

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75973

AT AUCKLAND

<u>Before:</u>	R J Towle (Member)
<u>Counsel for the Appellant:</u>	P Thoman
<u>Appearing for INZ:</u>	No Appearance
<u>Date of Hearing:</u>	11, 12 & 13 December 2006
<u>Date of Decision:</u>	9 March 2007

DECISION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of Immigration New Zealand (INZ), declining the grant of refugee status to the appellant, a citizen of China.

[2] This is the second time this appellant has applied for refugee status. His first application was dismissed by the RSB on 5 October 2001. The appellant did not appeal against that decision.

[3] The determinative issues in this appeal are:

- (a) Whether the Authority has jurisdiction to consider the appellant's second claim to refugee status under s129O(1) of the Act; and
- (b) If so, whether he has a well-founded fear of being persecuted on return to China because of his changed family circumstances in that country.

Chronology to date

[4] The appellant arrived in New Zealand on 26 April 1997 and applied for

refugee status on 21 May 1997. He was interviewed by the RSB on 20 April 2000 and 17 July 2000 and 18 June 2001. His claim was declined by the RSB on 5 October 2001. His work permit was revoked by INZ on 1 March 2002. The appellant appealed to the Removal Review Authority (RRA) on 15 March 2002 and, in a decision dated 3 March 2003, the RRA declined his appeal. The appellant then remained in New Zealand unlawfully and undetected until June 2006, when a removal order was issued against him on 23 June 2006. Since then, he has been held in custody in Mt Eden Prison.

[5] The appellant lodged a second claim to refugee status on 29 June 2006. The claim was received by the RSB on 30 June 2006 and the appellant was interviewed on 13 and 15 August 2006. In a decision dated 30 October 2006, the RSB accepted that it had jurisdiction to receive the appellant's second application but declined his claim on substantive grounds. The appellant appealed against that decision to this Authority on 2 November 2006.

JURISDICTION TO CONSIDER SECOND CLAIM FOR REFUGEE STATUS

[6] The Act permits a second (or subsequent) application for refugee status to be made provided certain jurisdictional criteria are met.

[7] The jurisdiction of the RSB to consider second claims is found in s129J of the Act.

[8] The Authority's jurisdiction to hear and determine appeals from decisions of the RSB is found in s129O(1) of the Act:

"A person whose claim or subsequent claim has been declined by a refugee status officer, or whose subsequent claim has been refused to be considered by an officer on the grounds that the circumstances in the claimant's home country have not changed to such an extent that the subsequent claim is based on significantly different grounds to a previous claim, may appeal to the Refugee Status Appeals Authority against the officer's decision."

[9] In the past, the Authority has articulated two somewhat different approaches to the question of jurisdiction.

[10] Under the first approach, originally articulated by the Authority in *Refugee Appeal No 2245/99* (28 October 1994) pursuant to the terms of reference (30 August 1999) under which the Authority then operated before the Immigration Amendment Act 1999 came into force on 1 October 1999, the question of

jurisdiction to hear and consider second refugee claims is a mixed one of fact and law. This approach was largely reaffirmed by the Authority in *Refugee Appeal No 75576* (21 December 2006) as being the appropriate test pursuant to s129O(1) of the amended Act.

[11] A second approach was taken by the Authority in *Refugee Appeal No 75139* (18 November 2004). In that decision, the Authority considered that the jurisdictional question under s129O(1) of the Act is assessed simply by comparing the first claim with the second claim, as asserted by the claimant.

[12] Under this second approach neither the RSB, at first instance, nor the Authority, on appeal, is required to have regard at all to the truthfulness of the second claim. If the second claim, as asserted by the appellant, meets the jurisdictional threshold then jurisdiction is established and the Authority would then embark on the determination of the merits of the second (or subsequent) claim for refugee status.

[13] For the reasons that follow, the Authority finds that under either approach, the appellant has satisfied the jurisdictional threshold established by s129O(1) of the Act.

THE APPELLANT'S FIRST REFUGEE CLAIM

[14] The appellant was born in a city in Fujian province and is Han Chinese.

[15] During his student years, the appellant participated in student demonstrations on 4 and 5 June 1989 to support the movement for freedom, democracy and human rights in China. He did not make any speeches, nor did he have any prominent role other than as a participant amongst a crowd of thousands.

[16] Following the demonstrations, the appellant felt it would be safe to return home. However, shortly afterwards, he was arrested by the Public Security Bureau (PSB) and detained for two weeks. He was beaten and questioned on numerous occasions by the authorities during this period. In late June 1989, he was released after his father had paid a bribe to the authorities.

[17] Because of his involvement in the demonstrations, the appellant was not permitted to return to school and thereafter he was unemployed. He was not particularly interested in politics but participated in commemoration events of the “June 4th incident” in subsequent years.

[18] Between 1991 and 1995, the appellant tried various avenues of employment however, when the authorities discovered these activities, they closed him down due to his involvement in the student protests in 1989.

[19] In May 1994, the appellant married XX and they had a child, YY, the following year.

[20] At the 4 June commemoration in 1996, the appellant attended a memorial service for protesters. The meeting was broken up by PSB officials but the appellant was able to escape without being apprehended and remained in hiding after that time. Later that month, he learned that the PSB had visited his family home with a warrant for his arrest.

[21] Fearing for his safety, the appellant arranged the services of an agent who organised an overland trip from China into south-east Asia and then a subsequent flight to New Zealand. After his departure from China in August 1996, he learned that the authorities had again visited his family home with an arrest warrant in his name. After a brief period in south-east Asia, the appellant bought a false passport and travelled to New Zealand where he arrived on 26 April 1997.

[22] In assessing the claim, the RSB accepted that the appellant had attended various commemorative services for the June 4th incident but did not accept that any arrest warrant had been issued in his name in 1996, nor that he had been of any interest to the authorities after that time.

[23] In declining the appellant’s claim, the RSB found:

- (a) that his participation in the 1989 student demonstrations did not attract the adverse attention of the authorities;
- (b) that the appellant’s interest in political matters was superficial and not likely to lead him into any confrontation with the authorities in the future;

- (c) that the appellant's employment difficulties were not related to the Refugee Convention and were not of sufficient seriousness to amount to persecution; and
- (d) that the appellant's illegal departure from China may place him in breach of the ordinary criminal law, but would not amount to persecution for any of the stated reasons in the Refugee Convention.

[24] On the advice of his then counsel, the appellant did not appeal to the Authority against the decision of the RSB.

