

**1101261 [2011] RRTA 935 (13 November 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1101261

**DIAC REFERENCE(S):** CLF2007/125084, CLF2010/120677

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Robert Wilson

**DATE:** 13 November 2011

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of China (PRC), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2007 and applied to the Department of Immigration and Citizenship for the visa [in] September 2010. The delegate decided to refuse to grant the visa [in] January 2011 and notified the applicant of the decision.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations for the grant of a Protection visa.
4. The applicant applied to the Tribunal [in] February 2011 for review of the delegate's decision.
5. 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 has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. 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.
7. 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. Third, the persecution which the applicant fears must be for one or more of the reasons 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.
16. 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.

17. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
18. 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**

19. The Tribunal has before it the Department's files, CLF2007/125084 and CLF2010/120677 relating to the applicant. 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, including the Tribunal's file, 1101261.
20. The applicant appeared before the Tribunal [in] April 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
21. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

### ***Application for a Protection visa lodged [in] September 2010***

22. The applicant is a single man born on [date deleted: s.431(2)] in Fuqing, Fujian, China. He received 11 years of education in China and he can speak, read and write Mandarin. He was a student before coming to Australia. In Australia the applicant studied at [school and period deleted: s.431(2)]. He has worked in Australia from December 2008 to March 2010 part time, on a call basis.
23. The applicant lodged the following claims in answer to Questions 42-46 of Part C of the Application.
  42. Why did you leave that country?  
As corruption ran rampant and there was no democracy in China, my father hoped that I would live in a country where democracy and freedom were offered. That's why he sent me to Australia to pursue study when I was only [age].
  43. What do you fear may happen to you if you go back to that country?  
Because of the corrupt political system, my father was framed, just like many other people, for not keeping to their rules. Moreover, collusion between government officials and businessmen resulted in the loss of his right to appeal. His business thus went bankrupt, and he ended up in miserable condition, and died at the end of 2008. I hate them, and fear I would be thrown on the same disastrous road and end up having the same fate as my father.
  44. Who do you think may harm/mistreat you if you go back?

I think if I am forced back to China, would be harmed and mistreated by the authorities under that system. Bureaucrats shield one another out of their interest. No matter how hard I fight against them, I will end up in the same consequence.

45. Why do you think this will happen to you if you go back?

The unfair treatment my dear father had received is strong evidence that so long as the corrupt system exists, there would not be change to our fate. What happened to my father has cast a shadow on me. I hate the social system. I am scared of returning to China.

46. Do you think the authorities of that country can and will protect you if you go back? If not, why not?

Definitely there would be no authorities that would protect me if I go back to China, a country which is filled with corruption. Our fate is controlled by a minority of people and special interest groups. We have no right to vote. When the disadvantaged people like my father have a conflict with some authority or interest group, they would not be protected. I firmly believe it will also happen to me.

***Interview held with the Department [in] January 2011***

24. The following is a summary and it is not a transcript of the interview held with the Department of Immigration [in] January 2011.
25. The applicant could understand the interpreter. He did not know the interpreter. He had no objection to the interpreter.
26. The applicant provided his passport to the delegate. The applicant confirmed his name and date of birth. He is not known by any other name. He was born in [Village 1], Chengtou Town, in Fuqing City, Fujian Province.
27. The delegate asked where his family members lived. He stated that his relatives lived in Hua Xian, in Yongan City, and also Sanming City. He was asked which family members lived in those places, and he said his parents and his brother. The applicant is a student. They all lived at the one address.
28. The applicant came to Australia to study. He was studying at the language school in Australia. The delegate asked if there were any other courses of study. He said no. She asked if he was still studying at the moment. He said no. He finished studying at the end of August, at the end of 2008. The delegate asked why he ceased studying. He said because his father passed away. The delegate asked if that was the main reason for him not studying. He said also his family cannot pay his school expenses any more.
29. The delegate asked what he had been doing in Australia since he completed his studies in 2008. He replied after his father passed away, his family could not pay the expenses and he has been trying to support his family. He was also trying to earn enough money for him to go back to school.
30. The delegate asked how he was earning money in Australia. He said he worked in a supermarket first and then he worked for a construction company. The delegate asked if he had been doing that since he finished school in 2008. He said yes, that is right.
31. The delegate asked why he did not return back to China when he finished studying. He said if he goes back to China after he finishes school he will put more financial pressure on his family. He came to Australia when he was young so he does not know many

people in China or in his hometown, so he does not think he can find a good job to support his family.

32. The delegate said the applicant did not return back to China because he did not finish his studies. The applicant said, and he does not want to go back to China because he has a different political view to most Chinese. The delegate asked him to tell her why he does not return back to China. He said he has a different political view because, for example, he believes in freedom and he is against corruption, so he would like to stay in Australia. What happened to his father affected him a lot. If he goes back, what happened to his father will give the applicant a negative influence.
33. The delegate asked the applicant to explain to her what happened to his father. The applicant said his father had a car accident on the way from work to home. This occurred at the end of 2008. The delegate asked why what had happened to his father would affect the applicant if he were to return to China. He said because he believes what happened to his father was set-up by someone else, like for some political reasons. So he believes it is not good for him to go back to China.
34. The delegate asked the applicant to explain how he believes that his father was set-up by somebody else. The applicant said before the accident occurred they had some information that his father's business was being bought back by someone else. But at the time his father's business was very successful, so his father did not want to sell the business. Also, at the time, someone came to the applicant's home and threatened his father to sell the business. The delegate asked who the people were that came to his father's home. He said, some gangster people. The delegate asked when all this occurred. He replied, before the accident happened. The delegate asked about what period? He responded from May up to the end of 2008.
35. The delegate said, so people were interested in his father's business, and asked what happened to his father's business. The applicant said the business was bought back by someone else. Every time when those people came to threaten the father to sell the business, his father said no to them. The delegate asked what happened. The applicant said they also said to his father that if he did not sell the business to them they would come there often. The delegate asked what type of threats the applicant's father received. They said if his father did not sell his business to them, they will come and try to damage his business often. The delegate asked what sort of business his father owned. He responded, it was a construction company. The delegate asked when the company was established. The applicant said when he was in Year 3 at primary school. He did not know what age he was at the time.
36. The delegate asked how often these people came to his father's home and threatened him. The applicant said once a week. The delegate asked each time the people came to threaten the father, did the father report any of these incidents to the authorities. The applicant said yes. The delegate asked what happened when they reported them to the authorities. The applicant said the people came more often after his father reported it.
37. The delegate asked if the threats that his father received were just verbal threats. He said they also damaged the factory. They caused damage to the machines in the factory.

38. The delegate said the applicant's father passed away and the business was bought back by other people. The applicant said yes. The delegate asked the applicant to explain how what had occurred to his father in China would now affect the applicant if he were to return to China, as there is no longer a business. The applicant said there won't be any hurt or threats to him physically, but his father left a lot of problems and the accident which happened to his father caused some mental damage to the applicant. The applicant said he believes what happened to his father would have some influence on the applicant as far as his mental state is concerned. The delegate said the accident that happened to his father and the applicant is living in Australia, and, whether he is living in Australia or China, would he not be feeling the same effect? He said no, it will not be the same. If he goes back to China, if he sees everything there, it will hurt him more. If he stays in Australia, there will not be any direct influence on him.
39. The delegate said so he has said the main purpose of him not going back to China is emotional as his father passed away in China. He said yes. Also, because he holds different political views. The delegate asked, what is this different political view that the applicant holds? He said freedom, democracy, and also no corruption.
40. The delegate asked if he was a member of a political party. He said no. The delegate said so it is just a personal reason and it is only personal that he is against the current Chinese government, and it is a personal reason why he does not want to return back to China, because of the memories of his father and the accident that occurred to his father. He said yes.
41. The delegate said your mother and brother still live in China. He said yes. The delegate asked whether they had encountered any problems residing in China. He said no. His mother does not work. His brother is studying. The delegate asked how his family was supported, were they being supported by him in Australia. The applicant said yes. The delegate said so your family rely on you financially in order to survive in China. He said yes.
42. The delegate asked, is your main reason to remain in Australia to do your best to support your family financially in China? He said, and also if he can earn enough money he will go back to school, to finish his school. The delegate said the applicant never completed his Year 11 and 12 studies. He said, he did complete them. He completed them in China. The delegate asked, when he came to Australia it was to complete his Year 11 and 12 as well? He said he only finished Year 11 in China. The delegate said, so he would like to finish his studies in Australia so he can get a better job? He said, yes.
43. The delegate said the applicant had put in his claim that if he was forced to go back to China that he would be harmed and mistreated. The delegate asked what he meant by harmed and mistreated. He said he just explained before. He will be persecuted emotionally, or mentally. The delegate said so it is your own personal feeling; that is, it is just personal with him returning to China where everything is familiar, and the memory of his father, and his father's death; that is what he means by being harmed and mistreated, and the delegate asked if that is what he meant. He said yes.
44. The delegate asked if he were to go back to China what does he believe will happen to him. He said there will not be anything happening to him in the short term but in the long term, if he does well in his work, he believes that whatever happened to his father

will happen to him as well. The delegate asked what does he mean what happened to his father will happen to him, that is, what does he mean what happened to his father would have the same effect on him? The applicant said because his father's business was bought back by someone from the government so he believes that if he has a good business in the future, the same people will come to him and try to buy his business.

