

0905560 [2009] RRTA 902 (16 October 2009)

DECISION RECORD

RRT CASE NUMBER:	0905560
DIAC REFERENCE(S):	CLF2009/50664
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Tony Caravella
DATE:	16 October 2009
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the People's Republic of China (PRC) arrived in Australia [in] August 2008 and applied to the Department of Immigration and Citizenship ("the Department") for a Protection (Class XA) visa [in] April 2009. The delegate decided to refuse to grant the visa [in] July 2009 and notified the applicant of the decision and her review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] July 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources including a detailed submission provided to the Tribunal by the applicant's representative.

Application made to the Department for Protection Visa

20. The following details of the applicant are contained in her *Application for an applicant who wishes to submit their own claims to be a refugee* (Form 866C) lodged with the Department [in] April 2009.
21. The applicant was born in Jin Jiang in the People's Republic of China (PRC) on [date deleted: s431(2)]. In her application Form 866C the applicant states her marital status as separated from [date deleted: s431(2)] December 2008. She states that she is a citizen of the PRC and is the holder of a passport of the PRC issued to her in Fujian [in] November 2007. The applicant lists her occupation before coming to Australia as a clerk
22. The applicant sets out her reasons for leaving the PRC at question 41 of the application form referred to above. In summary she states:
 - a) She married an Australian citizen (hereafter 'Mr R') in Fujian Province [in] October 2007 and lived with him in Jin Jiang City for about 6 months during which time she became pregnant;
 - b) Her husband told her that he wanted to sponsor her to obtain a spouse visa to come to Australia and asked her to apply for a PRC passport which she duly did;
 - c) Her husband then changed his mind about the applicant applying for a spouse visa telling the applicant that it would be too expensive and time consuming so he suggested she apply for a visitors visa instead;
 - d) The applicant's husband returned to Australia [in] May 2008 leaving the applicant in the PRC. The applicant states her husband still wanted her to travel to Australia and provided financial support for her while she remained in the PRC;
 - e) [In] August 2008 the applicant was granted a visitors visa to travel to Australia and [in] August 2008 the applicant arrived at Perth International Airport.
23. The applicant sets out what she fears may happen to her if she goes back to the PRC at question 42 of the application form. In summary she states:

- a) The applicant's child (a son) was born in Perth on [date deleted: s431(2)];
- b) After she came to Australia her husband was violent towards her and their relationship became unhappy and they separated [in] December 2008 after a violent incident;
- c) The applicant has been living in women's refuge accommodation in Western Australia since she separated from her husband;
- d) After the separation, her husband continued contacting the applicant asking her to return to him however she refused. Her husband then travelled to the PRC and spoke to the applicant's father and uncle in an attempt to obtain their assistance to have the applicant return to the relationship with him. While in the PRC the applicant states she received a text message from her husband where he threatened to burn down her village in the PRC and also threatened to obtain a gun to get his son from the applicant;
- e) The applicant obtained a violence restraining order against her husband from the Perth Magistrates Court [in] March 2009;
- f) The applicant states:

"I fear that if I return to China my husband will come there and I will be forced to return to live with him. My family do not support me and want me to give my husband another chance. My husband has been to China to see my family and if I return there he will come to where I am.

The Chinese police will not protect me because they have very few resources and they do not protect ordinary people like me. If I was an important person or if I was very wealthy then they would protect me."

The Department's decision

24. The Department's delegate set out the reasons for refusing the application for a protection visa in the Decision Record dated [in] July 2009. Amongst other things it states:
 - The applicant made an application for a tourist (class TR) visa [in] July 2008 and this was refused [in] August 2008 because the decision maker did not accept the applicant worked in the position claimed nor had a strong incentive to return to China. After contact from the applicant's husband who assured the Department that the applicant wanted to have the baby in the PRC and that she had no wish to migrate to Australia, a tourist visa was subsequently granted to the applicant [in] August 2008;
 - The Decision Record sets out the facts which largely match the facts of the relationship described above. The delegate then goes on to state that the threat of harm issued by the husband is personally motivated domestic violence and not for a Convention reason, such as race, religion, political opinion or nationality. The delegate writes, "...it is the applicant's relationship, or the breakdown of that

relationship, that is the cause of his violent behaviour against her.” The delegate concludes that the harm feared is private harm and not state-sanctioned persecution.