THE APPELLANT'S SECOND REFUGEE CLAIM

[25] The appellant reaffirms the history of events that he described to the RSB in his first claim. Since he has been in New Zealand, the appellant has remained in regular contact with his wife and daughter. Between 1997 and 2001, the appellant spoke with both of them on a regular basis and has remitted any surplus monies that he has earned in this country for their benefit and support in China.

[26] In early 2001, the appellant's relationship with his wife began to deteriorate because the appellant had met and formed a relationship with a new partner, AA, a Chinese student studying in New Zealand. The appellant and AA had met through mutual friends and, after a brief period of courtship, they fell in love and decided to live together. The appellant had a frank relationship with AA and told her about his marital situation and that although this was an obstacle to their getting formally married, he was committed to a permanent *de facto* relationship with her.

[27] On learning the news of this new relationship, the appellant's wife was upset and she was vehemently opposed to any divorce unless the appellant was prepared to pay a substantial financial settlement to her. The appellant has been unable to proceed with the divorce proceedings for two reasons:

- (a) He has not got any funds to satisfy his wife's settlement claim; and
- (b) He cannot authorise a representative to act on his behalf in China because he does not have a valid passport or visa in this country. As such, he is not able to enlist the services of the Chinese embassy in this country.

[28] The appellant's wife's attitude to divorce is intractable. Unless she is paid the sum of RMB150,000 (an estimated NZ\$27,500 at current exchange rates), together with RMB1,000 for living expenses, she will not agree to a divorce.

[29] By the time the appellant's first claim was finally declined in October 2001, he was in a serious and stable relationship with AA. She was unable to return to China because she was in the middle of her studies and her family had made a considerable financial sacrifice to allow her this opportunity.

[30] Despite the decline of his claims to status in New Zealand by the RSB and the RRA, he still felt he would be at risk in China. He believed that he would be imprisoned and persecuted. Because of his small stature and softly spoken nature, he felt that he would easily be bullied and ill-treated by the authorities.

[31] In November 2004, the appellant and AA had a son. His birth was registered in New Zealand and, under the law then prevailing, is a New Zealand citizen. His birth has not been registered with the Chinese authorities.

[32] In early 2005, AA and their son wanted to travel to China to visit her own and the appellant's families. She was advised that her son would not be permitted entry into China. She decided to travel to Hong Kong where, following payment of a bribe, she was given an entry and exit permit for her son on the basis of false information she provided about her residence in Hong Kong. During this trip, AA was able to visit the appellant's own family and also her own. She did not encounter any difficulties leaving the country through Hong Kong because she had a false exit permit already secured for her son.

[33] In December 2005, the appellant and AA had a second child who was also registered as a New Zealand citizen under the prevailing immigration policy.

[34] In June 2006, the appellant was arrested by the Compliance Branch of Immigration New Zealand and placed in Mt Eden Prison.

[35] By this time, he was deeply concerned for his own security if he were returned to China and the effect this would have on his partner and two young New Zealand citizen children.

[36] The appellant instructed his counsel to appeal against his removal to the Associate Minister of Immigration on 30 June 2006 but this was declined on 19

July 2006. On the basis of these fears, the appellant felt his only other avenue to remain in this country was to lodge a second claim to refugee status.

[37] The appellant believes that there has been a significant change in his circumstances since his previous claim. He is concerned that, if he were to return to China, he would suffer because:

- (a) He has violated the marriage law of China by being in a *de facto* relationship with AA for five years without first obtaining a divorce from his wife in China. Chinese law would regard him as a “bigamist” and he would face a significant period of imprisonment. The appellant is deeply opposed to the Marriage Law. He wanted to divorce his wife a long time ago and to legalise his relationship with AA but has been prevented from doing so by the rules applied by the Chinese authorities – which have also forced him to cohabit with AA outside of marriage and to violate the Chinese criminal law;
- (b) He has violated the ‘one child’ policy as he has two children born in New Zealand without prior permission from the Chinese authorities, bringing the total number of his children to three. He has heard stories from family and friends that forced sterilisation practices have occurred in his home village. He has heard that women in his locality with a number of children have been forcibly sterilised, including termination of pregnancy by surgery, and have faced very heavy financial penalties;
- (c) The punishment for violating the policy is a fine of RMB140,000 for the first illegitimate child and RMB280,000 for a second child, bringing a total of RMB420,000 (estimated at NZ\$77,000 at current exchange rates). He also believes that his children will be deprived of medical insurance, education and any quality of life if they returned to China with him;
- (d) He would face social ostracism and alienation in Chinese society for breaching social norms; and
- (e) The Chinese authorities would know of his refugee claim and his illegal departure from China and that these circumstances would be

exacerbated due to his long and illegal absence from China and his subsequent breaches of Chinese laws.

[38] The appellant is concerned that if he were returned to China, he would be irrevocably separated from his present partner and children. He would be denied any passport in the future and prevented from leaving China. This would make it impossible for his family to remain together outside of China. He would also be unable to live with them in China because of the operation of the residence laws (*hukou*) whereby his partner would have to live in her former place of residence and he in his own. These are separated by large distances. If he was unemployed, he would be unable to maintain any meaningful family connection with his partner and young children.

[39] The present circumstances for his partner and two children are very difficult. Her own immigration status is increasingly uncertain. She has lost a large amount of money to an immigration consultant, has no source of income whatsoever and her financial situation is very precarious. The appellant's parents are of very limited means themselves and would be unable to provide the appellant with any meaningful accommodation or support if he were to return to China.

[40] The appellant did not consider the full ramifications of having two children with AA at the time. He was living in a happy and stable relationship with her and the threat of his arrest and return to China was not, during this period, imminent nor at the forefront of his mind. This changed, however, when he was arrested by the INZ in June 2006. During his period in detention and since, he has reflected on the serious consequences for him and his family if he were to return to China.

[41] His children would be in a very difficult situation. The Chinese government does not recognise dual nationality. As the children presently have New Zealand citizenship, he doubts whether they would be allowed to return to China and, if so, they would be treated as non-nationals and therefore deprived of access to any health, social or other citizen rights.

[42] In addition to all these various factors, the appellant believes that the authorities will have a record of his prior activities with the 4th June commemorations and that this would exacerbate the treatment he might receive from them in that he would be labelled a "subversive" person.