45. The delegate asked what evidence did he have that this would happen to him. He said none. The delegate asked, this is just something that he believes may happen to him if he followed the same path as his father. He said, and also emotionally, like even if he had his own path, like a different one to his father, it will be the same thing. The applicant continued, he does not want to live in the shadow of his father left to him. The delegate asked who he believed would do this to him if he were to return to China. The applicant said this is just something that he believes. He believes the shadow his father left to him will be with him all the rest of his life. Another reason is that there are too many corruptions around in China. The delegate asked why they would be interested in the applicant. He said it might not be the same group of people, but if he has a success in business in the future, they may be different people from the government who try to buy his business. It is merely something; he is emotional.
46. The delegate asked whether he intended in the future to establish a business if he were to return to China. He said yes. He said in China everyone believes that if someone has a business then they can support their family better. The delegate asked what sort of business he would establish. He said a construction company, the same as his father.
47. The delegate said the applicant arrived in Australia in October 2007 and she asked why he waited three years to lodge an Application for a Protection visa. He said after his father passed away, he was trying to do his best to support his family but he did not think that much about Protection. He was trying to provide enough money for his family. He was also trying to earn enough money to go back to school but after a year he realised it was impossible for him to earn enough money both for his family and for himself. He asked his relatives how to stay in Australia and they told him to see a migration agent. He trusted a migration agent about his story and the agent said the best thing to do would be to apply for Protection. The delegate asked when he saw the migration agent. He said last year.
48. The delegate said she wanted to clarify that his main purpose in staying in Australia is to earn sufficient funds to support his family back home in China, and also to earn enough money for him to go back to school for further education. The applicant said to finish school.
49. The delegate asked if there was anything else he wanted to say to her today to support his claims. He said he hopes to get the Protection visa as well as the Work Permit.
50. The delegate asked whether he had said everything he wished to say today. He said yes.
51. The delegate asked if he had family in Australia. He said he had two relatives here. One lives in [suburbs deleted: s.431(2)]. The delegate asked if he had any other relatives besides his mother and brother in China. He said his grandmother.



52. The delegate said there is nothing else he wanted to say in support of his claims. He said no. The delegate asked if there was anything he wanted to ask. He said, no.

*Hearing with the Tribunal held [in] April 2011*

53. The following is a summary and it is not a transcript of the hearing held [in] April 2011.
54. The applicant was happy to have a Mandarin interpreter, he could understand her, and had no objection to her being the interpreter.

During the hearing I may put to you any information that I may consider would be the reasons for affirming or agreeing with the Department's decision. If I do that, I must also explain the relevance and the consequences of that information and I will invite you to comment on, or respond to, that information. You may respond to that information orally or in writing. You may also seek additional time to comment on, or respond to, that information. If I do use this procedure during the hearing today, I will let you know before I do so and I will discuss it with you.

55. The Tribunal indicated it wanted to ask the applicant some questions about his application for a Protection visa. In the applicant's case, there are two documents that form his application. The first is marked with "C" and, as the applicant can see, the questions are in English and the answers have been typed in English. The Tribunal referred to responses shown in the document. The Tribunal said that the applicant indicated on the document ("C") that his claims in answer to Questions 41-46 were attached. There is an English translation of the Chinese responses to Questions 41-46 as well. The applicant acknowledged his signature at the end of the document.
56. The Tribunal said the other document forming his Application for a Protection visa is the one marked "B" Again, it is in English and the answers are in English. The applicant acknowledged his signature on the document.
57. The Tribunal indicated it wanted to ask the applicant some questions about his application. Not so much what was in it at the moment, but how it was prepared.
58. The Tribunal asked if he had any help in filling out the two forms "B" and "C". The applicant said "No." The Tribunal asked whether he typed in the answers in English. He said he wrote it in Chinese, and he found a solicitor, to translate them. The solicitor is the person sitting next to the applicant at the hearing. That person said he is not a solicitor, he is actually a migration agent. His name is [name deleted: s.431(2)].
59. The Tribunal said it could understand the applicant's writing in answers in response to questions 42 to 46 (the original document, written in "Chinese" script), but for example, having regard to the question relating to his education, where someone has written for example, that from 10/2007 he attended [school deleted: s.431(2)]; the Tribunal asked whether he did that. He said yes. The Tribunal asked whether he typed it in. He said actually he just wrote it in Chinese and then his representative typed it for him. The Tribunal said it had another question, "So, you understood that this says "Education. Give full details of all the education you have undertaken (in any country)?" The applicant then said that his representative explained to him what the question was in the application. The applicant confirmed that both he and the agent spoke Mandarin.

60. The Tribunal said it wanted to ask an important question. The Tribunal asked, whether at the end of the process with the agent, when he had typed everything out and it was ready to go, did the agent read back to the applicant what the agent was reading to himself in English, and translating into Mandarin, for the applicant to understand what he had written? The applicant said, "Yes." The Tribunal asked if the information in the two forms marked "B" and "C" was correct. The applicant said, "Yes." The Tribunal asked if they were still his claims. He said, "Yes." The Tribunal asked if there was anything that had been left out that he would now like to claim. He said, "No."
61. The Tribunal referred to the passport which had been brought in by the applicant. The Tribunal checked the following information. His date of birth is [date deleted: s.431(2)]. The date of issue of the passport is [in] July 2007 and the date of expiry is [in] July 2017. The applicant is now [age deleted: s.431(2)].
62. The Tribunal asked whether he has travelled to any other countries besides Australia. He said no. He arrived in Australia [in] October 2007. He came to Australia on a Student visa. The Tribunal said it had the file which has his application in it. It looked at that file. He came to study English for high school. He did not have a student guardian. The Tribunal asked what college he went to. He said [school deleted: s.431(2)]. He was there for one and a half years. He entered that course roughly in November 2008. The Tribunal asked whether that was due to the tragedy in China, due to his father's death. He said yes. The Tribunal asked whether he finished Year 11 in China. He said he did not finish Year 11 in China.
63. The Tribunal said it wanted to clear up something from the interview with the Department, and asked where he lived. He lived in [Village 1], Chengtou Town, Fuqing City, Fujian Province.
64. He was then asked where his family members lived, and he stated that his relatives lived in Hua Xian and Yongan City and Sanming City. The Tribunal asked who lived in those places as it could not understand what was said on the tape. He said his father, mother and younger brother. The Tribunal asked which place they lived in. He said they lived in a place close to a school. It was just one address in Yongan City.
65. The Tribunal asked the applicant to describe his claims for refugee status. He indicated regarding political issues, and he is afraid to go back to China. He has a fear to go back to China. That is why he applied for the Application for a Protection visa. The Tribunal asked what his fear related to. He said because of the Chinese government system, it hurt his father deeply and that is why he has a fear. He is afraid because of this authority system; it might hurt him as well. Also, what happened to his father is a kind of tragedy that makes him fear to go back to China.
66. The Tribunal said it had listened to the CD of the interview that the applicant had with the Department of Immigration, so it is familiar with the claims that he made to the Department.
67. The Tribunal said it had some questions about that.
68. The Tribunal said it would repeat what it thought the applicant's claims were in relation to his father. He had a car accident on the way home from work which occurred at the end of 2008. The applicant believes that what happened to his father was set-up by

someone else for a political reason. He agreed. The migration officer had asked him why he believed the death of his father was set-up by somebody else. The applicant had said that before the accident took place he, his family, had some information of his father's business being bought back by someone else. However, his father's business at the time was very successful, so his father did not want to sell the business. Also, someone came to the family home and threatened his father to sell the business. The applicant had said they were gangster people who came. The Departmental officer had asked when this occurred. The applicant said before the accident happened. The Departmental officer asked him to be more specific, and he said from May up to the end of 2008.

69. The Tribunal asked whether the summary represented what he had said to the Department. He said he was happy with that. The Tribunal said what it wanted to ask about that is that he arrived in Australia in October in 2007, and he said that these things happened to his father from May to the end of 2008. He said he thought so. The Tribunal said he obviously was not in China at the time, so how does he know what happened during this period? The applicant said sometimes he used the internet to contact his parents or the phone to contact his parents, and also relatives.
70. The Tribunal said that he apparently said to the Department that he had two relatives in Australia, and asked if that was correct. He said yes. The Tribunal asked the relationship of those persons to the applicant. He said one is his uncle. He said he is his Mum's brother's brother, and the other person is an aunt from his father's family. The Tribunal said if it is your Mum's brother's brother, is it not your Mother's brother? He said no, it is his Mum's brother's brother-in-law. They live in Sydney. The Tribunal asked whether they were citizens or had permanent visas. He said that his uncle had submitted an Application for a Protection visa. Regarding his aunt, he is not sure, she never mentioned anything.
71. The Tribunal said in his claims he had a different idea to a lot of people in China about how things should be. He referred to him believing in democracy. The Tribunal asked him what he meant by democracy. He said just like a kind of movement that occurred in Egypt. The people were against the government because they were not satisfied with the government control. In the Chinese internet, there are sort of news reports against the government. He read a lot of reports on the internet to push the government to reform in China, but very soon after that news, the reports on the websites were blocked by the Chinese authorities. The Tribunal asked whether this was on Xinhua? Where did he find the information? He said he found it in the newspapers and the websites. The Tribunal asked which websites. He said, such as Baidu, or all the websites in the news.
72. The Tribunal asked if the people in Egypt are successful, and democracy is introduced to Egypt, if it isn't already, what changes are they looking for, that comes under the umbrella of democracy. He said he thought because of the corruption of the government authority in Egypt, it is the main motivation of this movement, and also in China.
73. The Tribunal said that the applicant said his different political view also includes freedom, and asked what he means by freedom. He said freedom does not only mean the physical but also from the spirit. That means people can speak out freely what they

want to say and it is easy to be accepted. If people were suffering from harmful things, of disasters or persecutions, the government could stand up and help them.

74. The Tribunal asked the applicant to talk about the corruption that he talks about in China. The Tribunal said that he seemed to be talking about corruption affecting his family in China, and asked what the corruption is in China that he particularly does not like. He said an example is one officer retires, and from the regulations this officer should have received a large amount of superannuation or pension allowance but the Chinese authority just deducted money and killed the officer. This officer's family sued the Chinese, or accused the Chinese authorities, to the High Court in Beijing but on the way to the court the family members of the member suffered from a lot of troubles and difficulties. Another example is that China is now building a lot of railways and because there is a lot of corruption in these railway offices within the high levels of the railways, and they get a lot of money from the corruption. So, at the end the railway quality is not very good and it is harmful, and it is not responsible to the passenger safety and security. There are a lot of other examples.
75. The Tribunal asked when, in his first example he refers to an officer who retires, whether that is someone he knows. He said he does not know this particular person but it is very common.
76. The Tribunal asked what would happen to the applicant if he were to return to China. He said what happened to his father made him have a serious fear of going back to China. If he goes back to that place where his father had the accident it will make him upset and depressed and in fear. So he could not live like a normal person.
77. The Tribunal took a short break.
78. The Tribunal said the following. Remember at the beginning of the hearing I told you that I may put to you any information that I would consider could be the reasons for affirming, or agreeing with, the Department's decision. I am going to do that now. When I give you the information, I will explain the consequences and the relevance of the information. You will be invited to comment on or respond to the information. You can respond to the information orally or in writing. You can seek additional time to comment on or respond to the information. The Tribunal said that it considered that there were three possible ways to possibly respond.
79. The applicant said he wanted to respond orally. The Tribunal said it was about to say he can respond orally, or in writing, or come back in two weeks and respond orally. He said he wanted to respond orally today.
80. The Tribunal said the first piece of information is that at the Department interview the applicant indicated that the main reason for staying in Australia, and his failing to lodge a Protection visa application sooner than when he did, was because he wanted to earn more money to support his family in China. He lodged his Protection visa application [in] September 2010. The relevance of the information is that it may indicate that he does not have any fear of returning to China. He really just wants to stay in Australia so he can earn the money to support his family back in China. The consequences may be that the Tribunal affirms the Department's decision.