- The delegate then goes on to consider whether the applicant establishes that her membership of a particular social group, namely ‘women’ is the essential and significant reason for her fear of harm. The delegate then considers whether there is state tolerance or condonation of domestic violence and whether the applicant is able to obtain protection of the state authorities against the threatened harm. The delegate finds, amongst other things that ‘there is increasing provision of services and protection for victims of domestic violence’ in the PRC and concludes that the applicant has not satisfied the grounds whereby she is a person to whom Australia has protection obligations.

Application for review

25. The applicant was represented in relation to the review by a registered migration agent who [in] September 2009 provided the Tribunal with a detailed written submission on behalf of the applicant. The submission summarises the applicant’s reasons why she should be allowed to remain in Australia as follows:
 - She is a person to whom Australia owes protection obligations due to the risk of persecution at the hands of her father and her husband for which there is no effective state protection;
 - She has an Australian citizen child who has a right to know his father and his paternal grandparents;
 - As a matter of equity, if the applicant had come to Australia on the right (spouse) visa she would now have a right to permanent residency and that this is relevant because the applicant claims it was due to the control exerted by her husband that she came on a visitor’s visa thereby losing the family violence protection contained under the spouse visa provisions.
26. The submission referred to in the previous paragraph also contains statements why the applicant’s case is one where, if the applicant is found not to be a refugee, then her case should be brought to the notice of the Minister for Immigration in accordance with the *Minister’s Guidelines on Ministerial Powers* . In summary, the submission argues there are grounds for Ministerial referral, namely, equity issues and Australia’s international obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention of the Rights of the Child (CRC).

Tribunal hearing

27. The applicant appeared before the Tribunal [in] September 2009 to give evidence and present arguments.
28. The applicant was represented in relation to the review by her registered migration agent.
29. The applicant told the Tribunal:

- a) She was born [date deleted: s431(2)] in Jin Jiang in Fujian Province. She graduated from high school having done 11 years schooling at the [high school deleted: s431(2)]. She graduated in 2003 and obtained a job as a statistician calculating the quantity of products made in a shoe and sandal factory. She held the job for one year. She then moved to Shenzhen which she said is some 8-9 hours by bus from her hometown. There she obtained work for a short while doing sales work followed by a job in her uncle's factory;
 - b) She has one sibling, a brother born in 1986. She remains in contact with him once every 2-4 weeks while she has been in Australia. Her father is still alive however her mother is deceased.
30. The applicant told the Tribunal in respect to her relationship with her husband:
- a) She met her husband Mr R over the internet when she was working at [company deleted: s431(2)] in Shenzhen. It was summer (June or July 2007). She used the internet and Skype there. She had just broken up with a boyfriend at the time and he had also recently ended a relationship. Mr R was in Australia at the time their internet relationship developed. He would write to her and ask such questions as "whether she was the one?" referring to whether she would be his partner. He has been previously married and there are four children from that marriage, he is the biological father of two of the children and the stepfather of the other two
 - b) Mr R travelled from Australia to China in August or early September 2007 and they met at the Shenzhen airport. The applicant said she showed him around Shenzhen. They stayed in Shenzhen until late September and during that time her father and her brother met Mr R because they were also in Shenzhen
 - c) Mr R proposed marriage to the applicant and she accepted. They went to the marriage registry office [in] October 2007 however they found it closed as it was the Chinese National Day holiday. They eventually married in Fuzhou [in] October 2007. There was no wedding celebration because they had no money. Only the applicant and Mr R attended the marriage registration office
 - d) For the first three months of their marriage they stayed at the applicant's father's home located in [village deleted: s431(2)]. She described her father's house as being a double storey home with three bedrooms. They were alone in the house at the time because the applicant's father and brother were in Shenzhen
 - e) During this period of three months there was no violence towards the applicant from Mr R. The couple also got on well with their neighbours. She said Mr R was polite to them and would spend time to teach the neighbours English. He would also cook and read the bible. She said they were happy then. Mr R travelled back to Australia for a short period and then returned to China where they lived together for a further three months. In total they lived together in the applicant's father's house for about six months.
 - f) During this six-month period, they would speak to each other about the applicant moving to Australia and her father accompanying her in such a relocation;

