previous year income.*

'Black children' refers to children who are not registered in China's household registration system ('*hukou'*), and who therefore do not enjoy the same rights as registered children. A September 2001 report produced on behalf of the US Department of Justice describes 'black children' as 'socially non-persons' with low social status:

> *…Sometimes known as "black children" or the "black population" (hei haizi, hei renkou), these "unplanned persons" are legally and socially nonpersons. Ineligible for household registration, they have no right to state provided schooling, higher education, health care, and a host of other state services and benefits. They are excluded from many types of jobs and not permitted to purchase property. Certainly, some unplanned children manage to obtain these services on the market although at higher cost and lower quality than if they had been provided by official sources. But we have no idea how many are getting services in other ways. Stories in the Chinese media reveal the troubles these "outlaws by birth" can encounter and also create. With little formal education and low status in society, growing numbers live on the streets, turning to petty crime to survive.*
>
> *…Parents must register their children in compliance with the national household registration system within one month of birth. If children are not registered, they cannot access public services.*

Whilst children born out of wedlock have the same legal rights as those born to a married couple (see Article 25 of the Marriage Law of the People's Republic of China), reports also indicate that children born out of wedlock may experience societal discrimination.

The 2008 USD Human Rights Practices report on China quoted above indicates that 'single' (i.e. unwed) mothers face 'punishment' in the form of 'social compensation fees' as well as the threat of job loss as illustrated below: penalty

> *It continued to be illegal in almost all provinces for a single woman to have a child. Social compensation fees were levied on unwed mothers.*
>
> *The country's population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures such as the threat of job loss or demotion and social compensation fees. Psychological and economic pressures were common. Those who violated the child limit policy by having an unapproved child or helping another to do so*

faced disciplinary measures such as job loss or demotion, loss of promotion opportunity, expulsion from the party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of property. In the case of families that already had two children, one parent was often pressured to undergo sterilization. The penalties sometimes left women with little practical choice but to undergo abortion or sterilization.

In Guangdong, the population and family planning regulations effective from 1 September 2002 (PRC 25 July 2002) reveal additional penalties imposed on women who have given birth out of wedlock as follows:

According to Article 25 of the regulations, women of child-bearing age who have given birth to one child should make the intrauterine device their first choice for contraception (PRC 25 July 2002). Article 55(d) stipulates that, "[i]n the case of a first birth out of wedlock, a social support fee that is twice the amount" of the fee imposed on married couples who have one more child than is permitted, will be levied (ibid.). While one province, Jilin, has legalized the birth of a child to unmarried women, the Shanghai Star reported that Guangdong had indicated it would not follow suit (3 Jan. 2003). Under the national Population and Family Planning Law, births to single women are considered as "unplanned" and are subject to penalties (ibid.). However, Article 3 of the 2002 Guangdong regulations states that "[p]opulation and family planning work shall be coordinated with increasing educational and employment opportunities for women, improving women's health and raising the status of women".

A DIMA Country Information Service 2007 report of 4 April 2007 states that:

Illegitimate children, children born out of wedlock, are by definition outside of the family planning quota system. In practice, permission to bear a child under the quota system is only ever granted to couples, never to single women. Combined with the social condemnation to which single mothers are still often subject, the denial of social services and the imposition of fines almost inevitably forces most women in such a situation to leave home (whether or not a 'shotgun wedding' takes place). Thus, inevitably, illegitimate children in China are virtually never registered, but become a member of the 'black' population.

'Single' women in China

An article by Dr. Thomas Weyrauch in the report of the 10th European Country of Origin Information Seminar on China dated 17 March 2006 includes information on the situation of single women in China. The report notes that:

Certainly, the low level of social security has an impact on single women. Today millions of single women are a part of the large number of migrants in China, looking for a job, moving from one province to another. There are literally millions of young women on a journey to another region. There is a risk especially for those young migrant women to be forced to work as prostitutes in a "hairdresser saloon", or to become victim of human trafficking

The 2008 USD Human Rights Practices report on China quoted above provides comments about the gap between laws and practice in terms of addressing gender-based discrimination in China as follows:

The Law on the Protection of Women's Rights and Interests was designed to assist in curbing gender-based discrimination. However, women continued to report that discrimination,

sexual harassment, unfair dismissal, demotion, and wage discrepancies were significant problems. According to a survey by the ACWF, 50 percent of female migrant workers, versus 40 percent of male migrants, had no labor contract with their employers. ACWF studies also showed that 21 percent of rural women working in cities were fired after becoming pregnant or giving birth and that some women delay motherhood for fear of losing job and promotion opportunities.