81. The applicant responded as follows. Making money is a partial reason but the main reason is the fear of what happened to his father. This has made him have a lot of fear of going back to China. If he returns to China he has to live under that system for the rest of his life and also he has to live under his father's shadow, and the darkness of China. The system is everywhere in China. So he does have fear to go back to China.
82. The Tribunal said the next piece of information is that he does not want to return to China because most Chinese have a different political view to him, and also he does not want to live under the system that exists in China and the system is everywhere in China. The Tribunal said, however, he does not belong to a political party, and he said at the interview that his political views were his own personal and emotional views. The Tribunal said the applicant has not indicated that he is going to join a political party or act upon his feelings and views, if he were to return to China. The relevance of this is that if he does have a different view to the way China should be run, or how it exists, it may be that will never come to the attention of the authorities because he will never say anything about it. So, from the persecution point of view, it may be that if he does not say anything and he does not do anything about it, then he will not come to the attention of the authorities and he will not suffer any harm. The consequences may be that the Tribunal affirms the Department's decision.
83. That applicant said, that is true, but that system has already hurt his father. So that is why he is thinking that if he returns to China probably the system will harm him as well. He said, yes, that's true that he did not join any political party right now, but he is not sure that he has to, or he will join the political party if he returns to China, or, show his political view in public. The system of China is all over China. Even if he does not speak in public to show his political view, it is still there.
84. The Tribunal said the next piece of information is that the applicant claims that gangsters purchased his father's business. The Tribunal asked if that is right. He said yes. The Tribunal continued, they threatened his father and they smashed machines and his factory. The applicant agreed. The Tribunal said the applicant said the same thing will happen to him if he returns to China and he sets up a business. However, it may be that the applicant does not know that this will happen if he sets up a business. Secondly, he may be an employee. There are other options. The Tribunal may find that just because these things happened to his father it does not mean that they will happen to him, and he has the choice to choose a profession, and how he is going to pursue it. The Tribunal said the consequences may be that the Tribunal affirms the Department's decision. The applicant said he agrees that he can be an employee but the Chinese system is everywhere and, no matter what work he is going to do, it is going to harm him one day. What happened to his father has made him have fear, so being an employee or setting up a business does not make any difference. The applicant said if it does not happen to him right away after he returns to China, he cannot say it will not happen in the future. What happened to his father hurt him deeply. No matter what type of job he is doing, it stays the same.
85. The Tribunal said the next piece of information relates to his father in that the applicant has claimed that he cannot return to China due to the emotional trauma caused by the death of his father which has caused mental anguish, or mental damage. The relevance of this information is that this claim may not fall under the Refugees Convention. The applicant has also said in his interview, or he was asked, would he would have suffered mental damage, whether he was in China or Australia. The Tribunal said the applicant

had said it would be worse back in China. The relevance of this is that, first of all, the applicant does not know what is going to happen to him in China, it may or may not be bad. It may not be worse. He may find it will not cause any more anguish if he goes back to China and lives somewhere else and not where his father lived. The Tribunal is not sure whether this falls into what the Convention definition is meant to consider. The consequences may be that the Tribunal affirms the Department's decision.

86. The Tribunal was asked to repeat the question. The Tribunal said it relates to the emotional damage caused by death of his father, causing mental anguish or damage. The Tribunal said the applicant had been saying that if he were to return to China it would be worse for him than if he stayed here. The Tribunal had been saying that it may or may not be worse if he goes back to China. He may find if he goes back, and he has a chance to grieve with his family, it may alleviate some of the mental anguish; or he could go back to a different part of China where he is not reminded of his father.
87. The Tribunal said the third point that the Tribunal tried to make was that the claim may not fall within the Convention definition and it may not amount to serious harm according to the Migration Act. He said he can move to another place but the Chinese system is everywhere. Compared to serious harm or serious pain he would rather choose the less pain, so he does not want to put his future at risk. If the Chinese system cannot be changed, the suffering or the pain of what happened to his Dad will be there forever with him. Because his father was killed under that system, that is why he has fear.
88. The Tribunal said the next piece of information is that there is no evidence that the death of his father was due to anything other than a car accident, and there is no evidence that it was related to gangsters. The relevance of this is that his fears may be based on unprovable thought that his father's death was caused by gangsters. It may be that he just had a car accident. This may mean that the basis for his claim in relation to the death of his father causing an impact on him, and so on, may not be based on fact. The fears for his future in the Chinese system may not be based on fact. The consequences may be that the Tribunal affirms the Department's decision.
89. The applicant responded that he does not think it is his own thoughts. It is very common in China. Also he does not think it is a car accident because shortly after the death of his father, his father's business was bought by someone else. The Chinese authority and business have a special relationship and they can cover the truth. They can smash machines at the factory and set-up an accident. Their local government officer covered the truth and that is why they could not find any evidence. This is a kind of disadvantage of the system and it harms people. As a Chinese citizen, he does hope the Chinese system can be changed so if he returns to China, he will probably release his political view in public. That makes him have fear of returning to China, and he is very disappointed with the system.
90. The Tribunal said the next piece of information is that he has not provided any evidence that he has shown his disappointment with the Chinese system whilst he has been in Australia. This may mean that what he is saying is not credible and may be something that he has manufactured today. It might be thought that someone who had views that they would express when they went back to China, then one would think that they would be expressing them here. The relevance of this is that it may indicate that the applicant's evidence is not credible and he has just manufactured it and he has just

thought of this idea now based on the information that has been given to him. The consequences may be that the Tribunal may affirm the Department's decision.

91. The applicant responded as follows. Because his father was living under that system in China, that is why his father did not want him to live in China for the rest of his life, and that is why he sent him to Australia. The applicant was very young when he first came to Australia. Since his father passed away he understands what the Chinese system looks like and he does not like it, and he is not very satisfied with the system in China. Even if he did not express his political views in public, he always took an interest in political issues of what happened in China, for example, the reforms in China. He always responds through the internet, for example, regarding the Jasmine or Tunisia reform to express his political view about the Chinese system.
92. The Tribunal asked whether he signed his names to those comments. He said no. The Tribunal asked if there was any way that the Chinese government could trace him. He said, not sure. He said, "I am not sure because that website that I browse was always blocked by the Chinese authorities." The Tribunal said, "the browser was blocked by the Chinese authorities." The Tribunal asked, what does that mean; he could not access it at all, or he could not respond? He said he cannot browse the website, it does not exist anymore.
93. The Tribunal said the next piece of information is that the applicant said that if he were to return to China he cannot get a good job in China due to his lack of education, as he has only completed Year 11 studies but in fact he has only completed Year 10 studies, and the Tribunal asked if that was right. He said, "Yes." The Tribunal said the relevance of that is it was not looking at people's opportunities for employment in these matters. The Tribunal is really looking at whether he can be employed, not whether he can be employed in a good job. As he has said in his claims, he has been employed in Australia in construction and some other work, and perhaps that will be what he will be employed in, in China. The relevance of that is that may be sufficient for the applicant not to gain the protection of the Refugees Convention. That is, as long as he is able to obtain a job, it does not appear that the Convention would protect him by giving him receive refugee status in Australia. The consequences may be that the Tribunal affirms the Department's decision. The applicant said, no. The applicant then said it is true that he can find a job but it does not mean that he can get what he should get in China. Normally the official government officers and business have a special relationship, so most of the time he could not get his salary. The Tribunal asked what he meant by saying he would not get his salary. Does he mean he would not get a salary at all, or he could not get what is commensurate with his abilities? He said he could not get a salary at all. The Tribunal asked whether he was saying he would work, but get no money. He said sometimes, when the project was finished. The Tribunal asked whether he had ever worked in China. He said, no. The Tribunal asked what he was basing this comment on. He said a lot of people around him have had the same thing happen. If it happens, if he appeals to the higher courts the local government officer or related business people will stop him. That is all because of the system. He thinks that people have rights to speak out what they think and to express their political views.
94. The Tribunal said some people may find that this is not credible and it needs some supporting evidence. The Tribunal is saying it on the basis that he had said people around him, and he is a [age deleted: s.431(2)] year old man. So, the Tribunal is wondering what experience people around him, students, have had in working and

perhaps they have the same lack of experience as the applicant. He said that he could show the Tribunal the evidence later. The Tribunal asked for him to provide that evidence within two weeks. The Tribunal said at the moment the Tribunal may find that it is not credible. Even if it happened in isolated incidents, it would need to be happening across the board to be significant. The same situation may happen in Australia where some people are employed and are not paid. They think: will they take it to court? Well, maybe, maybe not, it's only one week's salary, or something. So it may not distinguish the communist system from the western system.

95. The Tribunal asked if there was anything else he wanted to say. He said the system is really bad with darkness everywhere and also the corruption.
96. The Tribunal asked whether the applicant could name the people who employed him in the construction industry in Australia. He said he did not know. He said it is a long time ago. The Tribunal asked whether he was employed now. He said no. The Tribunal asked who was supporting his family now. He said he heard that his mother got a job, and his uncle gives him support once a month. The Tribunal said so that is no longer a reason for him to stay in Australia to provide money for his family.
97. The Tribunal asked when was the last time he had work? He said before September 2010. The Tribunal asked what type of work it was. He said inter-construction. The Tribunal asked for more detail. He said because it was casual. The Tribunal asked what work he did. He said painting or lifting. The Tribunal asked how long the job was for. He said three weeks.
98. The Tribunal referred to, and explained s.91R(3) of the Act. The Tribunal stated that his activities on the internet relating to the activities in Australia may not be considered.
99. The Tribunal asked if there was anything else he wanted to say about that, or anything else.
100. The Tribunal discussed with the applicant his provision of the documentation to prove that people were not paid in China. The Tribunal and the applicant agreed that he would provide that information by [a date in] April.
101. The Tribunal asked if there was anything else the applicant wanted to say.
102. The applicant asked the Tribunal to repeat the first question as he had something to add.
103. The Tribunal said it thought the first question was that he said at interview that the reason he failed to lodge his Application for a Protection visa sooner was that he had to support his family in China. The Tribunal said that is the basis of the information. He said he had nothing more to comment.