- g) After these six months Mr R returned to Australia leaving the applicant in the PRC and shortly thereafter, the applicant learned she was pregnant. She was in the process of gathering all the necessary forms to make a spouse visa application to travel and live in Australia when she discovered she was four months pregnant. She told Mr R she was pregnant and he responded that he wanted the baby born in Australia. Around this time Mr R changed his mind about applying for a spouse visa and decided the applicant should apply for a visitor visa. During one telephone conversation when the applicant believed he was under the influence of alcohol, he told the applicant to tell the Australian Embassy that she did not want to stay in Australia and that she would only stay for 2-3 months and return to China to have the baby. That was not her actual intention. When asked by the Tribunal why she misrepresented her intention to the Australian Embassy the applicant replied that she knew it was wrong to do this however she did not want to upset Mr R.
- h) The applicant told the Tribunal that she had made no arrangements for the birth of her child in China. Their son was born on [date deleted: s431(2)] at a maternity hospital in Perth. Mr R was present at the birth.
- i) The applicant told the Tribunal of an incident when she was pregnant and when Mr R was drunk and abusive. They were sharing a house with a person she referred to as a "Muslim man". Because of this drunken and abusive incident the Muslim man told them to leave the house. As they found themselves without accommodation the applicant turned to their church and pastor for assistance. Their pastor agreed to provide accommodation for the applicant and the child however not for Mr R because of his drinking. They therefore decided to move into a Motel for about a week until they could find rental accommodation. She told the Tribunal that shortly after moving into the Motel Mr R found a place to rent and signed up a lease. He then had a drinking session and during this time he decided that the house he had signed up for was 'shit'. He became enraged and hit the applicant on the head with a mobile telephone. She was scared for her safety and for the baby's. Having noticed the violence the manager of the Motel and her boyfriend intervened by arranging for the applicant to move into another room so as to physically separate her from Mr R and from further risk. The applicant told the Tribunal that she did not report this incident to the police because Mr R was already having too much trouble with the police and she did not want to add to that trouble.
- j) They left the Motel together and moved into a rental in [suburb deleted: s431(2)]. She stayed there for one night and even though Mr R was sober the applicant said she was still scared so she decided to leave and moved into a women's refuge. She said she believes Mr R is mentally ill and his character is not stable. One month after they separated he threatened the applicant that he would get a gun to get the child back. This is when she decided to apply for a violence restraining order which was subsequently issued.
- k) The applicant told the Tribunal of another violent incident which occurred after she had arrived in Australia and while she was pregnant. She told the Tribunal that Mr R pushed her and then pulled her by the hair and threatened to kick her in the stomach. She also said that she was worried because he kept an axe in the cupboard and he had told her that he wanted to kill his mother and his brother.

- l) From her perspective her relationship with Mr R is definitely finished and she is not going back to him. She claims Mr R wants her to go back as does Mr R's mother with whom the applicant still has some contact.
31. The applicant told the Tribunal in respect to her father and uncle:
- a) she has not told her father and uncle the details about the violence she experienced at the hands of Mr. R. She said she did not want to worry them. At one point during the Tribunal hearing she said that she thought they would not necessarily force her to return to the relationship with Mr R. She also said that she feels she would be accepted in her father's home but there would also be pressure on her to return to the relationship.
 - b) He father is unable to support her if she was to return to China. She said her father is also unable to protect her if she returns to China. He father has a stomach illness and her brother has [medical condition deleted: s431(2)]. She said that she is worried if she goes back to China to live with her father she will cause him financial stress and shame because she left her husband.
 - c) As to the reference in the applicant's claim for the protection visa to her uncle persecuting her, the applicant told the Tribunal that her uncle has supported her and her family and that he may think that Mr R should be given another chance. She is also fearful of the possibility of Mr R returning to China and convincing her father and uncle that the applicant should rejoin him. She said that her father and uncle would not say that the applicant must go back to the relationship with Mr R however there would be gossip in the village and her father might feel ashamed. Her family thinks she is happy with her situation in Australia.
 - d) Her last contact with Mr R was in January or February 2009. He sent her a text message saying that he wanted to get back together with her. She said she believed he sent the text message from China. She believed Mr R was not working at the time although previously he had been employed with a church and also wrote songs for the church. She said that Mr R had told her he did not want to work too much because it was due to his work that his first marriage failed.
 - e) She believes Mr R is currently in prison. According to the applicant, Mr R has a criminal record for drunk driving and also for committing violence towards a friend.
 - f) She was staying in a women's refuge when Mr R returned from China around May 2009. She had a violence restraining order granted against Mr R at the time however according to the applicant Mr R found out where she was staying and he breached the violence restraining order.
 - g) As to the custody of the child, Mr R has applied to the Family Court for access to the child. According to the applicant Mr R was granted one hour supervised contact with him every two weeks.
32. On whether she would be provided police protection in the PRC the applicant told the Tribunal:

