

1219589 [2013] RRTA 336 (7 May 2013)

DECISION RECORD

RRT CASE NUMBER:	1219589
DIAC REFERENCE(S):	CLF2011/140402
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Patricia Leehy
DATE:	7 May 2013
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

INTRODUCTION

1. There are two applicants in this matter. They are partners. The male applicant was born in Pingtang County, Fuzhou City, Fujian, China, on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants], and lived there all his life until he came to Australia on a student visa [in] June 2007. The female applicant was born in China on [date deleted: s.431(2)] and came to Australia on a student visa [in] May 2007. The applicants met about the end of 2010 and became lovers. Their student visas ceased at the same time, [in] March 2009, and they have been living in Australia since, without legal status.
2. The male applicant says that he left China to get a better education, and to practise his religion as a Christian more freely than he could in China. He fears that if he goes back to China his religious practice will be restricted by the Communist government. He is also afraid that he will be prevented from expressing any dissident views against the regime if he returns to China.
3. The female applicant did not make her own claims to protection, but relied on her membership of her partner's family unit. She said in a statement that she is also Christian, and that she and her partner were involved in Christian activities together after they met. She had not given oral evidence in relation to her protection claims to either the Department's officers or to the Tribunal (differently constituted) at a previous hearing of this matter [in] May 2012. She did not attend the earlier Tribunal hearing because she was pregnant, and was due to give birth in [month and year deleted: s.431(2)]. She gave evidence at the Tribunal hearing she attended with her partner and their child [in] March 2013.
4. Additional claims were made at the 2013 Tribunal hearing by the female applicant. She said that, apart from her concerns about the consequences of her partner's Christianity, she was also very worried about her child's unregistered status and the consequences of the contravention of the Family Planning laws in China by herself and her partner. She was afraid that the child would be deprived of rights such as education, and was also worried that she and her partner would be penalised by the authorities because they were unmarried.

APPLICATION FOR REVIEW

5. The applicants are applying for review of the decision made by a delegate of the Minister for Immigration to refuse to grant them Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
6. The applicants had applied to the Department of Immigration for the visas [in] August 2011 and the Delegate refused to grant the visas [in] December 2011. The applicants then applied to the Tribunal (differently constituted) for review of the decision [on a later date in] December 2011. The Tribunal affirmed the decision [in] May 2012.
7. The applicants applied to the Federal Court for review of the Tribunal's decision, and the matter was remitted to the Tribunal for reconsideration [in] November 2012.
8. The applicant's case was also considered under the Ministerial guidelines for stay in Australia under the Public Interest Guidelines Assessment. [In] June 2012 it was found that

the case did not satisfy the requirements for consideration of the exercise of the Minister's discretion under Section 417(1) of the Act.

9. The applicants appeared before the Tribunal [in] March 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicants brought their child, born on [date deleted: s.431(2)] in Sydney, to the hearing. There is no decision before the Tribunal to review in respect of this child.

RELEVANT LAW

10. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

11. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
12. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
13. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
14. 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.
15. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
16. 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)). Examples of 'serious harm' are set out in 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.

17. 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.
18. 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.
19. 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 being persecuted for a Convention stipulated reason. 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.
20. 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.
21. Whether an applicant is a person in respect of 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.

Complementary protection criterion

22. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

23. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
24. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Member of the same family unit

25. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition.

CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issues in this case are: the applicants' country of reference; whether the applicants are Christian; whether the applicants will be seriously harmed in China for reason of their Christianity; whether the male applicant has publicly expressed any dissident political views against the current regime in China or is likely to do so if he returns; whether the applicants will be penalised because they have contravened the Family Planning laws, and whether any such penalties amount to serious or significant harm in relation to the Refugees Convention or to the Complementary Protection legislation respectively.
27. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Nationality and Country of Reference

28. On the evidence before it, including the evidence of their passports, the Tribunal finds that the applicants are nationals of China, and have no right of entry to any other country. The Tribunal finds that the country of reference for the applicants is China.