***Letter dated [in] April 2007, with reference to three documents***

104. The applicant's letter stated:

As required by the Tribunal Member during the interview [in] April 2011, I would like to provide the following the hyperlink (*sic*) as evidences as references.



105. The applicant then provided the following three references, which the Tribunal has accessed and where appropriate, has reproduced below.

1. <http://chinadigitaltimes.net/china/unpaid-wages/>. These documents are all China News items tagged with: "unpaid" wages, with 34 items as at 6 November 2011 (last accessed 6 November 2011).. There is also an Archives for 2004-2011. The Tribunal has not reproduced any of the documents into this Decision Record

106. 2. [http://www.chinadaily.com.cn/cndy/2011-03/31/content\\_12253185.htm](http://www.chinadaily.com.cn/cndy/2011-03/31/content_12253185.htm). (accessed 27 April 2011)

Unpaid migrant laborers dominate disputes

By Wang Wen (China Daily)

Updated: 2011-03-31 07:58

Migrant workers fighting for unpaid wages filed more than half of all labor disputes in the capital last year, it was revealed on Wednesday.

A total of 14,361 cases were reported to authorities in 2010, with the vast majority of victims being "laborers in the construction industry", said Wu Antai, director of labor inspection at Beijing's human resource and social security bureau.

In releasing the latest statistics, Wu named and shamed six major Beijing firms recently taken to court for failing to pay salaries on time. Among them was Huapu Property Group, a real estate firm in Chaoyang district, which was found to have withheld payments to 24 employees for 14 months.

Huapu and two other companies were fined between 2,000 and 20,000 yuan, as well as ordered to clear the arrears with affected staff and pay compensation.

"We want to make them pay the salary rather than a penalty," said Wu, who added that two other firms received fines of 14,000 yuan and 19,000 yuan respectively for illegally prolonging employees' working period.

Beijing's labor inspection team helped 48,300 workers get unpaid salaries totaling almost 176 million yuan in 2010. Roughly 39,200 of claimants were migrant workers. Officials also dealt with 269 mass incidents caused by disputes.

"Labor wrangles in the (construction) industry will continue to be serious as the city develops at high speed," said Wu.

The building industry is the worst for disputes, according to Wang Fang, director of Zhicheng Legal Aid and Research Center for Migrant Workers, although official statistics show small and medium-sized enterprises have been involved in more than 90 percent of all conflicts over the past four years.

"Although the city is still seeing a peak in labor violations, the number of disputes fell by 23 percent last year compared to 2009," added Wu.

He predicted that social security will likely be the next big conflict, as from July 1 firms are required to cover migrant workers' social security contributions.

China Daily

107. 3. <http://ilo-mirror.library.cornell.edu/public/English/dialogue/actrav/publ/128/7.pdf>  
(Footnotes have been deleted).

The crisis of wage arrears

The challenge of wage arrears in China

Unpaid wages are common throughout China - in state-owned enterprises, but also in foreign-backed companies. Meanwhile, many state firms face bankruptcy, and legal changes prompted by the World Bank will soon end wage earners' right of first call on available funds. Protests are spreading, but the lack of trade union freedom is hampering the Chinese workers' campaign.

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Speaking to the National People's Congress (NPC) in Beijing on 17 March 2002, Chinese Minister of Finance Xiang Huaicheng called for more rapid economic reform, while promising - yet again - national prosperity and progress. Yet the national political leadership was compelled to recognize a number of growing social crises, not least the prospect of rapidly rising unemployment, increased inequality and growing poverty. Also casting a long shadow across this vision of national prosperity was the problem of unpaid wages; a problem that has led to a wave of industrial unrest across the country and brought tens of thousands of protesting workers out on the streets.

In his report to the NPC, Xiang Huaicheng announced that in 2001, "extra revenue in local budgets was mainly used to pay the overdue wages and salaries of employees in government departments and institutions ...". Yet the problem (as understated as it is in official statistics) remained unresolved, with RMB 6.5 billion (US\$793million) in wages owing from the previous year. Outlining a series of measures for county-level governments to take over wage payments for local cadres (especially teachers) in townships, the Finance Minister exposed an underlying sense of urgency. This urgency was based not on the needs and interests of government workers, but instead reflected the Party leadership's overriding concern with social stability. Xiang Huaicheng was quick to assure NPC delegates that: "Funding for social security benefits and wages and salaries will be guaranteed to maintain social stability."

A similar sense of urgency concerning the growing wage arrears crisis was conveyed in Premier Zhu Rongji's report to the NPC on the previous day: "We need to ensure that wages and salaries are paid on time and in full even if for that, new construction projects have to be cancelled and things that are not urgent have to be given up or reduced in scale."

Significantly, Zhu Rongji also alluded to "extravagance and waste" as an explanation for the shortage of state funds. Corruption was identified as a factor, though not explicitly: "Officials use public funds for wining and dining, extravagant entertainment and private travel abroad. This misconduct invariably consumes large sums of money, so we must resolutely stop this tendency."

This link between unpaid wages and corruption is significant precisely because at the very moment that Zhu Rongji was addressing the NPC, tens of thousands of workers in the north-eastern provinces of Heilongjiang and Liaoning staged mass demonstrations calling for the resignation of corrupt officials and demanding immediate payment of overdue wages. An estimated 50,000 oilfield workers held pro-tests in Daqing City in Heilongjiang Province, and 30,000 workers from more than 20 state-owned enterprises (SOEs) rallied in Liaoyang City in Liaoning Province. The workers were demanding unpaid wages, pensions and compensation, as well as protesting against the corruption and injustice of local officials and enterprise managers. However, only hours before Xiang Huaicheng informed the NPC in Beijing that the problem of wage arrears would be resolved through financial measures, a more decisive political step was taken. On the morning of 17 March, Yao Fuxin, a retired steel rolling mill worker and representative of the protesting workers from the local Ferro-Alloy Factory, was detained by police in Liaoyang City. Three days later, armed police were deployed to break up the protests against Yao's detention. Three more workers were detained, and later all four were formally charged with "illegal assembly". They remain in detention and face five years' imprisonment if convicted.

In its attacks on the workers' protests, the Party leadership clearly demonstrated its narrow view of the wage arrears problem as a threat to "social stability". Also clear is the divide between rhetoric and reality. Ultimately, the Party leadership's recognition of the problem is ritualized in Beijing, while workers' collective action to resolve the problem is criminalized.

Like the wage arrears problem itself, workers' action to demand unpaid wages and end corruption is not new. In May 2000, over 5,000 workers protested in Liaoyang City over wage arrears. At that time, 2,000 workers still working at the Ferro-Alloy Factory had not been paid for 16 months, while 2,000 xiagang ("off-duty") workers and 1,000 retired workers had not received their living allowances and pensions for three to six months. Then, as now, 900 armed riot police were deployed to break up the protest and three workers' representatives were detained. In response workers marched through the streets with banners that read "Being owed wages is not a crime!"

### **The scale of the problem**

The Finance Minister's reference to RMB 6.5 billion (US\$793 million) in government-sector wage arrears reflects an attempt to contain the problem by recognizing it, then seriously understating its size.

Though incomplete, existing nation-wide data give us a useful insight into the true scale of the problem. According to an oft-cited report released in December 2001, the total wage arrears across the country amounted to RMB 36.7 billion (US\$4.4 billion) in 2000. This is marginally higher than the figures published by another official source, the All China Federation of Trade Unions (ACFTU). The ACFTU data show that 13.9 million workers in 79,000 work units were owed RMB 31.9 billion (US\$3.9 billion) in wages in 2000.

These data are revealing in that there is a strong correlation between the number of workers owed wages (and the amount owing) and the sites of recent mass protests. The

largest number of workers facing wage arrears is concentrated in Liaoning Province, with Hunan in second place, followed by Heilongjiang and Henan provinces.

However, these figures must be revised upward to take into account the increase in wage arrears over the last two years, especially with increased bankruptcies and closures of SOEs. Also, unpaid wages should be more broadly defined to include all forms of remuneration owed to workers. Off-duty SOE workers themselves refer to their monthly living stipend as their "off-duty wage". Thus, they consider that they have just as much right to these wages as does any worker still employed in the workplace. Furthermore, unfair wage deductions, unpaid insurance and pension premiums that were deducted from workers' wages, but not paid into appropriate funds, are key issues in workers' protests and strikes.

It is difficult to estimate the scale of wage arrears owed to retired SOE workers. In June 2000, Zhang Zuoji, the Minister for Labour and Social Security, stated that arrears in pensions during the period from January to May 2000 alone totaled RMB 1.4 billion (US\$174.6 million) in 19 provinces and autonomous regions. Similarly, data on the late payment or non-payment of off-duty SOE workers' living allowances are incomplete. However, localized surveys may reveal the heavy concentration of "off-duty" SOE workers owed wages within certain cities. For example, according to a survey of off-duty workers in ten cities by the China Economic Research Centre, released in March 2002, 57 per cent of workers were owed wages averaging RMB 3,634 (US\$443) each. The task of estimating the amount of wage arrears for migrant workers is even more difficult, given the lack of wage records and the prevalence of informal employment, though one lawyer involved in defending the rights of migrant workers put their total wage arrears at RMB 36.69 billion (US\$4.47 billion) in 2000.

Regardless of what these figures do or do not say, it is clear that the non-payment of pensions and living allowances and of migrant workers' wages is an integral part of the wage arrears crisis - not least because of the role of these workers in escalating protest actions, strikes and labour disputes.