- a) she believes the police in the PRC will only respond to a call if there is a serious injury. She told the Tribunal of an experience while she was living with Mr R in her father's house in the PRC Mr R was letting off fireworks and this caused a dispute with one of their neighbours with the result that the police told her they would not attend such an incident because nothing had happened. She also told the Tribunal that she is concerned that the roads in the vicinity of her father's home are too narrow and the police would have difficulty getting access in the case of an emergency.
 - b) She is also aware of two friends who live in Jiangshu Province where in one case a mother attempted suicide due to domestic violence. The applicant told the Tribunal that she has since advised that woman that she should go to one of the women's refuges in the area having been made aware of the existence of women's refuges by the country information contained in the Department's decision record. The applicant spoke of a second case she was aware of where a friend in Fujian was the victim of domestic violence and had tried to leave her relationship on a couple of occasions According to the applicant, in that case the person had no option but to return to the relationship because she could not get financial support and there were no women's refuges so she was unable to survive outside of her home.
 - c) The applicant told the Tribunal that if she was a government leader's daughter or if she could pay the police then she might be able to get protection.
33. On whether it would be possible for her to relocate to another part of China the applicant told the Tribunal:
- a) she had considered the possibility of relocation. She said that she would have to go alone with her child and that her father's income is only 800RMB per month and her brother does not work. She also said it would take her too long to find a job in her particular clerical occupation and she could not survive without a job. She said she would probably only earn 600RMB per month and furthermore she would not have the income for childcare. She also expressed doubt over whether her child would be entitled to a Chinese medical card. She told the Tribunal that she was also worried that education for the child might be more expensive in China because he is an Australian citizen. The applicant also told the Tribunal that she is concerned that if the child grows up in China he might become confused as to who his father is and she is worried that he might be ridiculed.
 - b) The applicant is currently receiving special benefits from Centrelink.
34. In respect to the delay in applying for the protection visa, the applicant told the Tribunal that her husband had told her that she did not need to extend her visa so she followed his advice. It was not until she had moved into the women's refuge that she was given legal advice that she should apply for a Protection Visa.
35. In respect to the relevant country information the applicant told the Tribunal:
- a) she was not aware of the existence of women's refuges in the PRC She said she did recall a program on television in the PRC and the program had a theme that there was too much domestic violence in China She said the program also made the point

that victims of domestic violence are often reluctant to seek police assistance because the police required evidence before they would act.