…Many employers preferred to hire men to avoid the expense of maternity leave and childcare, and some lowered the effective retirement age for female workers to 40 (the official retirement age for men was 60 and for women 55). In addition work units were allowed to impose an earlier mandatory retirement age for women than for men, which limit women's lifetime earning power and career span. Lower retirement ages also reduced pensions, which generally were based on the number of years worked. Job advertisements sometimes specified height and age requirements for women.

… A high female suicide rate continued to be a serious problem. According to the World Bank and the World Health Organization, there were approximately 500 female suicides per day. The suicide rate for females was 25 percent higher than for males. Many observers believed that violence against women and girls, discrimination in education and employment, the traditional preference for male children, the country's birth limitation policies, and other societal factors contributed to the especially high female suicide rate. Women in rural areas, where the suicide rate for women is three to four times higher than for men, were especially vulnerable.

FINDINGS AND REASONS

Applicant child

The applicant child was born in Australia in early 2000s to Chinese-citizen parents She/he has an Australian birth certificate. She/he was issued a Chinese passport several years later. [Information about the applicant child's history deleted in accordance with s.431 as it may identify the applicant].

To determine the nationality of the applicant child the Tribunal has considered the approach taken by Nicholls FM in *SZEOH & ANOR v MIMIA* [2005] FMCA 1178 (Nicholls FM, 26 August 2005) at [8]-[9], who held that where the applicant child was born in Australia and had no nationality or county of former habitual residence, it was appropriate, sensible, practical and fair for the Tribunal to consider her claims against a return to her mother's country of nationality, being also the country against which her claims of fear of harm were made. The applicant mother is a Chinese national who fears persecution for herself and her child if they return to China. Therefore, the applicant child's claims are considered against the People's Republic of China (PRC).

Because of his young age the applicant child is unable to articulate fear. Therefore, as allowed for in *Chen Shi Hai v MIMA*, the Tribunal finds that the fears of the applicant's child's mother (i.e. the applicant mother) on her/his behalf are sufficient for the purposes of the Refugees Convention.

The applicant mother fears that her applicant child, who was born in Australia, outside China's one-child policy, and outside of wedlock, will be denied access to basic services that will threaten her/his capacity to subsist if she/he returns to China. Her fear is compounded by her claim that she does not have the financial capacity to change this situation for the better.

She claims that her applicant child, as a member of a particular social group of 'black children', born in Australia, out of wedlock will face persecution if he returns to China.

The Tribunal accepts that the applicant child was born in Australia, outside of wedlock, and in contravention of China's one-child policy. The meaning of the expression 'for reasons of…membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

> *…First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in Applicant A, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group"...*

Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However, it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

In this case the Tribunal will consider whether 'black children' constitute a particular social group within the meaning of the Convention.

Of children born in breach of China's one-child policy, the High Court in *Chen Shi Hai v MIMA* held that there was no error in the Tribunal's finding that children born outside of officially approved parameters – i.e. 'black children' – were a particular social group (*Chen Shi Hai v MIMA (*2000) 201 CLR 293 at [23] per Gleeson CJ, Gaudron, Gummow & Hayne JJ). Accordingly the Tribunal is satisfied that 'black children' form a particular social group in Convention terms.

Given the above finding, the Tribunal does not need to consider whether 'child born outside wedlock' or 'children born in Australia' constitute particular social groups.

The Tribunal has considered the likelihood of the applicant child being registered and thus enjoying the same rights as other Chinese citizens on return to China. After considering the country information the Tribunal finds that it would be possible (although not automatic) for the applicant mother to register her child if she is able to pay a number of fines, including additional fines because she has had a child out of wedlock, as well as an ongoing 'social support fee' payable for 'out-of-plan' children. The Tribunal has considered the financial capacity of the applicant mother, her husband, and her family in China in this regard. Although her family has demonstrated they have been willing and able to provide some financial support to the applicant mother whilst she was pregnant, the Tribunal finds that their capacity is limited. Her parents are retired, old and ailing Her siblings' work is not lucrative, and they have their own family commitments. Her husband works part-time in a in the hospitality industry in City P, rents his home, and pays ongoing child support to his child from his first marriage, which indicates that he has limited financial means. The Tribunal has considered that even if the applicant's family were able to help with one-off payments, it is unlikely that they would be able to continue to help pay a series of 'levies' The Tribunal

accepts the applicant mother's claim that she would find it difficult to find work on return to China given her situation.