Evidence of partner, AA

[43] AA gave evidence in support of the appellant's claim. She came to New Zealand at the end of 2000, initially for a language course in tourism. She then undertook a four-year study period in tourism that was funded by her parents in China. Since December 2005, she has been looking for jobs in this country but this has proved difficult for international students. She paid an immigration consultant NZ\$14,000 to assist her in this search but no work has been forthcoming. The consultant has retained the funds.

[44] AA confirmed the appellant's account of the circumstances in which they met. She found him to be a genuine, mature and thoughtful man who would make a responsible partner and a good parent. She was aware that at the time he was still married but, because of their love for each other, this was not an immediate threat to their happiness.

[45] Not long after they began to cohabit, they made enquiries with the Chinese consulate and found out that it would be very difficult for him to divorce his wife from New Zealand because of his lack of a passport and a valid visa in this country. Neither of their pregnancies were planned but both the appellant and AA were delighted by their new family and, in her view, the appellant has been a reliable and excellent father to their children. AA confirmed the appellant's difficulties if he were to return to China. If AA and the children were to return, they would be obliged to live with her own family in the north of China, a large distance from the appellant's place of residence. Moreover, his wife is angry and vindictive. Unless he paid her the large sum required, she could cause trouble with the authorities concerning his bigamous status and his violation of the one child policy.

[46] AA has conducted a lot of research on the Internet concerning the legal situation if the family were to return. She believes that any child of a bigamous relationship would get harsher penalties than other children when applying for *hukou*. It would be very difficult for the children to be placed on one *hukou*. Even if she and the appellant were lawfully married, it would be difficult to get their New Zealand-born children registered.

[47] If AA were to return to China, she would also face serious difficulties as she is in violation of the same marriage laws and one child policy as the appellant. She is also concerned about practices in China whereby women who violate the one child policy can be sterilised. This happens frequently in China, including in her own province and she has had friends who have been forcibly sterilised by the

authorities. On another occasion, a friend of the appellant was in the last stages of a pregnancy when the authorities took the child away and killed it in her village.

[48] AA described the circumstances of her visit to China in 2005. Her parents wanted to see the child and she had not been back for a number of years. She pretended to her parents that she was married to the appellant so as not to offend them.

[49] AA also visited the appellant's family in China. Although the appellant's immediate family was privy to the real nature of their relationship, AA said that almost as soon as she had arrived in the village, a woman from the family planning department identified her as a stranger in the village. She asked questions such as whose child it was, if it had a permit, who the father was and AA's own identity. She had to lie to the officer about the true circumstances.

[50] At the conclusion of their evidence, the appellant's counsel submitted that the appellant's fears of being persecuted in China rest on cumulative grounds:

- (a) The threat of imprisonment and possible forced sterilisation;
- (b) Fear of re-education through labour and/or substantial fines that he would be unable to pay;
- (c) Family separation;
- (d) Violation of his rights to privacy; and
- (e) Punishment for his illegal departure in 1996.

[51] Counsel submits that:

- (a) The appellant has violated the marriage laws of China and is liable to a penalty of up to two years' imprisonment;
- (b) He has violated the one child policy and faces substantial fines and/or physical sterilisation;
- (c) He faces social ostracism from his family and community;
- (d) Having a low level political profile, his illegal departure would attract the attention of the authorities, as would the circumstances of his illegal departure and his inability to obtain a passport.

- (e) The family's unique circumstances and predicament will cause the disintegration of the family unit in violation of the appellant's rights under Article 23 of the International Covenant on Civil and Political Rights (ICCPR).

[52] In counsel's submission, the cumulative effect of these various forms of harm amounts to persecution.

Documents provided

[53] Counsel has provided submissions dated 6 and 12 December 2006 and 17 January 2007, together with documents relating to country information on the various grounds advanced in this appeal, principally the laws and practices relating to the 'one-child' policy and those arising from the Marriage Act.

JURISDICTIONAL ISSUES COMPARING THE APPELLANT'S FIRST AND SECOND CLAIMS

[54] The appellant claims that since the date of his first RSB decision (5 October 2001), his circumstances have changed significantly. The Authority accepts this submission. It finds that since the date of final determination of his first claim, he has consolidated a permanent and (in terms of the marriage law in China) a possibly bigamous relationship with AA. That relationship has produced two children which will exacerbate his situation under the Chinese Marriage Act and place him in violation of the one-child policy.

[55] The Authority also accepts that, since the date of final determination of his first claim, his personal circumstances have changed to such an extent that they will have a deleterious effect on his enjoyment of a broad range of social, economic, civil and political rights in China if he were to return.

[56] Under either of the two tests articulated by the Authority, it is clear that the second claim is based on circumstances in China that have changed to such an extent that his subsequent claim is based on significantly different grounds from his first claim.

[57] Accordingly, the Authority has jurisdiction to consider the substance of his second claim.

THE ISSUES

[58] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[59] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

Credibility

[60] The Authority had the opportunity to question both the appellant and his *de facto* partner, AA. The Authority finds both to be frank and compelling witnesses. Neither attempted to exaggerate the gravity of their situation, nor to conflate issues that were not relevant to the claim of changed circumstances. The Authority accepts the evidence of both witnesses as consistent and credible.

[61] In order to assess whether the appellant's claim is well-founded it is necessary to assess the legal implications (including the practical application of laws) relating to the Marriage Act and the one child policy in China.

Country information

Marriage Act

[62] The Chinese (Marriage Act), adopted on 10 September 1980, and as amended on 28 April 2001, provides, *inter alia*:

"Article 3: ... Bigamy shall be prohibited. Cohabitation of a married person with any third party shall be prohibited. Domestic violence shall be

prohibited. Within the family maltreatment and desertion of one family member by another shall be prohibited.

Article 32: Divorce shall be granted if mediation fails under any of the following circumstances:

- (i) bigamy or cohabitation of a married person with any third party;
- (ii) domestic violence or maltreatment and desertion of one family member by another;

Article 45: If bigamy, domestic violence to or maltreatment and desertion of family member(s) constitute a crime, the criminal responsibility of the wrongdoer shall be investigated according to law. The victim may institute a voluntary prosecution in a people's court in accordance with the relevant provisions of the criminal procedure law. The public security organ shall investigate the case according to law and the people's procuratorate shall initiate a public prosecution according to law.

Article 46: A no-fault party shall have the right to make a request for damage compensation under any of the following circumstances bringing about divorce:

- (i) bigamy;
- (ii) cohabitation of a married person with any third party;
- (iii) domestic violence;
- (iv) maltreatment and desertion of one family member by another."