Are the applicants Christian?

29. The male applicant in this matter was located by Compliance and interviewed [in] August 2011. When asked whether there were any reasons why he could not return to China, he said that there were not. He loved Australia and did not want to go back to China. The male applicant was then detained.

30. The male applicant submitted to the Department a statement by his mother, undated but translated [in] October 2011, in which she stated that after she returned to China [in November 2010] from Australia, where she had been on a student guardian visa to support her son in his studies, she attended “preaching meetings” which were held twice a week in her home town in Fujian. In mid-June 2011 the meetings were reported to the authorities, and a woman was arrested and detained. The applicant’s mother said she then stopped attending the preaching meetings, and with her friends raised money to get the imprisoned colleague released. She said in her letter that she had not wanted to tell her son about this previously, but decided to do so since his interview with a Departmental officer was near.
31. The male applicant also submitted to the Department a statement by a woman named [Ms A] who said she had known him for about two years. She is a friend of the applicant’s mother. [Ms A] attended the [Australian church deleted: s.431(2)] from 2008, apart from a short period when she lived in [city deleted: s.431(2)]. She said that she usually saw the applicant participating in a variety of Christian activities and discussing the Bible. She believed him to be a genuine Christian. [Ms A] had applied for refugee status and had been found to be a refugee by the Tribunal in March 2010. The Tribunal, differently constituted, had put it to the applicant at his Tribunal hearing in May 2012 that through his friendship with [Ms A] he would have known about Protection Visas some considerable time before he had lodged his application for protection. The applicant had responded that he knew [Ms A] had lodged an application, but had never asked her about it.
32. The male applicant submitted to the Tribunal evidence of his baptism together with a letter from [name deleted: s.431(2)], an elder of [Church 1], who said that the applicant had come to the church in 2011, had received basic instruction and had been baptised [in] October 2011. He said that the applicant also studied the bible with the Fellowship at the church. The applicant said at his Tribunal hearing in May 2012 that he started attending church soon after he arrived in Australia. After he and his mother moved to [suburb deleted: s.431(2)], they attended a Gospel Church which the applicant attended on and off for about six months. When he and his mother moved to central Sydney, the applicant attended the [church deleted: s.431(2)] about once a month, because he was working as a [tradesman] and did not have the time to go every week. The applicant delayed getting baptised because he did not think he was a “religious follower” He explained this at his Tribunal hearing in May 2012 as meaning that he did not feel he was religious enough to be baptised.
33. At his interview [in] October 2011 with an officer of the Department in relation to his Protection Visa application, lodged some two weeks after he was first detained, and at his Tribunal hearing [in] May 2012, the applicant said that he began attending Christian church services in China at a Government church with his parents at the age of six, but discontinued because of a warning from his school to stop attending. He told the Tribunal that he was about 8 at the time. The applicant told the Tribunal that his parents kept on attending a government church, but that they both stopped in July 2011.
34. The Delegate said that the applicant was confused at his interview about the denomination of the church he claimed to have attended since he arrived in Australia in 2007. The applicant said that he had been baptised in October 2011, shortly before his interview. His knowledge of Christian beliefs and practices was considered by the Delegate to be vague. The Delegate in conclusion did not accept that the male applicant was a Christian “whose depth of commitment would bring him to the adverse attention of the PRC authorities should he return to China” The Tribunal (differently constituted) appeared to accept that the applicant was

Christian but found that there was not more than a remote chance that he would be harmed for this in his home province of Fujian.