For these reasons the Tribunal is not satisfied that the applicant child would be readily granted household registration on return to China, unless his mother was able to pay a sizeable fine(s) – which even then is not guaranteed, particularly given that she/he was born outside wedlock. Country information supports the applicant mother's claim that the fines would be significant, and given her limited financial capacity, the Tribunal finds it likely that they would be prohibitive. The Tribunal therefore finds that it is unlikely that the applicant child will be registered on return to China. As the Tribunal is not satisfied that the applicant child will be registered, it must now consider the consequences for the applicant child as an unregistered 'black child', growing up in China.

Considered a 'black child', the Tribunal finds that the applicant child would be subject to some level of discriminatory treatment – both officially and unofficially According to country information often such children may not be able to gain access to medical care, education or in the longer term, employment, unless payment is paid. However the applicant mother (and her extended family and husband) have to be in a position to do so: for the reasons detailed above, the Tribunal finds that they are not. Accordingly the Tribunal is not satisfied that the applicant child will be able to access basic services such as education or medical care if she/he returns to China because she/he will be considered a 'black child'.

The Tribunal finds that denial of access to education and medical care for the applicant child constitutes a serious form of harm. The Tribunal has considered whether this treatment could amount to persecution within the meaning of the Convention. The term 'persecution' is not defined in the Refugee Convention. However there is a significant body of domestic law on the meaning of 'persecution' in the Convention context. One of the leading cases concerning the meaning of persecution is the decision of the High Court in *Chan and Applicant A.*

The types of harm that may constitute persecution are not limited. In *Chan* it was recognised that persecution has traditionally taken a variety of forms of social, political and economic discrimination. In *Applicant A*, Justice McHugh observed that (at 258):

> *Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.*

Furthermore, the feared conduct need not be the product of any government policy; it may be enough that the government has failed or is unable to protect the person in question from persecution (*Chan* per McHugh J at 430). However, as noted above, persecution requires "some serious punishment or penalty or some significant detriment or disadvantage" (*Chan* per Mason CJ at 388). Transient or minor detriment will generally not constitute persecution (*Gunaseelan v MIMA* (unreported, FCA, French J, 9 May 1997) at 11), nor will trivial or insignificant harm (*Shetty v MIMA* [1999] FCA 1601 (Branson J, 18 November 1999 at 17).

The Tribunal accepts that the applicant child is likely to be unregistered, and combined with the social stigma attached to being born out of wedlock, is likely to face discrimination, and difficulty accessing basic services. The Tribunal is of the view that there is a real chance that

the applicant child born outside the one-child policy and outside wedlock would face serious harm in the form of discrimination and significant disadvantage (resulting in lack of access to essential services) if she/he returns to China, which could extend to serious harm to amount to persecution within the meaning of the Convention.

In summary the Tribunal finds that the applicant child is a member of a particular social group of 'black children'. The Tribunal finds that her/his situation would be compounded by the fact that she/he was also born out of wedlock. The Tribunal is satisfied that the discrimination, social ostracism, and disadvantage in the form of denial of access to services that she/he may face if she/he returned to China would be significant enough to amount to persecution within the meaning of the Convention. The Tribunal finds that the applicant's child's family (i.e. mother, step-father, and extended family in China) do not have the financial capacity to significantly alter her/his 'status' in this regard.

Accordingly, the Tribunal is satisfied that the applicant child would suffer persecution as a member of a particular social group of 'black children' if she/he returned to China now or in the reasonably foreseeable future. The Tribunal is therefore satisfied that the applicant child has a well-founded fear of persecution within the meaning of the Convention.

Applicant mother

Based on information on her file, the Tribunal finds that the applicant mother is a citizen of the PRC.