- b) she considered notifying the Chinese authorities about the violence she had experienced at Mr R's hands and request that he be refused future entry to China. Such an outcome would provide comfort to her that he would not be able to commit any future violence towards her if she returned to China. She added however that she was concerned that Mr R might change his name or enter China through another country such as Burma and thereby circumvent that protection.
 - c) she feels safer in Australia She can get housing here, she can get a job and get an education. Her child can get a Medicare card whereas in China she would not have the money for her or her child to go to hospital.
36. At the end of the hearing the Tribunal invited the applicant's representative to make submissions in view of the possibility that the applicant was a vulnerable person and owing to the violence which she had experienced being unable to present her case adequately. The applicant's representative made the following submissions:
- a) there are complex cultural issues associated with the circumstances of this case, including the expectation in China that women should put up with domestic violence;
 - b) the laws in China are in a fledgling and inadequate state and are perhaps some 30 years or so behind the laws in Australia;
 - c) there is a serious question as to whether the police would respond to provide protection to the applicant;
 - d) as Mr R has dual citizenship, namely Burmese and Australian, it is possible that he might enter China via Burma and thereby avoid any prohibition the Chinese authorities might impose on him due to the domestic violence that occurred in Australia It was submitted also that Mr R has demonstrated he has the ability to move around and that he is able to return to China;
 - e) with respect to relocation there are practical problems associated with this in the circumstances of the applicant's case including: she is a single mother and there is discrimination in China towards single mothers. Further, the child would face the added discrimination as a result of his Australian citizenship. The services in China to protect and support the victims of domestic violence, if they exist, would be focused on the urban areas and not the rural area which is the applicant's normal place of residence;
 - f) the applicant is a member of a particular social group, namely the group comprising married women in China. The persecution is from Mr R and the state will not protect the applicant. The applicant's action to leave her husband will be seen as a transgression of the obligation of married women in China and she will not attract sympathy from the community or service providers because, amongst other things, she has a child;

- g) the child does not have the automatic right to enter China and so he will be required to obtain a Chinese visa;
- h) it is in the best interest of the child that the applicant be permitted to continue living in Australia because, amongst other things, the paternal grandmother wishes to have contact with the child;
- i) if the applicant returns to China and Mr R is also able to return and present a threat to the applicant then there is a risk to the applicant's right to life under the ICCPR

Post hearing submission

37. After the hearing, the Tribunal received a written submission from the applicant's representative (received by fax [in] October 2009). The submission includes information on state protection in the PRC with regard to domestic violence. In particular, the submission includes a document written in the Mandarin language together with a translation of that document. The document is *titled Current status of China's domestic violence*, is dated 12 January 2009 and its source is stated as Mental Training Network, Author ADMIN.
38. The post hearing submission also states that the Chinese authorities would be "unable, if not unwilling" to protect the applicant and her infant for the following reasons:
- The legal mechanisms in place to address the problem of domestic violence are insufficient and need to be seen in the context of a country with over 1.3 billion people;
 - There is substantial evidence that there is a culture of tolerance of domestic violence in China, particularly in rural areas and that the applicant would be at risk because the local authorities may ignore or respond too slowly to threats against her;
 - The person the applicant fears most, her estranged husband, is not a Chinese citizen and is less likely to be bound by the legal measures that are available. He has dual nationality (Burmese and Australian) "which allow him to travel freely in Asia and cross borders without detection."

Country of origin information

39. The amended *Marriage Law of the People's Republic of China (1980)* is the primary law codifying domestic/family violence as unlawful. This law was amended in 2001 specifically to outlaw domestic/family violence. Articles 3,32,43,45 and 46 respectively of the Law provide:

Article 3 Marriage upon arbitrary decision by any third party, mercenary marriage and any other acts of interference in the freedom of marriage shall be prohibited. The exaction of money or gifts in connection with marriage shall be prohibited.

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 When one party alone desires a divorce, the organizations concerned may carry out mediation, or the party may appeal directly to a people's court to start divorce proceedings.

In dealing with a divorce case, the people's court should carry out mediation between the parties. Divorce shall be granted if mediation fails because mutual affection no longer exists. Divorce shall be granted if mediation fails under any of the following circumstances:

- (1) bigamy or, cohabitation of a married person with any third party;
- (2) domestic violence or, maltreatment and desertion of one family member by another;
- (3) bad habits of gamble or drug addiction which remain incorrigible despite repeated admonition;
- (4) separation caused by incompatibility, which lasts two full years; and
- (5) any other circumstances causing alienation of mutual affection.

...Article 43 In regard to the domestic violence to or maltreatment of family member(s), the victim shall have the right to make a request, and the neighbourhood or villager committee as well as the units in which the parties concerned work shall dissuade the wrongdoer, and offer mediation.

In regard to the domestic violence being committed, the victim shall have the right to make a request, the neighbourhood or villager committee shall dissuade the wrongdoer, and the public security organ shall stop the violence.