35. At his Tribunal hearing [in] March 2013, the male applicant said that he was currently attending [Church 1] where he goes about once every two weeks. The baby's birth means that he is unable to go more frequently. The male applicant said that his partner attends church with him. This evidence is supported by a letter dated [in] April 2013, submitted to the Tribunal [the following day], from [Pastor B] of [Church 1]. In his letter [Pastor B] reiterates that in August 2011 the male applicant "took part in a Christian faith course" and was baptised [in] October 2011. [Pastor B] states that the church has a home bible study fellowship program which the male applicant attended, and says that the male applicant "and his wife" have also been attending their Sunday Worship Service.
36. It was put to the applicant that it was surprising that as a practising Christian he did not feel it necessary to marry his partner. He said that they felt married in the sight of God, having sworn in front of the Cross to stay together. It was put to him that a marriage in the sight of God without a formal marriage might not be sufficient for most Christians to feel comfortable. He said that he and his partner did not know how they should go about getting married, and in any event it would be too expensive for them. Their parents would want to attend the ceremony.
37. The male applicant said that his parents were still not attending church in China. They had stopped any church activities after the incident referred to by his mother.
38. When asked why he had not applied for a Protection Visa until he had been located by the Department's Compliance officers, the male applicant said that in the past he did not know there were so many restrictions on religious practice in China. It was put to him that he must have known about this from [Ms A] who appears to have obtained a Protection Visa on the basis of her religion. The applicant said that although he knew she was a refugee, he only knew about it after he had been located by Compliance.
39. The applicant was questioned about his religious beliefs, with particular reference to the meaning of Easter. He spoke readily about what Easter meant to him and other Christians. He said that he owned a Bible, and read it.
40. The Tribunal read out independent information before it on the treatment of Christians in Fujian in China, from which both applicants come. It was explained that a 2009 report on the Protestant Church in Fujian Province in a Global Chinese Ministries newsletter confirms [earlier reports] that there are large numbers of independent house churches in Fujian. The report also indicates that '[i]n general, local government in Fujian seems fairly tolerant of unregistered believers as it is rare that one reads of cases of persecution of house-church Christians in this province'¹

¹ Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April
http://www.omf.org/omf/us/resources__1/newsletters/global_chinese_ministries/gcm_newsletter_2009/global_chinese_ministries_apr_09/the_protestant_church_in_fujian_province> Accessed 2 November 2009. The information is said to be taken from information has been taken from November 2008 *Tianfeng* and *History of Christian Missions in China* by K.S. Latourette. *Tianfeng* is a Protestant magazine published by the TSPM/CCC and can therefore not be taken to be unbiased in relation to house churches.

41. The independent information provided to the applicant also indicated that Fujian was rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China. In November 2007 the Department of Foreign Affairs and Trade (DFAT) advised that they had no information on the treatment of unregistered churches in Fujian and reported on the difficulty in gaining politically sensitive information in China.² Nevertheless a few actions against local Protestants in Fujian have been reported, including a December 2012 crackdown on members of a Christian sect, Eastern Lightning, condemned as an “evil cult” by the authorities.³ Similarly there was a report in 2009 of members of the Local Church, or Shouters, being targeted.⁴ Other than these incidents, there were reports in 2006 of police closing unregistered places of worship in various provinces including Fujian, according to the US Department of State.⁵
42. In response to this information, the male applicant said that the churches in Australia are different from the government churches in China. An elder in his church had told the applicant that someone who had translated the Bible had been arrested. The applicant said that the Chinese government thinks it is above everything, including the church.

Will the applicants be seriously harmed in China for reason of their Christianity?

43. On the evidence before it, the Tribunal accepts that the male applicant is a practising member of a Protestant Christian church, and would seek to continue to practise his religion if he returned to China. The Tribunal is not satisfied, however, on the basis of the country information outlined above, that there is a real chance that the male applicant would be persecuted for reason of his Protestant religion if he returned to China. On the applicant’s evidence, he might well be reluctant to attend a registered church, but even if he attended an unregistered church, the Tribunal is not satisfied that there is other than a remote chance that he would be persecuted for this reason if he returned to China. The Tribunal is therefore not satisfied that the applicant has a well-founded fear of persecution in China for reason of his religion.
44. The female applicant said at the Tribunal hearing that she was worried that her husband might be harmed because he is a Christian. She said that she herself had not been baptised as a Christian, and did not claim that she thought that she would be harmed because she practised Christianity. She has, however, regularly attended Church services at [Church 1] with the male applicant.
45. On the evidence before it, the Tribunal accepts that the female applicant has attended Church services with her male partner, but it finds that she herself is not a committed Christian. Even if she were, the independent information before the Tribunal indicates that there is not a real chance that she would be persecuted for reason of her religious practice as a Protestant Christian if she returned to China in the foreseeable future. The Tribunal is therefore not

² Department of Foreign Affairs and Trade 2007, *DFAT Report No.07/83 – China: ‘Shouters’ Christian group and Fujian Province*, 28 November.