[63] Under an amendment to the Marriage Act on 28 April 2003, bigamy was made a criminal offence punishable by up to two years imprisonment; United Kingdom Home Office Country of Origin Information Report: *China* (29 September 2006) at Divorce 30.13.

[64] Although the language of Article 3 appears to differentiate between 'bigamy' and 'cohabitation of a married person with a third person', the distinction appears to be blurred when judicial and administrative penalties are imposed, by the Chinese authorities; "Lawmakers struggle with law-ethics distinction" *China Daily* (15 May 2001).

[65] According to an article, "Extra-marital affairs under spotlight" *China Daily* (26 December 2000):

China's Criminal Code stipulates that bigamy may result in imprisonment for up to two years. Married people who leave home to live with their lovers are considered to have committed bigamy, according to a current judicial interpretation.

[66] As part of the government's efforts to tighten the Marriage Act in October 2000, there were reported cases of (formerly) married men being imprisoned for between six and eighteen months for 'bigamy' following lawsuits filed by their

divorced or estranged wives, even though, in two cases, the men were only cohabiting with their new partners and had not attempted remarriage; “Bigamy lands couple in jail” *South China Morning Post* (19 December 2000); “Beijing jails married men for cohabiting with mistresses” *United Press International* (20 December 2000); “Man lands in slammer after bigamy conviction” *Modern Life News* (7 April 2006).

‘One-child policy’ and practice

[67] A full description of the one-child policy in China and its human rights implications is usefully set out in *Refugee Appeal No 3/91* (20 October 1992) pages 18 – 46 and is adopted for the purposes of this appeal. What follows is a brief survey of country information that post-dates that decision.

[68] The Chinese government’s current population control policy is scheduled to remain in place through the mid-21st century. Coercive fines are still the main enforcement mechanism, although there are reports of local officials using physical coercion to ensure compliance, even though this practice violates Chinese law. The severe gender imbalance resulting from the population control policy has grown worse over the past two decades; Chapter [32.02] United Kingdom Home Office *Country of Information Report: China* (29 September 2006) (Home Office report).

[69] The Centre for Reproductive Rights in a report entitled “*Women of the World: Laws and Policies Affecting their Reproductive Lives, East and Southeast Asia*” published in 2005 noted that:

“Under the Population and Family Planning Law, specific regulations and plans for population and family planning are formulated by the provincial, municipal, and autonomous regional people’s congresses and implemented by local family planning departments, villagers’ committees, and residents’ committees ... Citizens who have children without permission from the government must pay social compensation fees, must assume financial responsibility for all maternal health-care costs, and are denied maternity insurance benefits for leave and subsidies; rural citizens are refused future increases in land allocation.”

[70] In the appellant’s region of origin, Fujian, Article 14 of the Population and Family Planning Regulations provides that a woman is not allowed to give birth to a child out of wedlock (PRC 30 July 2002) and Article 39 provides a ‘social maintenance fee’ of four to six times the average disposable income and even higher fines for second or subsequent children born out of wedlock; Canadian Refugee Research and Information Branch (IRB) Responses to Information

requests (6 September 2005) http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=449481.

[71] While the Chinese government has made efforts to end the practice of coercion in the implementation of family planning policies by prohibiting the use of force and introducing financial rewards for one-child families (*Sunday Times* 18 September 2005; see also *The Independent* 21 September 2005; *US Newswire* 19 November 2003), some sources report that forced sterilization and abortions continue to occur, particularly in rural areas (AI 2005; AP 15 September 2005; HRW 1 January 2004; VOA 26 September 2005; *The Washington Post* 27 August 2005). According to an article in *The Washington Post* "many local officials continue to rely on forced abortion and sterilization, in part because the ability to limit population growth remains a top consideration in party deliberations about promotions and raises" (27 August 2005); see also *Associated Press* (15 September 2005); *Time Magazine* (12 September 2005)); all referred to in the Home Office report (*supra*).

[72] According to the United States Department of State *Country Report on Human Rights Practices for 2006: China* (7 March 2007) (DOS report 2006):

The country's birth planning policies retained harshly coercive elements in law and practice. The laws restrict the rights of families to choose the number of children they have and the period of time between births. The penalties for violating the law are strict, leaving some women little choice but to abort pregnancies. In addition, implementation of the policy by local officials resulted in serious violations of human rights. Reports of forced sterilizations and abortions, in violation of the national law, continued to be documented in rural areas. During the year officials in Chongqing municipality and in Fujian Province reportedly forcibly sterilized women.

The law requires family planning officials to obtain court approval before taking "forcible" action, such as detaining family members or confiscating and destroying property of families who refuse to pay social compensation fees. However, in practice this requirement was not always followed..... Central government policy formally prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, although reports of physical coercion to meet birth targets continued.

[73] Those who violate the policy face a broad range of officially-sanctioned and non-sanctioned penalties, from minor to severe. The DOS report 2006 noted that:

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

[74] There are instances of overzealous local officials, seeking promotion and/or trying to reach targets set by government policy, who exceed their authority by resorting to coercive measures such as sterilisation or abortion. The DOS report 2006 (*supra*) notes that:

According to law, citizens may sue officials who exceed their authority in implementing birth-planning policy. However, local officials retaliated with impunity against whistleblower Chen Guangcheng for his work in exposing the Linyi family planning abuses. In August Chen was sentenced to four years' and three months' imprisonment on dubious charges of obstructing traffic and damaging public property

[75] According to the United States Department of State *Country Report on Human Rights Practices for 2005: China* (DOS report 2005):

"Officials at all levels remained subject to rewards or penalties based on meeting the population goals set by their administrative region. There continued to be sporadic reports of violations of citizens' rights by local officials attempting to reduce the number of births in their region. The most egregious reports occurred in Linyi, Shandong Province. International press reports alleged that some 130 thousand persons were detained by local officials in "population schools" to force them or their relatives to submit to abortions or sterilization procedures. Local officials profited from this illegal system by charging fees, according to media reports. At least seven thousand people were forcibly sterilized."

[76] Beginning in March 2005, thousands of men and women were reportedly forcibly sterilized, and fetuses were aborted in the city of Linyi, Shandong Province; *Associated Press* (15 September 2005); *The Sunday Times* (18 September 2005); *Time Magazine* (12 September 2005); *The Washington Post* (27 August 2005): all referred to in Home Office report (*supra*).