#### SOE bankruptcies and wage arrears

In many ways, the references by Zhu Rongji and Xiang Huaicheng to the urgency of wage arrears were directed not at the current problem, but at a far greater problem in the near future. Both emphasized the need to speed up privatization, involving the forced bankruptcy and closure of SOEs, despite the central role that corruption and unpaid wages play in this process. Over the next five years, the Government will use RMB 290 billion (US\$35 billion) to write off the debts of 2,900 SOEs before declaring them bankrupt. Last year alone, RMB 50 billion (US\$6 billion) was used to write off the bad debts of SOEs, and this year it will be increased to RMB 80 billion.

However, the Government faces a dilemma. While it is allocating billions for SOE liquidation in order to bail out the banks, the existing bankruptcy law requires that workers' wages take priority in the liquidation process. In response, the Government is revising the bankruptcy law to give priority to the rights and interests of creditors, especially banks. This is a revision the World Bank and Asian Development Bank have long insisted be made. The result will be that under future SOE bankruptcies, workers' wage arrears claims will be considered only after the banks and other creditors have taken their share. As such, they will not only lose their jobs and wages, but their legal right to claim unpaid wages, including off-duty wages and pensions, will be seriously undermined.

The significance of these rights for workers cannot be overstated. Many off-duty SOE workers have refused to take on new jobs because breaking formal ties with their work unit renders it impossible to pursue wage arrears claims. Workers also suspect that corruption - and not merely inefficiency and unprofitability - underpins SOE bankruptcies. In Liaoyang City, over 30,000 workers from 20 SOEs joined the "Bankrupt and Unemployed Workers" in linking the loss of wages, allowances and pensions, forced factory closures and redundancies to corruption among management and local officials. That is why demands for unpaid wages were tied to calls for the resignation of key local officials and demands that the central Government intervene to investigate local corruption.

### **Unpaid "off-duty" wages and pensions**

In addition to intensified SOE bankruptcies, the end of the xiagang (off-duty) system will exacerbate the problem of wage arrears. Off-duty status will be abolished by 2003, ending the payment of monthly living allowances to workers after they are "stood down" from SOEs. The current system allows workers to maintain their existing ties to their work unit for up to three years or until they find new employment. During that time they receive a monthly stipend, of which a third is paid by the work unit, a third by the unemployment insurance fund and a third by local government. When the off-duty system is abolished, SOEs will instead pay a one-off "economic compensation fee" calculated on the basis of a month's salary for every year of employment.

Although SOE workers, retired workers and off-duty workers are treated as distinct categories governed by very different regulations and laws, for workers themselves the distinctions are often blurred. This is especially so when workers are drawn to protest over unpaid wages. Protests by retired and off-duty workers expose SOE workers to the prospect of hardship ahead, prompting them to question whether ongoing wage deductions are really going into pension and social security funds. Similarly, protests by SOE workers over unpaid wages place a question mark over the viability of the enterprise and highlight the risk that late pensions and living stipends may never be paid. In fact, protests over social security or labour insurance funds are widespread and in practice are often inseparable from the problem of wage arrears.

Mismanagement and even embezzlement of labour insurance funds by company managers have been widespread, causing great anger among workers. Some enterprises' unwillingness or inability to pay labour insurance premiums has led to protests by laid-off and retired workers — many of the latter have been forced into early retirement and are far short of the official retirement age of 55, some even as young as 35.9

The issue of social security benefits and pensions is also tied to former employers' compliance with the retrenchment agreements that workers signed — or were compelled to accept — when they were laid off from SOEs. For example, the failure of the Petroleum Administration Bureau in Daqing to comply with its retrenchment agreements led to protests by 50,000 workers in March and April 2002 — an action which saw the formation of an independent union to pursue workers' demands.

Similar mass protest actions also resulted when workers received retrenchment packages, but were still owed several months' wages. Again, the "break" with the work unit weakens their ability to lay claim to unpaid wages and often leads to militant action. Mine workers in Liaoning Province clashed with police and soldiers when the miners were given severance packages, but were still owed 18 months' wages.

Another phenomenon worth noting is the illegal attempts by SOE managers to pay wage arrears in kind. In May 2001, over 200 workers from the Dengkou County Chemical

Fertilizer Factory blocked the Baotou-Lanzhou railway line for over an hour. An official from the Dengkou County complaints office reported that the Government decided to distribute chemical fertilizer for the workers to sell in lieu of wages. They also ordered local police to find out who had organized the demonstration. In a telephone interview conducted by China Labour Bulletin, a worker from the factory said he received five tons of fertilizer in lieu of three months' wages. The report notes that: "He was pessimistic over the chances of receiving anything for the remaining five months' wages owed to him."

### **Failure to pay local government workers**

In March 2002, the Chinese People's Political Consultative Conference (CPPCC) General Office released the results of a nine-month research project showing that local government employees in 26 out of the country's 31 provinces and autonomous regions are owed wages.

Despite this, the central Government continues to order salary increases for government employees in an attempt to maintain social stability, stimulate consumer spending and reduce the level of corruption. However, as Yang Rudai, vice-chairperson of the National Committee of the CPPCC pointed out: "If the problem of these overdue salaries cannot be solved, encouraging a policy of 'rational salary preventing corruption' can hardly be implemented."

The central Government, however, claims that enough funds are transferred to provincial and county governments to alleviate the problem. At the NPC session in March, Finance Minister Xiang Huaicheng reported that the central Government transferred RMB 89.2 billion (US\$10.9 billion) to local governments in 2001 to pay off wage arrears and RMB 98.2 billion (US\$12 billion) for social security programmes, including basic living allowances for off-duty SOE workers. This was then used to justify another pay rise for government workers in the coming year. Only a month later Xiang Huaicheng acknowledged massive debt levels in county governments. The financial daily, Shichang Bao (Market Daily), estimated this debt to be as high as RMB 3 trillion (US\$366 billion). The central Government puts the figure at RMB 10 billion (US\$1.22 billion) in hidden government debt at the county level, most of which is owed to state-owned banks.

An important part of this tension between central and local governments over the handling of wage arrears concerns the local tax revenue base. Local officials argue that the overdue wages of government employees are linked to a drop in tax revenue caused by unpaid taxes and declining farmers' incomes. This is the result of falling agricultural prices since 1997 — a problem exacerbated by China's accession to the WTO. The diminished tax base of local governments has led to the imposition of additional taxes and levies on farmers, worsening their situation and leading to widespread rural unrest. Thus the wage arrears of local government workers become highly politicized in local-central government relations.

Among those affected by this problem are rural teachers. In January 2000, over 1,000 teachers from 38 schools in Huangkou Township, Anhui Province, went on strike to protest against the non-payment of wages for the previous eight months. One of the teachers explained: "The government has repeatedly promised that they would issue the pay. However, eight months passed like that and we still haven't received anything. It was inevitable that the teachers would erupt like this and organize a collective action. They have also yet to give us the raises promised back in 1997." The teacher also criticized the official trade union for failing to protect their rights: "We went to the provincial union office and they said they couldn't do anything, so we decided to act on our own."

## **Wage arrears as a "local custom"**

On 8 January 2002, seven migrant workers from Sichuan climbed a 40-metre-high crane at a construction site in Shenzhen, Guangdong Province, and threatened to jump if they were not paid back wages. Over 100 workers employed at the state-owned construction company — also migrant workers from Sichuan — protested below while police tried to talk the workers into coming down. A similar incident occurred on 30 August 2001, when the leaders of a team of carpenters from Chengdu scaled a 30-metre-high crane, demanding payment of several months' wages owed to them. While the workers swung from the crane 30 metres overhead, dozens of workers held protest actions below.

Protest actions like these exemplify the extreme measures workers are forced to take in their fight for unpaid wages. In Shenzhen such cases are proliferating, as wage arrears become an integral part of work and life in the Special Economic Zone. In December 2001 alone there were 19 major labour disputes concerning unpaid wages. According to Xie Zhiwei, at least half of the private companies in Shenzhen, including foreign-invested companies, owe wages to their employees. The problem is so rampant that the Government established the Shenzhen Labour Dispute Mediation Department in January 2002, and in Shenzhen's Baoan District a campaign called "Get Your Money Back!" was launched.

A sample survey of 220 collective actions dealt with by Labour Inspectorates in Guangzhou revealed that 90 per cent were wage arrears cases. An economist specializing in foreign investment in southern China argues that:

According to informed officials and factory managers, the illegal retention of workers' wages for between one and three months exists in 80 per cent of foreign-financed firms. This phenomenon exists despite the fact that the firm is liable to pay 1 per cent interest on the overdue wages from the sixth day of the following month onwards as compensation for workers. Article 14 of the Guangdong Regulations on Workers Rights 1994 also stipulates that workers can claim RMB 5,000-50,000 in compensation if their wages are overdue by more than three consecutive months.

There are additional regulations stipulating compensation for wage arrears in the Special Economic Zones. Article 40 of Labour Regulations Governing the SEZs in Guangdong states that: "An employer unit shall issue wages at least once a month. A date shall be fixed and the issue of wages on that date shall be strictly implemented. If payment is not made by the stipulated date, the employee shall be rewarded compensation equivalent to 1 per cent of the wage owed for each day after the sixth day in arrears."

Local regulations such as these determine actual penalties and compensation rates within the general provisions for wage arrears in the national Labour Law. In practice these regulations, at both national and local levels, fail to protect workers in their struggle to claim unpaid wages.

Legal cases are long drawn out, making it impossible for migrant workers in particular to sustain their livelihood while waiting for an outcome.

Violence against workers seeking wage payments is also common. Ties to state officials and the police strengthen the ability of employers to threaten and intimidate workers.

Another common practice that exploits the vulnerability of migrant workers and institutionalizes wage arrears is the deliberate retention of wages in foreign-invested enterprises as a means of imposing labour discipline. As one specialist on labour issues

in southern China commented: "Keeping wages in arrears for three to six months in an attempt to halt high staff turnover is common at the low end [of the manufacturing industry]. By leaving a factory without the required management permission, workers risk losing owed wages as well as personal files and the security deposit that most migrants are required to pay."

So prolific are wage arrears problems in Guangdong Province that an article in Gongren Ribao (Workers' Daily) describes it as a "local custom". As Xie Zhiwei points out, wage arrears are often the result of "deliberate negligence", where loopholes in the law are exploited.