³ Li, Yao 2012, ‘Christians warn against cult influence’, *China Daily*, 20 December

<http://www.chinadaily.com.cn/china/2012-12/20/content_16033787.htm> Accessed 18 March 2013

⁴ Congressional Executive Commission on China 2009, *Annual Report 2009*, 10 October, pp. 138-139.

⁵ US Department of State 2007, *International Religious Freedom Report 2007: China (includes Tibet, Hong Kong, and Macau)*, 14 September, Introduction & Section 2.

satisfied that the female applicant has a well-founded fear of persecution in China for reason of her religion.

46. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of their being removed from Australia to China there is a real risk that the applicants will suffer significant harm for reason of their religion.
47. The country information set out above indicates that in general Fujian province has a reasonably tolerant attitude towards Protestant churches and their adherents, even though this tolerance does not extend to what the authorities consider to be “evil cults”. Having considered the evidence before it, and taking into account the exhaustive definition of “significant harm” in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicants will suffer significant harm because of their religious practice if they are returned to China. It is not satisfied that Australia has protection obligations in respect of the applicants within the meaning of the Complementary Protection legislation for reason of their religious beliefs or practice.

Has the male applicant publicly expressed any dissident political views against the current regime in China and is he likely to do so in future?

48. The applicant claimed in his Protection Visa application that he wanted to talk to the public about his ideas. He believes that he will be monitored by the government for doing this, and that he might be arrested or charged with serious crimes if he expresses his ideas which might be seen to threaten the leadership in China. He reiterated these concerns at his Tribunal hearing in March 2013.
49. The applicant had submitted no evidence that he had been engaged in any demonstrations or protests in Australia against the Chinese authorities. He had not been involved in any dissident activity in China. The applicant said that he had been working hard up to the time of his location by Compliance officers, and since then has been looking after his partner and their child. He has not engaged in any political activities in Australia. When questioned about his political activity at his Tribunal hearing in March 2013, the applicant said that he had not engaged in any activity against the regime, including posting any comments on the Internet. He said that he was afraid of his freedom being restricted and his activities monitored in China. He said that the Chinese government is even above the law in China.
50. On the evidence before it, the Tribunal is not satisfied that the applicant has engaged in any political activity against the Chinese regime in the past. It is not satisfied on his evidence that there is a real chance that he will engage in any political activities against the regime if he returns to China in the foreseeable future. The Tribunal is not satisfied that the applicant will be persecuted in a Convention sense for reason of his political opinion, real or imputed, if he returns to China in the foreseeable future. It is not satisfied that the applicant has a well-founded fear of persecution in China for reason of his political opinion, within the meaning of the Refugees Convention.
51. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China there is a real risk that the applicant will suffer significant harm for reason of his political opinion, real or imputed, if he returns to China.

52. The Tribunal has found that the applicant has not engaged in any political activity, either on the internet or anywhere else in the past, and on the evidence before it, is unlikely to engage in any political activity if returned to China.
53. Having considered the evidence before it, and taking into account the exhaustive definition of “significant harm” in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicant will suffer significant harm because of his political opinion or activity if he is returned to China. It is therefore not satisfied that the applicant is a person in respect of whom Australia has protection obligations within the meaning of the Complementary Protection legislation.

Will the applicants be penalised for contravening Family Planning regulations in Fujian?