[77] Children born contrary to the "one-child policy" are called "black children" (*hei haizi*). Officially they do not exist and therefore do not qualify for government assistance. According to the information in the Home Office report (*supra*), officials can usually be "persuaded" to add them to a household registration document (*hukou*), but a bribe is often required to facilitate this. Because of the stiff financial penalties for second children, many couples have unregistered children and there may be as many as a 100 million of these 'illegal' children.

[78] According to the IRB, information on whether couples with more than one child would be penalised under family planning regulations or encounter difficulties in returning to China was scarce among the sources consulted by the Research

Directorate. In a 21 January 2004 Response to Information Request, the Resource Information Centre (RIC) of the US Citizenship and Immigration Services quoted an anthropologist who co-authored a 2001 report on China's family planning policies as saying that "[i]n general, people who return to China from abroad are actively welcomed back to the 'motherland,' and children born outside China largely forgiven"; Canadian Immigration and Refugee Board Response to Information Request (24 February 2005) (RIR) http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=416243.

[79] According to a specialist in the United States Department of State, also quoted in the RIC Response, while the implementation of family planning policies varies across the country, some people in Guangdong and Fujian reported no difficulties in returning to China after having had children abroad; RIR, 24 February 2004 (*supra*).

[80] Implementation of family planning policies would appear to be easier for officials in urban areas while in the countryside, rules are more lax; *The Economist* (18 December 2004); *The Guardian* (14 April 2004) found in Home Office (*supra*).

[81] An article in the Zhu Jiang Times reported that fines for breaching the one child policy are increasing. Urban families face fines of up to RMB140,000 and rural residents' fines up to RMB50,000 and incremental fines are imposed for families with two or more children. The article also reports that "lawbreaker couples who remarry urban residents will have to pay RMB 318,000 whereas rural residents have to pay RMB149,000. Any person who refuse (*sic*) to pay the penalty may be arrested under the Birth Control Bureaux's policy of 'Reward and Punishment'"; (3 March 2006): untitled article found at website <http://dadao.net>.

[82] The Authority in *Refugee Appeal 3/91* (*supra*) drew a number of conclusions that, in light of the survey above, still appear to be valid. It is helpful to reproduce them *in extenso*:

CONCLUSIONS (on country information at page 36)

1. State practice in controlling the size and composition of their population in many instances extends to policies intended to limit population growth.
2. China's population control policy is one of the most stringent of its kind and the policy is enforced by intrusion into matters of family, privacy and individual choice.
3. Coerced abortions and sterilizations are not part of the official policy.
4. However, compulsion to submit to abortion or sterilization does continue.

5. The Government of China does not condone forced abortion and sterilization. At most, government officials continue to insist that family planning targets be met, thus perpetuating the system in which coerced abortions and sterilizations will occur. The state must be regarded as responsible for these acts.

6. Disciplinary measures for failing to comply with the one-child family policy can be extreme, ranging from stiff fines to loss of jobs.

7. Family planning policies are applied without discrimination to the majority Han population.

8. Overseas Chinese are not discriminated against in the implementation of birth control policy. If anything, in the appellant's province of Guangdong overseas Chinese are treated with greater leniency

CONCLUSIONS (on the human rights implications, at page 46)

1. There is evidence of international recognition of a human right to procreate, and to control fertility.

2. The extent of this right has not been determined.

3. Recognition of the right is largely aspirational.

4. The family planning policy of the People's Republic of China is not per se an infringement upon basic human rights.

5. However, compulsory abortion and compulsory sterilization may in certain circumstances constitute torture or inhuman or degrading treatment or punishment and be properly stigmatized as persecution.

Punishment for illegal departure

[83] The Home Office (*supra*), para (39.04) refers to a Canadian IRB report on the issue of illegal departures, dated 9 August 2000 that:

“the act of leaving China without exit permission or a passport is a criminal offence in China punishable of [sic] up to one year in prison. (Article 176 of the Chinese Criminal Code.) Only repeat offenders would get a sentence approaching the maximum. Most first time offenders would get a short sentence, depending on the circumstances of their case but probably with sentences of 3 months.”

[84] Foreigners caught entering the country illegally and Chinese returning from illegal migration activities abroad may be detained, including at a special facility at the Fuzhou Detention Centre which is managed by the Border Defence Force. Returnees are held pending the outcome of administrative investigations for up to 15 days and then transferred to other facilities or released. Independent visitors to the facility indicated that conditions of the centre were consistent with international standards although there was some question whether the centre was in fact in active use or show-cased to demonstrate the government's determination to deal with illegal migration. Home Office report (*supra*) para (39.10)

Police powers and prison conditions

[85] According to the United States Department of State (DOS) *Country Reports on Human Rights Practices for 2005: China* (8 March 2006), the Ministry of Public Security (MPS) coordinates the country's law enforcement, which is administratively organized into local, county, provincial, and specialized police agencies:

“Recent efforts have been made to strengthen historically weak regulation and management of law enforcement agencies; however, judicial oversight was limited, and checks and balances were absent. Corruption at the local level was widespread. Police officers reportedly coerced victims, took individuals into custody without due cause, arbitrarily collected fees from individuals charged with crimes, and mentally and physically abused victims and perpetrators.”

[86] For those arrested and detained, the DOS report 2005 (largely repeated in the DOS report 2006) notes that:

“Prison conditions in penal institutions for both political prisoners and common criminals generally are harsh and frequently degrading. Prisoners and detainees often were kept in overcrowded conditions with poor sanitation. Prison capacity became an increasing problem in some areas. Food often was inadequate and of poor quality, and many detainees relied on supplemental food and medicines provided by relatives ...

Conditions in administrative detention facilities, such as re-education-through-labor camps, were similar to those in prisons. Beating deaths occurred in administrative detention and re-education-through-labor facilities.”

Implications of the *hukou* system on the right to family unity

[87] The Chinese household registration system (*hukou*) was established in the 1950s to serve three main purposes: resource distribution, migration control (particularly rural to urban migration), and management of "targeted" people. Under this system, a person is only able to access community-based benefits and opportunities, as well as obtain legal permanent residence, in the *hukou* zone in which he/she is registered. All Chinese citizens aged one month and older must be registered in their place of residence and can only be registered in one place at any given time; Canadian Immigration and Refugee Board Research Directorate, Immigration and Refugee Board (IRB), *Response to Information Request CHN101198.E* (26 April 2006) http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=450154 (the IRB response).