The applicant mother fears that she will suffer persecution in the form of forced sterilisation, severe economic hardship, and discrimination because she is a woman who has breached the one-child policy, had a child out of wedlock, and of her imputed political opinion against the Chinese authorities on account of breaching their family planning policies and because of her long absence from China.

The Tribunal accepts that the applicant mother gave birth to the applicant child in Australia in early 2000s outside of wedlock, and in contravention of China's one-child policy. As stated above, the Tribunal is of the view that it is unlikely that her applicant child would be registered and as a consequence she/he would face discrimination and denial of access to basic services if she/he returns to China. The Tribunal also finds that the applicant mother and her family do not have the financial capacity to significantly alter this situation.

The applicant mother's representative argues that the applicant mother is a 'member of a particular social group' in order to establish a Convention nexus, variously described as 'women who have had a child in contravention of the one-child policy, and outside wedlock'. The Tribunal must consider whether this constitutes a particular social group within the meaning of the Convention, taking into account the consideration of 'member of a particular social group' in *Applicant S* (above). The Tribunal accepts that 'women who have had a child in contravention of the one-child policy, and outside wedlock' is an identifiable characteristic possessed by all members of this proposed group. The Tribunal is satisfied that such a characteristic is not and does not constitute a shared fear of persecution.

In relation to the third proposition in *Applicant S* the High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society. In *Khawar (MIMA v Khawar* (2002) 210 CLR), for example, McHugh & Gummow JJ stated:

> *The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.*

Taking into account the evidence before it as well as relevant country information, the Tribunal finds that 'women who have had a child in contravention of the one-child policy, and outside wedlock' can be considered to be a group set apart from the rest of society because of factors related to deep-seated societal attitudes about women's roles and status in China. Therefore the Tribunal is satisfied that 'women who have had a child in contravention of the one-child policy, and outside wedlock' can and do constitute a particular social group in the Convention sense. The Tribunal finds that the applicant mother is a member of this particular social group.

The applicant mother claims to fear forced sterilisation, severe economic hardship, and discrimination because she is a member of this particular social group. On the basis of the evidence before (including country information) the Tribunal accepts that 'single' women living in China who have breached the one-child policy and given birth out of wedlock suffer discrimination and disadvantage. Whilst there have been some progress in societal attitudes, it has been slow, particularly in rural and semi-rural areas (where the applicant mother claims to be from). These attitudes define a woman's status in society which is directly linked to her ability to find work and access services – i.e. to subsist. The Tribunal is of the view that prospects for the applicant mother finding gainful employment on return to China are low. Coupled with exorbitant fines that the applicant mother is likely to face, the Tribunal is of the view that there is a real chance that the applicant mother would suffer economic hardship that would affect her ability to subsist if she returned to China now or in the reasonably foreseeable future.

The Tribunal has considered whether this treatment could amount to persecution within the meaning of the Convention. Taking into account all of the evidence, including the credibility of the applicant mother as a witness, the Tribunal finds that there is a real chance that the applicant mother would face discrimination of a nature and level that would threaten her capacity to subsist if she returned to China. The Tribunal finds that this would constitute serious harm. The Tribunal therefore finds that the applicant mother faces a real chance of persecution for reasons of membership of a particular social group of women who have had children outside the one-child policy and outside of wedlock (and with limited social and financial support and capacity) on return to China now and in the reasonably foreseeable future

Taking into account country information, the Tribunal finds also that there is a real chance that the applicant mother – who has a few children to different fathers; some born in contravention of the one-child policy; and one outside wedlock – may be forcibly sterilised if she returns to China. The Tribunal finds that forced sterilisation is a serious form of harm.

The applicant mother has also claimed that her imputed political opinion (because of her breach of the one-child policy and her absence from China) would exacerbate the treatment she would receive and make discrimination more likely. While the Tribunal agrees with this proposition to some extent, it finds that the reason of imputed political opinion would not be the essential and significant reason for the applicant mother's persecution.

Considering the applicant mother's claims individually and cumulatively, and in light of the country information, the Tribunal finds that she faces a real chance of persecution for reasons of her membership of a particular social group of 'women who have had a child in contravention of the one-child policy, and outside wedlock' now and in the reasonably foreseeable future, should she return to China, thus her fear of persecution for a Convention reason is well-founded.

CONCLUSIONS

The Tribunal is satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicants satisfy s.36(2)(a) of the Migration Act, being persons to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. lward