### **The proposed "Wage Law"**

As labour disputes over wage arrears proliferate, and workers are compelled to take more desperate measures in the struggle to obtain their wages, there are growing calls among journalists, researchers, academics, policy-makers, trade union officials and others for the introduction of more effective laws to stop the deliberate retention of wages by employers. Of course, such calls are not new, especially among workers.

There now appears to be some progress in this direction. One of the reasons for this is that the wage arrears crisis has reached such a scale that it threatens to become unmanageable. While the details of a proposed national Wage Law remain undisclosed, a number of local regulations on wage arrears are under investigation as possible models for the new law. Among these are the Zhongshan City Regulations on Wage Payment by Enterprises introduced in Zhongshan, Guangdong Province, on 1 January 2002. According to Xie Zhiwei, the Zhongshan regulations have proved successful — though no evidence is provided to support this claim." It is most likely that at this early stage the measure of "success" is simply the fact that tough regulations governing the payment of wages have been legislated.

Although the proposed Wage Law represents a positive move towards alleviating the wage arrears crisis, its effectiveness will be severely limited by existing legal-institutional and political arrangements. Part of this concerns workers' access to legal representation in a form that permits them to pursue their genuine rights and interests. In the absence of freedom of association, workers are subordinated to the trade union monopoly of the All-China Federation of Trade Unions (ACFTU) and its branches. While local trade union officials express concern over the wage arrears problems faced by workers — an issue regularly reported in trade union publications — the fact remains that the trade unions are embedded in the political structures of the Party and State, and as such are entrusted with containing labour unrest, not articulating it.

There is a general tendency for wage arrears to build up for several months before workers lodge formal complaints with labour departments. This is often explained in press reports in terms of workers' lack of knowledge of the law. While this may be true, it is equally true that workers — particularly workers in SOEs — often suffer delays as they wait for trade union officials to act on their behalf. Only after it is clear that the union is failing to act in their interests do workers lodge complaints themselves or take industrial action. That is why protest actions by SOE workers often involve criticism of the official unions. In the case of the oilfield workers' protest in Daqing, the local trade union office was among those buildings attacked by angry workers.

The official trade unions do not only undermine workers' demands for unpaid wages through inaction. In many cases, they actively intervene to prevent workers from fighting against wage arrears. In March 2002, Nantfang Gong Bao (Southern Workers' Daily) described a case in which 131 workers dismissed from Meng Bao Industrial Company in



Guangzhou fought a legal battle for unpaid wages of RMB 840,000 (US\$102,440). Although the local Labour Disputes Arbitration Committee (LDAC) ordered the payment of wage arrears and compensation to the workers, the enterprise management appealed the ruling. The deputy chairperson of the enterprise trade union represented the management in the LDAC and cross-examined the workers. The newspaper article reporting this case carried the following sub-heading: Workers Take Wage Arrears Claim to Arbitration — Deputy Chair of their Trade Union Defends the Company Against Workers! Accompanying the article was a cartoon showing a trade union official sitting on the lap of the boss in the employers' chair, leaving the workers' chair empty.

The official trade unions' role in the "deliberate negligence" that underpins wage arrears should not be attributed to incompetence, lack of resources or a lack of understanding of the role of trade unions in a market economy. It is not simply a matter of inaction, but their active role in pursuing the Party's and the State's political agenda. As Article 4 of the revised Trade Union Law (27 October 2001) clearly states, trade unions must "... take economic construction as the core, uphold the socialist road, uphold the people's democratic dictatorship, uphold the leadership of the Chinese Communist Party, uphold Marxist-Leninist-Maoist-Deng Xiaoping Thought, uphold reform and opening up ...".'

### **Conclusion: "Free our workers' representatives!"**

In the absence of freedom of association, workers who organize independently to fight for unpaid wages face political persecution. The likelihood of political repression is heightened by the fact that self-organized workers rarely limit themselves to unpaid wage claims, often extending their struggles to attacking corruption and the abuse of power.

Numerous cases involving the political persecution and detention of workers have prompted strong criticism of the Chinese government by the ILO Committee on Freedom of Association. Just recently, the International Confederation of Free Trade Unions (ICFTU) lodged a new ILO complaint against the Government of the People's Republic of China concerning violations of freedom of association. This specifically deals with the suppression of workers' protests in Liaoyang and Daqing. Submitted on 27 March 2002, Case No. 2189 focuses on the arrest and detention of Yao Fuxin, Pang Qingxiang, Xiao Yunliang and Wang Zhaoming for organizing "illegal demonstrations" — a charge that carries a prison sentence of five years.

The continuance of such political repression today shows that the legal and administrative measures taken by the Government to alleviate the wage arrears crisis will remain ineffective as long as workers are denied the right to genuine, self-organized representation. The Government's response to the recent workers' protests in Liaoyang City is a sobering reminder of this fact. It also recalls an earlier protest by workers in Liaoyang, when they marched with banners that read "Being owed wages is not a crime?" and "Free our workers' representatives!" These two slogans, and the issues they represent, must be treated as inviolable and inseparable when facing the challenge of wage arrears in China today.

## **INDEPENDENT COUNTRY INFORMATION**

### **List of political parties in the People's Republic of China**

The People's Republic of China (PRC) is formally a multi-party state under the leadership of the Communist Party of China (CPC) in a United Front similar to the

popular fronts of former Communist-era Eastern European countries such as the National Front of Democratic Germany.

Under the one country, two systems scheme, the Special Administrative Regions of Hong Kong and Macau, which were previously colonies of European powers, operate under a different political system to the rest of the PRC. Currently, both Hong Kong and Macau possess multi-party systems.[1]

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## **Relationships with the Communist Party**

The dominance over the political system is such that China is effectively a single-party state. This means that only one political party, the CPC, holds effective power at the national level. Eight minor parties also participate in the political system under the leadership of the major party. The PRC political system allows for the participation of some non-party members and minor parties in the National People's Congress (NPC), but they are vetted by the CPC.

Although opposition parties are not formally banned in mainland China (the PRC), the CPC maintains control over the political system in several ways.

Firstly, the PRC political system is composed of a series of indirect elections in which one people's congress appoints the members of the next higher congress, and in which only the lowest people's congresses are subject to direct popular vote. This means that although independent members can theoretically, and occasionally in practice, get elected to the lowest level of congress, it is impossible for them to organize to the point where they can elect members to the next higher people's congress without the approval of the CPC or to exercise oversight over executive positions at the lowest level in the hierarchy. This lack of effective power also discourages outsiders from contesting the people's congress elections even at the lowest level.

Second, although PRC law has no formal provision for banning a non-religious organization, it also has no provision which would give non-CPC political parties any corporate status. This means that a hypothetical opposition party would have no legal means to collect funds or own property in the name of the party. More importantly, PRC law also has a wide range of offenses which can and have been used against the leaders of efforts to form an opposition party such as the China Democracy Party and

against members of organizations that the CPC sees as threatening its power.[2][3] These include the crimes of subversion, sedition, and releasing state secrets. Moreover, the control that the Party has over the legislative and judicial processes means that the Party can author legislation that targets a particular group.

## **The parties**

Communist Party of China (中国共产党) More than 70 million members,

The eight registered minor parties under CPC direction:

- Revolutionary Committee of the Kuomintang (中国国民党革命委员会 or 民革). Formed by leftist members of the Kuomintang (KMT) who did not escape to Taiwan. 82,000 members. It is considered "second" in status to the Communist Party of China. Thus it has 30% of the seats in the People's Political Consultative Conference.
- China Democratic League (中国民主同盟 or 民盟). Originally a league of pro-democracy parties. Formed by 144,000 members, mainly middle-level and senior intellectuals.
- China Democratic National Construction Association (中国民主建国会 or 民建). Entrepreneurs from the manufacturing, financial or commercial industries, in both private and state sectors.
- China Association for Promoting Democracy (中国民主促进会 or 民进). Intellectuals, mostly in the education, technology and publishing sectors. Some 117,500 members.
- Chinese Peasants' and Workers' Democratic Party (中国农工民主党 or 农工党). Most of its 65,000 members work in the fields of public health, culture and education, science and technology.
- Zhigongdang of China (中国致公党). Returned overseas Chinese, relatives of overseas Chinese, and noted figures and scholars who have overseas ties.
- Jiusan Society (九三学社). Most of its 68,000 members are high- and medium level intellectuals in the fields of science, technology, education, culture and medicine.
- Taiwan Democratic Self-Government League (台湾民主自治同盟 or 台盟). 1,600 people, most of whom are prominent people that are from Taiwan or are of Taiwanese heritage, but now reside on the Mainland.

Actively suppressed political parties

The following parties are ones which have been and are currently still being actively suppressed in the People's Republic of China. Due to the censorship and suppression, they most likely have their headquarters outside of the Chinese mainland:

- The China Democracy Party (中国民主党) was founded by participants of the 1978 Chinese Democracy Wall Movement and the 1989 Democracy Movement. It was made illegal in 1998 by the CCP on mainland soil.[2][3]
- The China New Democracy Party (中国新民党) was founded by Guo Quan in Nanjing at the end of 2007.[2][3]
- Union of Chinese Nationalists (中国泛蓝联盟) aspires to the ideals of the Pan-Blue coalition on Taiwan. As such, its values include establishing a liberal democracy in accordance with the Three Principles of the People. The group originated from an internet forum discussion in August 2004 and was declared to be an illegal organization in September 2006.[4]

(see [en.wikipedia.org/.../List\\_of\\_political\\_parties\\_in\\_the\\_People's\\_Republic\\_of\\_China](http://en.wikipedia.org/.../List_of_political_parties_in_the_People's_Republic_of_China))

See also [english.cri.cn/1702/2004-11-1/116@159461.htm](http://english.cri.cn/1702/2004-11-1/116@159461.htm).