[88] The IRB response also indicates that there are two categories of *hukou* in China: agricultural (rural) and non-agricultural (urban). A person's *hukou* record includes the category of *hukou* (that is, agricultural (rural) or non-agricultural (urban)) residential address and location, employment information, as well as other family and personal information including religious beliefs and physical

features. While it is possible to change one's *hukou* categorisation this is reportedly difficult and requires government approval.

[89] According to research included in the Home Office Report: (*supra*) para (35.01):

“National and local authorities are gradually reforming China’s household registration (*hukou*) system. In 2005, central authorities took some steps towards removing work restrictions on migrants in urban areas, but *hukou* discrimination in public services remains prevalent. *Hukou* reforms are enhancing the ability of wealthy and educated citizens to choose their place of permanent residence, but strict economic criteria often exclude poor rural migrants living in urban areas, preventing some of China’s most vulnerable citizens from receiving public services.”

[90] The IRB response notes that in smaller towns and cities, local governments have reportedly started implementing reforms to the *hukou* system, allowing rural migrants to apply for urban resident permits and the abolition in 11 of the country's 23 provinces, including Fujian. However, the process is slow and difficult and it is still unclear as to how much has been implemented. The IRB response includes evidence that government efforts to reform may be exaggerated and are addressing some of the unsightly categorisations and distinctions, rather than abolishing the *hukou* system itself.

[91] The Home Office report notes a report by the Canadian IRB *China: Reforms of the Household Registration System (hukou) (1998-2004)* (February 2005) that “administration of the household registration system and issuance of *hukou* documents are the exclusive responsibility of the Public Security Bureau (PSB).”

[92] According to research in the IRB response:

Prior to 2003, migrants without proper documentation could be arrested, fined, and returned to their permanent resident location. Since the Chinese government abolished the detention and repatriation system in 2003 migrants without proper documentation, but who are employed and have not become "homeless, paupers, or criminals" are no longer being detained, fined or repatriated.”

[93] *Hukou* holders in the urban areas have far greater access to work and other social services and benefits than those from rural areas. According to Amnesty International’s *Country Report: China (2006)*:

Despite ongoing reforms to the Household Registration (*Hukou*) System, migrants from rural to urban areas remained vulnerable to discrimination in the cities, including denial of access to health care and other social services such as education, medical care and housing.

[94] The DOS report 2005 also noted that access to social services in China, including education, was "difficult or impossible" for migrants without official residence status (*supra*) section 2d). These conclusions are largely mirrored in the most recent US DOS report for 2006 (*supra*) which notes that in 2006:

Although the government maintained restrictions on the freedom to change one's workplace or residence, the national household registration system continued to erode, and the ability of most citizens to move within the country to work and live continued to expand. However, the government retained the ability to restrict freedom of movement through other mechanisms.

The system of national household registration (*hukou*) underwent further change during the year, as the country accumulated a more mobile labour force. Rural residents continued to migrate to the cities, where the per capita disposable income was more than quadruple the rural per capita cash income. Nonetheless, many could not officially change their residence or workplace within the country.

The household registration system added to the difficulties rural residents faced in changing to urban residency, even when they have already relocated to urban areas and found employment. There remained a floating population of between 100 and 150 million economic migrants who lacked official residence status in cities. Without official residence status, it was difficult or impossible to gain full access to social services, including education.

[95] A report of the United Nations Committee on Economic, Social and Cultural Rights, UNESC E/C.12/1/Add.107 (13 May 2005) expressed deep concern about the *hukou* system and the situation of internal migrants in China:

The de facto discrimination against internal migrants in the fields of employment, social security, health services, housing and education that indirectly result from inter alia, the restrictive national household registration system (*hukou*) which continues to be in place despite official announcements regarding reforms.

ASSESSMENT OF THE APPELLANT'S CLAIM

[96] On the basis of the appellant's evidence, as assessed against the country information discussed above, the Authority finds as follows:

Punishment for illegal departure

[97] The Authority in 3/91 (*supra*) describes two conditions which, if met, could lead to a recognition of refugee status:

First, the country of origin must punish unauthorized exit or stay abroad in a harsh or oppressive manner. The appellant may very well expect to suffer a penalty for breach of, say, a passport law, but if that law is fairly administered and he faces the prospect of but reasonable penalties, the harm feared is not of sufficient gravity to warrant protection as a refugee.

Second, the illegal departure or stay abroad must either be explicitly politically motivated, or the state of origin must view the unauthorized departure or stay abroad as an implied political statement of disloyalty or defiance. Whether by law or administrative practice, it must be clear that the home country disapproves of illicit emigration, and views those who breach its rules on exit or travel abroad as non-conforming dissidents.

[98] In the present appeal, the Authority finds that the appellant is at risk of serving a period of up to 12 months detention or control for his illegal departure. As he is not a repeat offender he is more likely to face some lesser period than the maximum penalty.

[99] As a national from Fujian he may be held, at least initially, at the Fuzhou detention centre where, from available country information, it appears that the conditions of treatment do not appear to violate international standards. It is not possible to speculate where the appellant may be required to serve his sentence. He could face a judicially-sanctioned term of imprisonment or an administratively-imposed form of detention or labour through re-education. In any event, country conditions suggest that the conditions of detention are not likely to meet minimum human rights standards.

[100] The range of punishments likely to be faced by the appellant for illegal departure, including substandard conditions of detention, are within the range of penalties prescribed by the ordinary criminal law in China. Article 167 of the Chinese Criminal Code is a law of national application that, on its face, is neither harsh nor oppressive.

[101] As to the first condition in *3/91 (supra)*, the Authority concludes that the appellant's punishment, even he were sentenced to the maximum period, would not, in itself, amount to persecution because the law is of national application. The Authority does not consider that the punishment (including treatment in detention) is harsh or oppressive and is not 'a sustained or systemic violation of his basic rights demonstrative of a failure of state protection': *Refugee Appeal No 74665* (7 July 2004), neither does it consider that the appellant's low level of involvement in the democracy movement more than a decade ago is likely to be a relevant factor in the Chinese authority's decision to prosecute him under Article 167. To that extent, the criminal law will not be applied against the appellant in a discriminatory manner.

[102] As to the second condition, and contrary to the conclusions found by the RSB in the appellant's first appeal and distinguishable from the facts of *3/91*, the Authority finds that the appellant's illegal departure may have been motivated, at

least in part, by his political opposition to the Chinese authorities.