54. At the Tribunal hearing in March 2013, the male applicant was asked whether he was afraid there might be problems if he returned to China because he had a partner and child, but was unmarried. The applicant said that he was not worried, because he could get a false marriage certificate and other documents and they would not run into any problems.
55. The female applicant at the Tribunal hearing in March 2013 was not present in the hearing room when the male applicant was giving his evidence. She said at the hearing that she was afraid that she and her partner would be penalised for breaking the law in China. This was because, according to Chinese law, her partner had not reached the legal age for marriage, but they had had a child together. The child would not be able to get household registration and would be penalised.
56. It was put to the applicant that her partner had now reached the legal age for marriage, which was 22. It was explained that the country information indicated that the *Marriage Law of the People’s Republic of China 2001* sets the minimum marriage age at 20 years for women and 22 years for men.⁶ Consequently, the state will not recognise the marriage of younger individuals and where children are born to couples who are too young to marry penalties are imposed.⁷ It was put to the female applicant that her partner had said he was not worried about this because he could get a false marriage certificate. The applicant said that she was nevertheless worried about their situation. It was put to the applicant that, according to the country information available to the Tribunal, the worst that could happen to her and her partner was the payment of a fine.
57. The applicant recounted the history of her own family. She said that there were three children in her family, and her parents had had to pay a fine for the second and third children. Not only did they have to pay a fine, but her parents and her grandmother were arrested and detained, and half of their house was demolished. The applicant said that she had been registered and her youngest sister had been registered but the penalty had been more than a fine. It was put to the applicant that this did not appear to be usual in China. The applicant

⁶ *Marriage Law of the People’s Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People’s Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People’s Republic of China

<<http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm>> Accessed 10 May 2006; see also US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6

<<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186268>> Accessed 6 February 2013

⁷ Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request: CHN37505*, 12 November

said that she had read a lot of reports on the internet, and even though people had paid fines for having a child, the mothers were also detained.

58. It was put to the applicants at their hearing that independent information before the Tribunal indicated that it was a breach of the law to have a child outside marriage. According to the 2012 US Department of State's report on human rights practices in China, having children out of wedlock is illegal in 'almost all provinces' of China and doing so attracts a social compensation fee.⁸ In Fujian province, DFAT advised in February 2010 that if a couple marries after the birth of a child they will most likely still be charged a social compensation fee. DFAT further noted, however, that in Fujian 'If a child is conceived out of wedlock, but the parents marry prior to the birth of the child, no social compensation fee is charged'⁹
59. The applicant was given a document on Family Planning Fines in Fujian from 1991 to 2012 and it was explained that the tables on fines indicated that rural parents were required to pay a different fine from urban parents for having a child outside marriage¹⁰. Fines for rural parents ranged from 35116 yuan to 52674 yuan (about \$A5300 to \$A8088). Those for urban parents ranged from 99628 to 149442 yuan (about \$A15,700 to \$A23,600). These fines equate to four to six times the average annual disposable income of urban residents or the net average annual income of rural peasants in the previous year.
60. It was explained that the Tribunal needed to have considerably more information about the financial situation of the applicants and their parents before it could reach any conclusions about their capacity to pay the fines indicated, and whether any incapacity to pay would affect the status of their child as an unregistered or "black" child. The female applicant was also asked to submit any information she had about any punishment imposed on parents beyond fines.
61. The female applicant said that she came from a rural area in Fujian. Her parents ran a stall selling grains and rice. Her parents' income is only just sufficient to live on. Her younger sister is at school, her elder brother is engaged to be married. The applicant said that her parents had paid the fines for children outside the Family Planning regulations by borrowing money from friends and relatives. She and her younger sister are registered.
62. The female applicant said that she had completed two semesters' study in Australia, and then her parents could not afford to pay any more for her to continue studying. The female applicant then worked part-time until she had the baby. The applicants and their child live in two rooms of a house for which they pay rent. They share a kitchen and bathroom with another person. Three of them live in a granny flat behind a house. The applicants are helped financially by the male applicant's family and by her mother. The applicants were asked to submit to the Tribunal by [a date in] April 2013 the following documents: a letter from their church elder about their church attendance in the past year; a submission about their capacity to pay the fines set out in the document given to them at the Tribunal hearing about fines