If, in regard to the domestic violence to or maltreatment of family member(s), the victim makes a request, the public security organ shall subject the wrongdoer to administrative penalty in accordance with the relevant provisions of administrative sanctions for public order.

...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:

- (1) bigamy;
- (2) cohabitation of a married person with any third party;
- (3) domestic violence; and

(Marriage Law of the People's Republic of China, adopted at the Third Session of the Fifth National People's Congress on 10 September 1980 [amended 2001])

40. *The Law of the People's Republic of China on the Protection of Rights and Interests of Women (1992)* was amended in 2006. Article 2 provides, amongst other things:

Discrimination against, maltreatment of, or cruel treatment in any manner causing injury even death of women shall be prohibited.

Article 38 of the Law provides, amongst other things:

Women's right of life and health is inviolable. Drowning, abandoning or cruel infanticide in any manner of female babies is prohibited;..... cruel treatment causing bodily injury to or death of women by means of superstition or violence is prohibited; maltreating or abandoning of women who are ill, disabled or aged is prohibited.

Article 57 of the Law provides:

Where a person, in violation of the provisions of this Law, evades, delays or suppresses the investigation and disposition of a complaint, a charge or an exposure regarding the infringement upon a woman's rights and interests, or retaliates against the woman who make the compliant, charge or exposure, the unit where the person works or the department in charge or at a higher level shall instruct him to rectify, and give administrative sanctions according to law to the person directly in charge of the unit and the other persons directly responsible.

41. Shortcomings of the protections against domestic violence in China have been expressed in various sources. For example:

The most significant progress includes the unprecedented inclusion of domestic violence in the revised Marriage Law promulgated in April 2001, the adoption of local regulations to prevent domestic violence, and establishing support services for women victims. However, enforcing these policies and laws remains a big challenge, because law enforcers are unable to deal with cases of domestic violence effectively and victims may not get adequate judicial support. Furthermore, after the silence is broken, victims of domestic violence need further support to help them step out of violence.

...Provisions related to domestic violence are included in several national policies and laws. However, these laws do not provide adequate assistance to victims of domestic violence because of difficulties in implementation. This is especially true when the injury is minor, in which case it is usually difficult for a victim to get adequate evidence for the injury. A specific domestic violence bill is expected to meet the gap.

...Women's organizations have built a partnership with other civil society organizations in pushing for the adoption of a domestic violence law in China. On the eve of the International Day for the Elimination of Violence against Women in November 2002, the draft Bill for the Prevention of Domestic Violence was completed by a group of experts, researchers, and activists. The draft has been submitted to the Legislative Proposal Committee of the National People's Congress (2003-2008 session) for review (United Nations Development Fund for Women 2008, PR China Country Profile, UNIFEM website <http://www.unifem-eseasia.org/resources/others/domesticviolence/PDF/Chinapdf> – Accessed 9 September 2009

42. In 2006 the United Nations Committee on the Elimination of Discrimination against Women wrote, amongst other things, in its *Concluding comments of the Committee on the Elimination of discrimination against Women: China* that the 2001:

21. While commending the State party for the explicit prohibition of domestic violence in the amended Marriage Law of 2001 and for other measures taken to address violence against women, the Committee remains concerned by the lack of comprehensive national legislation on violence against women that also provides access to justice and means of support for victims and punishment of perpetrators, and the lack of statistical data concerning all forms of violence against women.....

22. The Committee urges the State party to adopt a comprehensive law on violence against women and to ensure that all forms of violence against women and girls, both in the public and private spheres, constitute a crime punishable under criminal law. It calls upon the State party to provide immediate means of redress and protection to women and girls victims of violence, in accordance with the Committee's general recommendation 19. It also encourages the State party to enhance victims' access to justice and redress, for example, through training aimed at judicial officers, including judges, lawyers and prosecutors, in order to enhance their capacity to deal with violence against women in a gender-sensitive manner and ensure that claims are investigated expeditiously, including incidents of violence against women in detention centres. It also calls upon the State party to strengthen its system of data collection in regard to all forms of violence against women and to include such information in its next report (UN Committee on the Elimination of Discrimination Against Women (CEDAW) 2006, 'Concluding comments of the Committee on the Elimination of discrimination against Women: China', UNHCR Refworld website <http://www.unhcr.org/refworld/country,COI,CEDAW,,CHN,,453778190,0.html> – Accessed 9 September 2009 –

43. The Chinese Communist Party aligned All-China Women's Federation states the following in its website:

China's first court order on the protection of personal safety was issued by Chong'an district court in Wuxi city, Jiangsu Province, on August 6, 2008 The court order prohibited the husband Chen from beating or intimidating his wife Zhang Lifang (fake name). It is the first time a judicial protection for personal safety has been applied by the court in a civil case.