[103] However, country information indicates that tens of thousands of Chinese nationals have left the country illegally in recent years and although the Chinese authorities disapprove of illicit emigration it is not evident that it views all those who breach its rules on exit or travel abroad as non-conforming dissidents. Without addressing the issue in detail, the Authority notes that China's response to combating illegal migration is largely consistent with efforts by many states to combat illegal and irregular migration, including people smuggling and human trafficking.

[104] In this context and if the appellant's unauthorised departure is taken in isolation from all the other grounds of this appeal, the Authority concludes that the Chinese authorities are unlikely to view his actions with any particular disquiet.

[105] Again, it considers that the appellant's low level involvement in political demonstrations before his departure more than a decade ago would not lead the Chinese authorities to view his actions as 'an implied political statement of disloyalty or defiance' in 2007. The second condition set out in 3/91 would not be met.

[106] Counsel submits, rightly, that the appellant's punishment for illegal departure must also be considered together with other elements of his claim. The Authority will consider the cumulative effects of all the grounds later.

Violation of Marriage Laws

[107] If the appellant were to return to China, he is unlikely to be able to pay the divorce settlement requested by his wife; it is simply beyond his means and that of his family. His inability to satisfy his wife's terms of divorce will make it difficult – albeit not impossible – for the appellant to secure a divorce and then regularise his legal status with AA.

[108] The Authority accepts the appellant's evidence that his estranged wife may be sufficiently vindictive to inform the authorities of his present *de facto* relationship, the existence of their two children and his violation of both the one-child policy and the Marriage Act. It accepts that she also has the motive and capacity to institute criminal charges of bigamy against the appellant under Articles 3, 45 and 46 of the Marriage Act.

[109] We also conclude that the local authorities, of their own initiative, could initiate criminal proceedings against the appellant under Articles 3 and 35 of the Marriage Act.

[110] In either event, the Authority accepts that the appellant would be liable for a prison sentence of up to two years under the Marriage Act and face additional and substantial fines that would be beyond his current means to pay.

[111] As with the issue of violations and penalties imposed under the one-child policy (considered below), the question arises whether the appellant's punishment under the marriage laws is part of a criminal prosecution under a law of universal (national) application which, however harsh the penalties may appear, does not amount to persecution under the 1951 Refugee Convention; The Office of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for determining Refugee Status*, January 1992, paragraph 56, states that:

Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees.

[112] In *Refugee Appeal No 74665* (7 July 2004) the Authority concluded that the expression 'being persecuted' in Article 1A(2) of the 1951 Refugee Convention 'is the sustained or systemic violation of basic human rights demonstrative of a failure of state protection' [124].

[113] Applying this analysis to the present case, the Authority concludes that, in itself, the appellant's prosecution and punishment for violating the Marriage Act 1980 may be unfair and even harsh when judged against the contemporary standards of marriage and family law in New Zealand but is not so draconian as to amount to 'being persecuted.'

[114] The cumulative effect of this and other elements of the appellant's claim, including whether the Chinese authorities might be motivated to apply these various laws of universal application against the appellant in a discriminatory way for reasons stated in the Refugee Convention, is considered later.

Violation of One-Child Policy

[115] In considering whether the policy and its implementation could amount to persecution on any of the grounds enumerated in the 1951 Refugee Convention the Authority in *Refugee Appeal 3/91* (supra) concluded, at page 55, that:

- “1. China’s birth control policy is applied to the general population;
2. That policy is not inherently or on its face persecutive;
3. However, forced or involuntary sterilisation and abortion constitute human rights abuses and may amount to persecution;
4. Persons in fear of such persecution are only protected by the Refugee Convention if the persecution is “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

[116] This approach has been applied consistently in subsequent decisions of the Authority. For example *Refugee Appeal No 74134* (18 March 2003) at [33] and *Refugee Appeal No 73785*, (28 March 2003) at [18].

[117] From country information, it is clear that these laws are of general (that is, national) application. However, whether these laws are applied vigorously, laxly or not at all, very much varies according to the vagaries of officials in each region and even locality. At the local level, national laws of general application can be implemented or overlooked in arbitrary, discriminatory and capricious ways particularly where individual influence (or lack thereof) or personal enmity is a contributing factor.

[118] In the appellant’s case and taking into account anecdotal evidence of vigilant local officials and their vindictive practices, the Authority accepts that he may be singled out for particular attention on his return Fujian. The following factors would, plausibly, draw additional attention to the appellant on his return to the place of his *hukou* and exacerbate his situation:

- (a) His known, albeit low level, participation in the pro-democracy movement before his departure;
- (b) His extended and illegal stay in another country;
- (c) His return and imprisonment for up to 12 months for illegal departure;
- (d) His apparent flagrant disregard for the social values and policies of his rural (and conservative) community as illustrated by:
 - (i) his three children, two of whom were born out of wedlock to an unmarried mother;
 - (ii) his failure to meet the demands of his estranged wife;

- (iii) his violation of the Marriage Act by 'bigamy' or other similar actions;
- (iv) his inability to meet any payments to settle fines.

[119] The local authorities would take a dim view of the appellant's persistent pattern of transgressions over the past decade and there is a real chance that they would make an example of him. In this case, he could face any or all of the following punishments:

- (a) A cumulative fine of up to RMB 420,000 (approximately NZ\$77,000), a sum well beyond the reach of the appellant or his family;
- (b) In the likely default of such payment, the appellant may face additional and other forms of punishment, including imprisonment and re-education. These would be additional to any terms of imprisonment and fines he might receive for illegal departure and violating the Marriage Act;
- (c) The risk that the appellant would be forcibly sterilised cannot be discounted, particularly in a rural area such as his locality where over-zealous administrators appear to be able to act with relative impunity;
- (d) The denial of other basic citizenship rights including the right to work and enjoy social services. It is plausible that having violated both the Marriage Act and the one-child policy, the appellant is likely to be stymied by the local authorities in his efforts to be reunified with AA and their children if they return to China;

[120] The Authority considers that forced sterilisation would amount to a significant invasion of the appellant's physical person and would constitute cruel inhuman or degrading treatment or punishment in violation of article 5 of the Universal Declaration of Human Rights and a similar provision, Article 3, of the International Covenant on Civil and Political Rights, 1966, (ICCPR), which China signed on 9 October 2005 but has not yet ratified.

[121] The Authority also concludes that there is a real chance that the appellant would be forcibly sterilised and that this would amount to 'being persecuted' pursuant to Article 1A(2) of the 1951 Refugee Convention see point 3, page 55 of

Refugee Appeal No 3/91 and Refugee Appeal No 74665.