⁸ US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186268>> Accessed 6 February 2013

⁹ Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February

¹⁰ *Population and Family Planning Regulation of Fujian Province (China)*, Promulgated 26 July 2002, (Effective 1 September 2002), UNHCR <<http://www.unhcr.org/refworld/pdfid/4242b7394.pdf>> Accessed 7 April 2005 ; *Fujian Province Family Planning Regulations (China)*, Promulgated 28 June 1991, (Effective 10 July 1991), Immigration and Refugee Board Canada

payable for contravention of Family Planning regulations in Fujian; any information they had about penalties imposed on people beyond fines.

63. It was explained to the applicants that the fines set out in the document that they had been given were applicable in the event that they were not married. The female applicant was asked whether she intended to stay with the male applicant. She said that she did. She was asked why they had not married. She said that they had checked it out, and found it was too expensive to get married.
64. Two extensions of time were granted to the applicants to provide the information asked for by the Tribunal, up to [a date in] April 2013.
65. [In] April 2013, the applicant submitted a significant amount of country information apparently downloaded from *The Epoch Times*, as well as the letter from the [Church 1] elder referred to above at para 35.
66. According to Wikipedia, *The Epoch Times* is often connected with the Falun Gong spiritual group. A 2006 report by the U.S. Congressional Research Service listed the newspaper as a Falun Gong affiliated media source,¹¹ and Professor David Ownby, an expert on Falun Gong, said that after years of ill-treatment by journalists, "they decided to publish a newspaper by themselves to publicize their beliefs"¹². According to Wikipedia, "The newspaper is heavily critical of the Chinese Communist Party (CCP) and the policies of Chinese government. In 2004, the newspaper published the "Nine Commentaries on the Communist Party", an in-depth critique of China's ruling regime. The newspaper covers causes and groups opposed to the CCP, including Falun Gong, dissidents, activists, and supporters of the Tibetan government-in-exile.
67. The English-language translation of *The Epoch Times* information submitted by the applicant was extremely poor, to the point of being unintelligible. This, combined with the fact *The Epoch Times* is a publication which is highly critical of the Chinese government and can hardly be considered to be "independent", has resulted in the Tribunal giving the information little weight.
68. The Tribunal attempted to make sense of the information from *The Epoch Times* submitted. One reported incident appears to relate to the selling of babies by family planning party cadres in Fujian. Another related to family planning inspections in Xianyou, Fujian, where the relatives of people who have breached family planning regulations are detained, and women who are pregnant or appear to be pregnant are closely monitored. Other articles submitted from *The Epoch Times* report on forced late-term abortions which appear to have taken place in Fujian in 2012. Other articles appear to be about the fate of those unable to pay fines. Many articles related to events which occurred some ten to fifteen years ago.
69. The Tribunal conducted a search of *The Epoch Times* English language version, and found a number of articles critical of family planning policy in China. However, over a period of some years up to the present there were few references to such matters as forced abortions as a result of the application of Family Planning laws. *The Epoch Times* published an article on 14 June 2012 headed "Late Term Forced Abortion Incenses Chinese Netizens" (<http://www.theepochtimes.com/n2/china-news/late-term-forced-abortion-incenses-chinese->

¹¹ Thomas Lum (August 11, 2006). "China and Falun Gong". Congressional Research Service

¹² Radio Canada ombudsman report, Pg10

[netizens-252090.html](http://www.theepochtimes.com/n2/china-news/chinas-one-child-policy-may-be-relaxed-province-by-province-357307.html)) which reported on the negative reaction of hundreds of thousands of Chinese internet users to a report of a late term forced abortion. Recently, on 5 March 2013, *The Epoch Times* published news that “China’s One-Child Policy May Be Relaxed Province by Province” (<http://www.theepochtimes.com/n2/china-news/chinas-one-child-policy-may-be-relaxed-province-by-province-357307.html>).