## FINDINGS AND REASONS

108. Having regard to the applicant's passport from the People's Republic of China, and other evidence, the Tribunal finds that the applicant is a national of China and it has assessed his claims accordingly.
109. The Applicant's claims may be summarized as follows.
110. The applicant's father died in a car accident on the way from work to home at the end of 2008. The applicant believes what happened to his father was set-up by someone else, for apolitical reason. Because of the corrupt political system, his father was framed. His business went bankrupt. Moreover, collusion between government officials and businessmen resulted in the loss of his father's right to appeal. Before the accident occurred the family had some information that his father's construction company was being bought by someone else. At the time his father's business was very successful, so his father did not want to sell it. Also, at the time, some gangsters came to the applicant's home once a week and threatened his father so that he would sell the business. They said if he did not sell his business they would keep damaging it. They damaged the father's factory, and the machines in the factory. Every time they came to threaten his father in order to sell the business, his father said "no" to them, and reported it to the authorities. This occurred from May to the end of 2008. The business was bought by other people when the applicant's father passed away.
111. If he were to go back to China, the applicant intends to establish a construction business, just like his father. He believes nothing will happen to him in the short term but in the long term if he does well in his work, he believes that whatever happened to his father will happen to him as well.
112. That is, if he has a good business in the future, the same people will come to him and try to buy his business. There is too much corruption in China. It might not be the

same group of people from the government who will try to buy his business, but this will happen to him.

113. From a political point of view, the Chinese government system hurt his father deeply and that is why the applicant has fear. He is afraid this “authority system” might hurt him as well. Also, what happened to his father is a tragedy that makes him fearful of going back to China.
114. Further, if he returns to China, what happened to his father will have a negative emotional influence on him. He would be harmed and mistreated. That is, he will be persecuted emotionally and mentally. That is, his personal feelings about returning to China where everything is familiar and his father’s death has taken place.
115. If the applicant returns to China, what happened to his father has left the applicant with a lot of mental damage. The applicant said that if he goes back to the place where his father had the accident it will make him upset and depressed, and in fear. He could not live like a normal person.
116. The applicant has a different political view to most Chinese because, for example, he believes in freedom, democracy, and he is against corruption. The applicant left China because corruption ran rampant and there was no democracy.
117. The applicant is not a member of a political party. He is against the current Chinese government.
118. Initially, a reason for remaining in Australia was for the applicant to do his best to support his family financially in China. The family were being supported by the applicant residing in Australia. The family had relied on him financially, in order to survive in China. His mother and brother have not encountered any problems residing in China. More recently, the applicant’s mother has found employment. His brother is studying. The applicant’s uncle living in Australia is now financially supporting the applicant.
119. Another reason for remaining in Australia was to earn enough money so he could finish his schooling. Also, he also does not want to return back to China because he did not finish his studies.
120. The applicant arrived in Australia in October 2007. A migration agent told him in 2010 the best thing to do would be to apply for protection.
121. On the Chinese internet, there are news reports against the government. In Australia the applicant read a lot of reports on the internet pushing the government to reform in China, but very soon after that, the reports on the website were closed by the Chinese authorities.
122. The applicant responded through the internet, for example, regarding the Jasmine or Tunisia reform, to express his political view about the Chinese system.
123. The applicant claims if he were employed in China, he would not receive full payment for his work.

124. The applicant does not think the PRC authorities can and will protect him if he returns, as China is filled with corruption. His fate is controlled by a minority group of people and special interest groups.
125. The Tribunal will now consider the applicant's claims.
126. The applicant arrived in Australia [in] October 2007 and he lodged his Protection visa application [in] September 2010.
127. At the Department interview the applicant indicated that the main reason for staying in Australia, and his failing to lodge a Protection visa application earlier, was because he wanted to earn more money to support his family in China, and to earn enough money so he can go back to finish his schooling. He also stated that the main purpose of him not going back to China is emotional, as his father passed away in China. A further reason was because he holds different political views, such as freedom, democracy, and no corruption.
128. At the Tribunal hearing, the applicant stated that making money in Australia was a partial reason for staying in Australia and not returning to China, but the main reason was the fear of what had happened to his father. This had made him very fearful of going back to China. If he returns to China he has to live under that system for the rest of his life and he also has to live "under his father's shadow, and the darkness of China." The system is everywhere in China, so he has a fear of going back to China.
129. At the end of the Tribunal hearing, the Tribunal asked who was supporting his family now. He said that he had heard that his mother had got a job, and his uncle gives him support once a month. The Tribunal said, so that is no longer a reason for him to stay in Australia to provide money for his mother.
130. The Tribunal has considered the applicant's responses and finds that his desire to stay in Australia to earn money for his family and to finish his schooling was a partial reason, but not the main reason for him staying in Australia, and not returning to China. The Tribunal finds that these are not Convention related reasons and it has not considered them further. The Tribunal will now consider the applicant's other claims for not wanting to return to China.
131. The applicant indicated that the system in China had already hurt his father. That is why he is thinking if he returns to China the system will hurt him as well. He believes the system is the same all over China. Even if he does not speak in public to show his political view, it is still there. The applicant indicated that he intended to open a construction business, like his father.
132. The Tribunal indicated that he had options other than to follow in his father's employment footsteps, and for example, he could become an employee. The applicant agreed that he can be an employee, but the Chinese system is everywhere and no matter what work he is going to do, the system is going to harm him one day. What happened to his father has made him have fear, so being an employee or setting up a business does not make any difference. The applicant said if it does not happen to him right away after he returns to China, he cannot say it will not happen in the future. What happened to his father hurt him deeply. No matter what type of job he is doing, it stays the same.

133. The Convention has been recognised in Australia and elsewhere as an instrument embodying principles for the protection of basic human rights and freedoms and it is uncontroversial that “persecution” in the Convention sense can include serious violations of such rights and freedoms.<sup>1</sup> Nevertheless, the protection of the Convention will not normally be attracted where the harm feared, no matter how serious, amounts to an indiscriminate or non-selective infringement of human rights. In *Applicant A*, Brennan CJ held that:

..the object and purpose of the Convention is not simply the protection of those who suffer a denial of enjoyment of their fundamental rights and freedoms; they must suffer that denial by prescribed kinds of persecution, that is, persecution “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.<sup>2</sup>

134. The general principle that persecution must involve discriminatory conduct, for one or more of the Convention reasons, is reflected in s.91R(1) of the *Migration Act 1958* (the Act). As the Full Federal Court held in *NADO v MIMIA*, any failure to protect “core human rights” would not amount to persecution unless the requirements of s.91R are satisfied.<sup>3</sup>

135. The Tribunal finds the applicant’s claims in relation to a generalized fear of what will happen to him, no matter what path he follows, does not involve a Convention nexus, nor does it involve any discriminatory conduct by the Chinese government.

136. The applicant also stated that he cannot return to China due to the emotional trauma caused by the death of his father which has caused mental anguish, or mental damage. The applicant indicated that this mental anguish would be worse if he were in China. The Tribunal indicated that the applicant does not know what is going to happen to him in China, it may or may not be bad. He may have a chance to grieve for his father with members of his family, and so release some anguish. It may not be worse than when he is in Australia. He may find it will not cause any more anguish if he goes and lives somewhere else in China, and not where his father lived, and where he may not be reminded of him. The applicant indicated that he can move to another place but the Chinese system is everywhere. He does not want to put his future at risk. If the Chinese system cannot be changed, the suffering and pain as a result of what happened to his father will be there with him forever. Because his father was killed under that system, is the reason why he has fear.

137. The Tribunal indicated to the applicant that there was no supporting evidence before it that the death of his father was due to anything other than a car accident, and there was no evidence that it was related to gangsters. His fears may be based on his unprovable thought that his father’s death was caused by gangsters. It may be that his father just had a car accident. This may mean that the basis for his claim in relation to his father’s death causing an impact on him, and so on, may not be based on fact. The Tribunal indicated that the fears for his future in the Chinese system may not be based on fact.

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<sup>1</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 231-2 per Brennan CJ, 296-7 per Kirby J, *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1 (Gleeson CJ, McHugh, Kirby, Hayne & Heydon JJ, 26 May 2005) at [108]-[111] per Kirby J.

<sup>2</sup> *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 232-233.

<sup>3</sup> [2003] FCAFC 169 (French, Sackville & Hely JJ, 8 August 2003) at [26].

138. The applicant responded that he did not think it was his own thoughts. It is very common in China. Also he does not think it was a car accident, because shortly after the death of his father, his father's business was bought by someone else. The Chinese authority and business have a special relationship and they can cover the truth. They can smash machines at the factory and set-up an accident. Their local government officer covered the truth and that is why they could not find any evidence. This is a kind of disadvantage of the system and it harms people.
139. The Tribunal finds the applicant's father died at the end of 2008, and the applicant arrived in Australia [in] October 2007. The Tribunal finds that the events in China concerning the applicant's father occurred between May 2008 and the end of 2008, and that the applicant was not present.
140. The Tribunal finds that the purchase of the applicant's father's business shortly after his father's death does not prove that his father's death was caused by anything other than a car accident. The Tribunal finds that the applicant has not provided any independent proof that his father's death was more than an accident, or that gangsters or Chinese officials were involved in it, and it does not accept the claim, nor the applicant's claim that he suffered mental anguish as a result of his father's death, which he claims was due to the Chinese authorities and gangsters.
141. In coming to these findings, the Tribunal does not accept that his father was framed, for not keeping the rules; that there was collusion between government officials and businessmen resulting in the loss of the father's right to appeal, that his business went bankrupt, his father was not protected; gangsters went to his father's house to threaten him from May to the end of 2008, they damaged machines and the factory and they came more often after his father reported these events; or that the local government officer covered the truth, and that is why the applicant's family could not find any evidence.
142. Further, the applicant did not provide any independent evidence that he has suffered from mental anguish or damage in Australia, as a result of his father's death.
143. For the reasons that the Tribunal provided at the hearing, referred to above, and its further findings, the Tribunal finds that there is not a real chance that the applicant would suffer mental damage or anguish, if he were to return to China.
144. Further, the Tribunal finds that there is not a real chance that the applicant would face a real chance of Convention related harm, as the son of his father.
145. The applicant stated that as a Chinese citizen, he does hope the Chinese system can be changed, so if he returns to China, he will probably release his political view in public. That makes him have a fear of returning to China, and he is very disappointed with the system. The Tribunal indicated to the applicant that he had not provided any evidence that he has shown his disappointment with the Chinese system while he has been in Australia.
146. The applicant responded that because his father was living under that system in China, that is why his father did not want him to live in China for the rest of his life, and that is why he sent him to Australia. The applicant was very young when he first came to Australia. Since his father has passed away, the applicant understands what the



Chinese system looks like and he does not like it, and he is not very satisfied with the system in China. Even if he did not express his political views in public, he always took an interest in political issues in China and reforms in China. He always responds from the internet regarding the Jasmine, or Tunisia reform, to express his views about the Chinese system.