[122] The issue of whether the Chinese authorities might be motivated to apply the 'one-child' policy, normally of universal application, to the appellant in a discriminatory way and for reasons stated in the Refugee Convention, is considered later.

Hukou and other legal and social implications of return

[123] The Authority accepts that, in addition to legal punishments, there are social disadvantages that the appellant and his family may face if returned to China. These include social ostracism, an inability to access meaningful education and health care for his children and limited or no access to employment because of his prosecution record and his violation of criminal law in China. Each of these issues impacts on his right to a family life.

[124] Although the appellant will face some measure of societal disapproval and social ostracism and the evidence indicates that his family may not have the resources to support him financially on his return, the Authority finds that the forms and degree of his social marginalisation do not, in themselves, amount to 'being persecuted' as articulated in *Refugee Appeal No 74665* (7 July 2004).

[125] The cumulative effect of these and other elements is considered later.

Invasion of rights to family

[126] The most difficult challenge that the appellant will face on his return to China will be in reunification with AA and his two children. The children's ambiguous nationality status (currently New Zealand citizens) means that their permanent and legalised residence in China is far from guaranteed. In the event that AA and/or the children remain in New Zealand it is not likely, given the appellant's earlier migration history, that he would be granted a passport to allow any meaningful contact with his family outside China.

[127] If AA and/or the children were able to navigate the legal requirements of return to China, the operation of Chinese residence laws (through the *hukou* system) would, in effect, divorce the appellant from any reasonable, substantial and meaningful contact with his family.

[128] Country information indicates that despite some relaxation of the country's

hukou laws, including in Fujian province, the appellant would have great difficulty in securing permission to relocate to the place of AA's official residence or vice versa.

[129] The Authority also accepts that the appellant's personal profile could cause the local authorities to be even more obstructive in allowing family reunion to take place than they might be for other more compliant and 'law abiding' citizens. In consequence, the appellant is unlikely to be able to restore the family life that he has enjoyed in New Zealand and, undoubtedly, this will cause considerable hardship to the whole family, including his partner AA and their young children.

[130] The fact that the appellant would be unlikely to have the legal right to reside with his partner, AA, and their two children raises issues relating to his fundamental right to be free from 'arbitrary interference with his privacy, family, home' (Article 12 UDHR; Article 17(1) ICCPR) and the protection, by society and the State, of his family as the natural and fundamental group unit of society (Article 16(3) UDHR; Article 23 (1) ICCPR).

[131] In the appellant's case, and when taken together with his right to found and maintain his family, any strict, arbitrary or capricious exercise of the country's *hukou* policies would threaten his right to freedom of movement and residence within the borders of the state (Article 13(1) UDHR).

[132] However, for the reasons that follow, the Authority does not need to consider the complex question whether the Chinese government's implementation of national laws relating to illegal departure and its control over internal migration through the use of the household registration (*hukou*) system are reasonable or illegitimate restrictions on the rights to freedom of movement and other socio-economic rights. On the issue of internal migration, for example, see an Amnesty International report: *People's Republic of China Discrimination and abuse: The human cost of an economic 'miracle'* (1 March 2007).

[133] Similarly, the Authority does not need to undertake any detailed analysis of whether the one-child policy and the Marriage Act are compatible with basic human rights, including the right to found a family in the UDHR and ICCPR.

Cumulative effect of above factors

[134] The Authority recognises that each set of laws - relating to illegal departure, the one-child policy, the Marriage Act and *hukou* (residence) - of themselves,

reflect the ordinary criminal law in China. By and large these are laws of ordinary and 'universal application' in China and apply to all citizens. Whilst they may appear harsh when judged by contemporary New Zealand standards, particularly the loose definition of, and penal sanctions for, bigamy, they are essentially non-discriminatory in nature.

[135] That is not to say, however, that such laws are not applied in discriminatory ways. The country information surveyed by the Authority is replete with examples of ordinary laws being implemented by local officials in a variety of discriminatory, arbitrary, capricious or otherwise abusive ways.

[136] The Authority accepts that in the unusual circumstances of the appellant's case, there is a real risk that the authorities, at the local level to which he would be obliged to return under the country's *hukou* laws, would regard him as a non-conformist. The appellant's personal records (*dang an*) would indicate his involvement with student politics in 1989 (albeit at a low level), his illegal departure and extended period of time outside the country, and (to their minds) his flagrant and continued disregard for the social policies, laws and norms of Chinese society relating to marriage and children.

[137] Against this backdrop, the Authority accepts that the appellant's profile could, plausibly, provoke the authorities into applying these laws, usually of general application to all citizens in China, in a discriminatory and more draconian manner in respect of the appellant. This could result in higher financial penalties, longer terms of imprisonment, harsher treatment by officials, reduced socio-economic opportunities and the denial of any meaningful contact with AA and his children.

[138] For the reasons given earlier, it is also not implausible that the appellant's profile as an 'errant' non-conformist and 'lawbreaker' could provoke the local authorities into making an example of him through coercive sterilisation – a repugnant act of persecution that is not officially sanctioned by the state but against which he is unlikely to have any protection or redress.

[139] Taken as a whole, his treatment would amount to a sustained or systemic violation of his basic rights demonstrative of a failure of state protection; *Refugee Appeal No 74665 (supra)*.

[140] It follows that the first framed issue in paragraph [59] is answered in the

affirmative.

Causation (or nexus) between persecution and Convention grounds

[141] In decisions published since *Refugee Appeal No 3/91*, the Authority has been of the view that it is sufficient for a refugee claimant to establish that the Convention ground is a contributing cause to the risk of being persecuted. The question of causation (or nexus) was considered in *Refugee Appeal 72635* (6 September 2002) where it was held at paragraph [173] that:

It is not necessary for that cause to be the sole cause, main cause, indirect cause or “but for” cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established.

[142] In the circumstances of the present appeal, the Authority is of the view that the appellant’s persecutors may impute to the appellant, because of his pattern of recidivist and disloyal behaviour over more than 17 years, a political opinion that is inconsistent with that of the state. Although this may not be the only, or indeed, dominant factor, the appellant’s imputed political opinion is, nonetheless a relevant and contributing factor in the persecution he faces.

[143] The second framed issue in paragraph [59] is also answered in the affirmative.

CONCLUSION

[144] For the reasons given, the Authority finds that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

.....
R J Towle
Member