70. The most recent human rights report by the US State Department (2012 *Country Report on Human Rights Practices*) published in April 2013 for China refers to the country having “a coercive birth-limitation policy that in some cases resulted in forced abortion (sometimes at advanced stages of pregnancy) or forced sterilization”. It states, relevantly:

In 2010 Xuzhou in Jiangsu Province was the site of a high-profile court proceeding in which a 30-year-old female plaintiff sued the local family-planning bureau, claiming that she had been barred from a civil service position in the county government for giving birth to a child before marriage. Although she married the father soon after the child’s birth, the court upheld the family-planning bureau’s decree that the birth of an out-of-wedlock child made her ineligible for the government position.

71. On the evidence before it, the Tribunal accepts that China continues to administer a highly coercive family planning policy which can result in substantial fines for breaches of the law, as well as other penalties, including punishment for unpaid fines which may result in children not being registered. The Tribunal accepts that unregistered children, commonly known as *black children*, do not have the full rights of a registered child.¹³ In particular, they are not entitled to public education and, as a result, their parents must pay for private education.¹⁴ The Tribunal notes that while there are some exemptions to family planning rules for Chinese students returning from study overseas, DFAT advised in February 2010 that the exemptions ‘do not apply to parents who have a child out of wedlock’¹⁵ As noted above at para 53, advice from DFAT indicates that even if the parents marry after the birth of their child, a social compensation fee, or fine, is “most likely” payable. In the applicants’ case, the child was born before the male applicant was 22, the legal age for marriage.
72. If the applicants were to return to China with their child, they would need to register the child in order for it to have access to free education and other benefits. The Tribunal accepts that it would quickly become apparent to the authorities that the applicants’ child was born out of wedlock, and before the legal age for marriage of the child’s father. Even if the applicants were to marry immediately, DFAT advice indicates that a social compensation fee is still “most likely” payable. The Tribunal finds that the applicants would be liable to pay a social compensation fee for having their child out of wedlock if they returned to China. The Tribunal does not accept on the evidence before it that they would be liable for any other penalties. The Tribunal accepts that if the applicants were unable to pay the fine imposed on them, they would be penalised by having an unregistered or “black” child. It also accepts that

¹³ Zhou, Y 2005, *Uncovering Children in Marginalization: Explaining Unregistered Children in China*, 14 June, International Union for the Scientific Study of Population, p.2 & 5
<<http://iussp2005.princeton.edu/download.aspx?submissionId=50479>> Accessed 2 August 2007

¹⁴ Zhou, Y 2005, *Uncovering Children in Marginalization: Explaining Unregistered Children in China*, 14 June, International Union for the Scientific Study of Population, pp.4-5
<<http://iussp2005.princeton.edu/download.aspx?submissionId=50479>> Accessed 2 August 2007; Department of Foreign Affairs and Trade 2007, *DFAT Report 691 – RRT Information Request CHN32173*, 31 August; Department of Foreign Affairs and Trade 2004, *DFAT Report No. 327 – China: RRT Information Request: CHN17017*, 7 October

¹⁵ Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February

one or both of the applicants could be excluded from government employment, as indicated above at para 70.