147. The Tribunal asked whether he signed his names to those comments. He said no. The Tribunal asked if there was any way that the Chinese government could trace him. He said he was not sure. He said he was not sure because the website that he browsed was always blocked by the Chinese authorities. The Tribunal asked what does that mean, he could not access it at all or he could not respond? He said he cannot browse the website, it does not exist anymore.
148. At the start of the hearing the Tribunal asked, if at the end of the process with the agent when he was assisting the applicant to complete his Application for a Protection visa form, when he had typed everything out and it was ready to go, did the agent read back to the applicant what he was reading in English and translating into Mandarin, for the applicant to understand what he had written? The applicant said, "Yes." The Tribunal asked if the information in the two forms marked "B" and "C" was correct. The applicant said, "Yes." The Tribunal asked if they were still his claims. He said, "Yes." The Tribunal asked if there was anything that had been left out that he would now like to claim. He said, "No." The applicant acknowledged his signatures on Form "C" and "B". The Tribunal finds that the applicant had been given the opportunity to add this new claim at that point at the start of the hearing, but he did not do so.
149. Also, in this regard the Tribunal finds that the applicant has had the help of the agent, [name deleted: s.431(2)], who signed the applicant's Application for a Protection visa [in] September 2010, and appeared with him at the Tribunal hearing.
150. The Tribunal finds that the applicant manufactured the claim at the hearing about expressing political views about China whilst in Australia, in order to show, in response to the Tribunal's question, that he did show his disappointment with the Chinese system whilst he was in Australia.
151. Further, the Tribunal finds that the applicant has not provided any independent evidence that he has shown his disappointment with the Chinese system whilst he has been in Australia.
152. As a result, the Tribunal does not accept the applicant's claims about commenting on the Chinese system whilst in Australia.
153. The Tribunal will now consider the progression of the applicant's claims regarding the expression of his political views if he were to return to China.
154. The applicant claimed that he does not want to return to China due to most Chinese having a different political view to him, and he would have to live under the inescapable system that exists in China. His views included freedom, democracy, and no corruption; he hates the social system; there is no right to vote; and in China, peoples' fate is controlled by a minority of people and special interest groups.

155. The Tribunal indicated at the hearing that the applicant claimed that he did not want to return to China due to most Chinese having a different political view to him, and he would have to live under the system that is in China, and the system is everywhere. The Tribunal indicated, however, that he had not indicated that he was going to join a political party or act upon his feelings and views. The Tribunal said that if he does have a different view to the way China should be run, or how it exists, it may be that it will never come to the attention of the authorities because he will never say anything about it. The Tribunal said that it may be that if he does not say anything and he does not do anything about it, then he will not come to the attention of the authorities and he will not suffer any harm. The applicant said that is true.
156. However, he then went on to say but, the system has already hurt his father. So that is why he is thinking that if he returns to China, the system will hurt him as well. That is why it is true that he did not join any political party right now and he is not sure if he has to, or will, if he returns to China, or show his political view in public. The system of China is all over China. Even if he does not speak in public to show his political view, it is still there.
157. Later in the hearing he stated that as a Chinese citizen, he does hope the Chinese system can be changed; so if he returns to China, he will probably release his political views in public. That makes him have a fear of returning to China, and he is very disappointed with the system.
158. Later again, in relation to him being employed in China and possibly not being paid, he stated that if it happens and he appeals to the higher courts, the local government officer or related business people will stop him. That is all because of the system. He thinks that people have rights to speak out what they think and to express their political views.
159. The Tribunal makes the following findings about the applicant's claims regarding expressing his political views if he were to return to China. The applicant's claims about speaking out about political issues developed throughout the hearing as the Tribunal provided information to him under the s.424AA procedure, as follows. Firstly, the applicant agreed that he had not indicated that he was going to join a political party or act upon his feelings and views in China; and it may be that his political views will never come to the attention of the authorities because he will never say anything about them. The Tribunal finds that there are political parties in China (see the INDEPENDENT COUNTRY INFORMATION). He then indicated that the system had hurt his father and it might hurt him as well and he was not sure if he would join a political party if he were to return to China, or show his political view in public. He then stated that if he returns to China, he will probably release his political views in public. Then, later again, he stated that he thought that people have rights to speak out what they think and to express their political views. The Tribunal finds that the applicant has, during the course of the hearing, incrementally expanded his claims regarding the expression of his political views in China, from not acting upon his feelings and views, to probably releasing his political views in public. The Tribunal finds that he has exaggerated his claims in an attempt to make his claims stronger.
160. Secondly, the Tribunal finds that the applicant has referred to the claimed circumstances regarding his father's death as a trigger to express his political views. However, the Tribunal has found that it does not accept that his father was killed in the

way the applicant has claimed, and in those circumstances, the applicant's principal reason for objecting to the PRC system has no basis.

161. Thirdly, the Tribunal has not accepted the applicant's claim that he has shown his disappointment with the Chinese system whilst he has been in Australia. The Tribunal finds that if someone has political views that they claim they would express when they go back to China, then there is a real chance that they would have expressed those views in Australia beforehand. However, the Tribunal has not accepted that the applicant has expressed political views against China, whilst he has been in Australia.
162. The Tribunal finds, for the reasons above, that if the applicant does not say anything about his political views in China, this is not because of fear, it is because he has no reason to do so, based on the findings referred to above.
163. As a result of its findings, the Tribunal finds that there is not a real chance that the applicant will come to the attention of the authorities if he were to return to China as there is not a real chance that he will express his political views, or expose corruption contrary to the PRC government, the Chinese Communist Party or any PRC authority; and as a result, there is no real chance of serious harm related to his political views in the future. The Tribunal further finds that the applicant does not face a real chance of Convention related persecution for reasons of political opinion. The Tribunal also finds that the Tribunal does not accept that the applicant is very disappointed with the Chinese system, and he does not face a real chance of harm on this basis.
164. The Tribunal also finds that the applicant has not claimed that he will face discrimination amounting to persecution by members of the general PRC society.
165. The applicant claimed that if he were to return to China he cannot get a good job due to his lack of education, as he has only completed Year 10 studies. The Tribunal indicated that it was looking at whether he can be employed, not whether he can be employed in a good job. The Tribunal indicated at the hearing that he had said in his claims that he has been employed in Australia in construction and other employment, and perhaps that will be what he will be employed in, in China. The applicant said it is true that he can find a job but it does not mean that he can get what he should get in China. He stated that normally the official government officers and business have a special relationship, so most of the time he could not get his salary at all. The Tribunal asked whether he was saying he would work, but receive no money. He said, sometimes, when the project was finished. The Tribunal asked whether he had ever worked in China. He said, no. The Tribunal asked what he was basing this comment on. He said a lot of people around him have had the same thing happen. If it happens and he appeals to the higher courts, the local government officer or related business people will stop him. That is all because of the system. He thinks that people have rights to speak out what they think and to express their political views.
166. After the hearing the applicant provided references to country information to support his claim. The applicant did so by providing three references.
167. The first documents that the Tribunal read were at the website *chinadigitaltimes*. These documents are all China News items tagged with: "unpaid wages", with 34 items as at 6 November 2011. However, the Tribunal did not read the archived documents on the website, which stretched back to 2004.

168. The documents that the Tribunal read in document one, and the third document (*ilo-mirror.library.cornell.edu*) provided a picture of delays in payments to workers, and of non-payments, particularly in the construction industry, in China; sometimes resulting in unrest and demonstrations.
169. The second document, published in *China Daily, May 14, 2011*, (see INDEPENDENT COUNTRY INFORMATION) indicated that there were 14,361 labour disputes in Beijing reported to the authorities in 2010, with the vast majority in the construction industry. However, the report also indicated that many of the workers were migrant labourers; that six major Beijing companies were “named and shamed” being recently taken to court; and three of these companies were fined between 2,000 and 20,000 yuan and were ordered to pay the arrears to affected staff, and to pay compensation. It also stated that Huapu Property Group and two other companies were fined between 2,000 and 20,000 yuan, as well as being ordered to clear the arrears with affected staff, and to pay compensation.
170. Further, Beijing's labor inspection team helped 48,300 workers get unpaid salaries totaling almost 176 million yuan in 2010. Roughly 39,200 of claimants were migrant workers. Officials also dealt with 269 mass incidents caused by disputes. Furthermore, although the city is still seeing a peak in labor violations, the number of disputes fell by 23 percent in 2010 compared to 2009.
171. The Tribunal accepts that there are cases of non-payment or delayed payment particularly in the construction industry in China. However, the applicant’s own evidence shows that Beijing authorities were taking serious action to ensure the salary arrears were paid and to fine offending companies. Further, sometimes compensation to affected staff was also ordered. Further, the number of disputes fell 23% over 2009/2010. The Tribunal prefers this report and accepts it.
172. The Tribunal finds that the applicant could be employed as a construction worker in Beijing, where there is a real chance that his rights would be enforced, and he would receive his wages. The Tribunal also finds that there is a real chance that the applicant would be employed in employment sectors, other than construction, commensurate with his education level and abilities, and receive his pay.
173. The applicant claimed that if he is not paid and he appeals to the higher courts the local government officer or related business people will stop him. Based on the *China Daily, May 14, 2011*, article above, which the Tribunal accepts, the Tribunal finds that there are avenues of appeal that are successful. As a result, the Tribunal finds that the applicant does not have a real chance of Convention-related persecution on the basis that if he is not paid, and he appeals, that the authorities and business people will stop him.
174. The Tribunal has considered all the claims in relation to the applicant both singularly and cumulatively.
175. Accordingly, the Tribunal cannot be satisfied on the evidence before it that the applicant faces a real chance of persecution should he return to the PRC, now or in the reasonably foreseeable future.

176. The Tribunal is unable to be satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution for a Convention reason.

177. Accordingly, the Tribunal is not satisfied that the applicant is a refugee.

### **CONCLUSIONS**

178. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

### **DECISION**

179. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.