73. Although the applicants were asked to provide information following their Tribunal hearing in March 2013 on their capacity to pay any fines imposed as a result of their breaching family planning regulations, the only information submitted in relation to their financial circumstances were two bank statements, one for a joint bank account and the other for a bank account in the name of the male applicant. The bank statement for the joint account gives the balance in the account [in] March 2013 as \$466.39 (credit), but gives no transaction information. The bank statement for the male applicant is for the period from [September] 2012 to [March] 2013, and show a credit balance of \$16.77.
74. The applicants' evidence at the Tribunal hearing indicates that they are currently in poor financial circumstances. The Tribunal accepts that they would be unable by themselves to raise the amount of money required to pay the social compensation fee for breaching family planning regulations, an amount ranging from some \$A5,000 (for rural parents, as in the case of the female applicant's former residence) to an amount of about \$A24,000 (for urban parents, as in the case of the male applicant's former residence).
75. On the basis of the applicants' evidence at their Tribunal hearing, the Tribunal finds that the applicants' families support their relationship, and would therefore be willing to offer them financial assistance. The female applicant's evidence indicated that her parents are unlikely to be able to offer financial assistance, having had themselves to borrow to pay social compensation fees in the past for their children, including the female applicant. They also appear from the female applicant's evidence to be in poor financial circumstances currently. They were unable to support her continued study in Australia.
76. The male applicant's evidence about his family indicates that that his father is not working although his mother now works running a [stall]. The applicant's younger brother is [studying] in China, and his parents own their own home. The male applicant described his family's circumstances at his Tribunal hearing as "just average". No further evidence has been submitted about the financial circumstances of the male applicant's family, and the Tribunal is unable to make a finding about whether his family is likely to be able to raise the money to pay a social compensation fee for the breach of family planning laws.
77. In the worst case, if the applicants are unable to raise the money to pay the requisite fine, their child will be an unregistered or "black" child, unable to access the advantages of a registered child. On the evidence before it, the Tribunal accepts that the applicants may be penalised if they return to China in the foreseeable future, by being unable to register their child. It also accepts, on the evidence before it, that the applicants may be excluded from government employment. The Tribunal does not accept, on the evidence before it, that the applicants will be subjected to any other penalties for having a child born outside wedlock.

Do the penalties for the contravention of family planning laws by the applicants amount to persecution in a Convention sense?

78. The Family Planning regulations in China, while acknowledged to be highly coercive, apply to all its citizens. There is no evidence before the Tribunal to indicate that the applicants would be treated differently from any other Chinese citizen in relation to the family planning legislation. While it has considered whether the male applicant's Christianity would affect his treatment in this regard, the Tribunal does not accept, on the evidence of the country

information set out above, that it would make any difference to the authorities' treatment of the applicants for breaching family planning regulations. While the Tribunal acknowledges that these laws place a very heavy penalty on the applicants, it finds that any such penalty would be imposed as a result of the administration of a law of general application, and therefore any harm to the applicants would not constitute persecution in a Convention sense.

79. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicants will be subjected to Convention-based persecution if they return to China in the foreseeable future because they have breached the Family Planning regulations of that country. The Tribunal is not satisfied that the applicants have a well-founded fear of persecution in China within the meaning of the Refugees Convention.

Do the penalties for the contravention of family planning laws by the applicants constitute significant harm for the purposes of the Complementary Protection legislation?

80. The Tribunal has accepted that the applicants are likely to incur penalties as a result of breaching family planning laws in China. It has accepted that the fines are onerous, and that the applicants are unlikely to be able to pay them without substantial assistance from their families, assistance which may not be able to be provided, despite the families' willingness to support the applicants. The Tribunal has further accepted that there are substantial grounds for believing that there is a real risk that as a result of failure to pay the social compensation fees the applicants' child may be an unregistered or "black" child. It has not accepted that the applicants would be subjected to any further penalties as a result of their contravention of family planning policy, but it does accept that having a "black" child would be a source of great distress to the applicants.
81. The Tribunal accepts that the penalties faced by the applicants may well amount to harm, although it does not accept on the evidence that this harm amounts to "significant harm" according to the definition set out in the legislation at s36(2A):s5(1). However, even if it were to accept that the penalty constituted significant harm within the meaning of the legislation, s36(2B) of the Act states that "there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: ... (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally".
82. As discussed above in relation to the Refugees Convention, the Tribunal has found that any penalty incurred by the applicants for breaching the family planning regulations would be imposed on them as a result of the administration of a law of general application. There is no evidence before the Tribunal that the applicants would be treated differently in this respect from other Chinese nationals. It has made this finding having taken into account that the male applicant is a practising Christian, as detailed above at para 73. The real risk faced by the applicants is therefore one faced by the population of the country generally, and for this reason the Tribunal is not satisfied that there is a real risk that the applicants will suffer significant harm if they are returned to China.
83. For the reasons given above the Tribunal is not satisfied that either of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.