Another court order to protect personal safety was issued by Yuelu district court in Changsha city, Hunan Province, on September 24. The court ordered the police department to keep an eye on the husband and prevent him from beating or intimidating his wife.

Chinese courts have issued two court orders to protect personal safety within two months. This reflects a change in the prevention of domestic violence: from punishment afterwards to protection beforehand. This can be seen as the result of the promulgation of "Court Guidance on Cases Involving Domestic Violence in Marriage" by the Institute of Applied Laws under the supreme people's court in May.

Both the Marriage Law and the Law on the Protection of Rights and Interests of Women have stipulations against domestic violence. Sixty-nine local laws or regulations also discuss this issue. However, all the articles are general in principle and difficult to implement.

Domestic violence is difficult to prosecute in family and marriage lawsuits. Even if the judge is certain that domestic violence is occurring, he or she cannot rule against

the abuser without the abuser's confession because "ruling out all reasonable doubt" is used as the standard in such cases.

It is difficult to collect evidence in such cases. In marriage and family cases, about 40 to 60 percent involve domestic violence. However, less than 30 percent of them are able to supply indirect evidence, including photographs, hospital records, police records or children's testimony. Witnesses seldom testify in court and only when the abuser confesses can the court rule against him. However, only 10 percent of accused abusers have confessed to violent behaviour in the family ('Domestic Violence in China' 2008, Women of China website, 10 October
http://womenofchina.cn/Issues/Rights_Protection/206783.jsp – Accessed 2 September 2009 –

44. The US Congressional-Executive Commission on China reported in 2008:

In order to provide better protection to domestic violence victims, four Ministries (Public Security, Civil Affairs, Health, and Justice), one Party-controlled organization (All-China Women's Federation), the Party's Central Propaganda Department, and the Supreme People's Procuratorate jointly issued the Opinions on Preventing and Detering Domestic Violence (Opinions) on July 31, 2008. Highlights in the Opinions include: requiring public security officers to respond to complaints made through the "110" telephone emergency hotline (Article 8); requiring hospitals and healthcare workers to undergo training programs to prevent and curb domestic violence (Article 11); and requesting All-China Women's Federation offices to establish domestic violence hotlines (Article 13). The Opinions appear to increase the government's responsibility in handling domestic violence cases, according to an article published by the organization West Women on September 9.

To ensure the safety of domestic violence victims involved in cases pending before a court, the Institute of Applied Laws under the Supreme People's Court also issued the Court Guidance on Cases Involving Domestic Violence in Marriage (Guidance, partially reprinted on Divorce Net) in May. Article 27 of the Guidance advises courts to issue protection orders to "prohibit offenders from beating, threatening, harassing, or stalking victims, or having unwelcome contact with the victims and their children," and if necessary, to require offenders to receive psychological therapy. Such protection orders can also order offenders to "temporarily move out of their residences, if necessary and if the cases meet qualifications." In addition, the Guidance provides that "during the effective period of the protection order, no party should handle valuable marital properties."

... Domestic violence offenders are punishable under Articles 234, 236, and 260 of the Criminal Law, and Article 43 of the Public Security Administration Punishment Law. China's Civil Procedure Law also allows victims to file civil lawsuits against offenders ('Government improves anti-domestic violence efforts; victim protection remains limited' 2008, Congressional-Executive Commission on China, 20 December
<http://www.cecc.gov/pages/virtualAcad/index.phpd?sho wsingle=115327> – Accessed 20 January 2009 –

45. A 2005 article entitled 'Anti-domestic violence drive needs legal support' published by the Chinese Communist Party's *People's Daily* states:

... Lawyers from the Law Research and Service Centre for Women under the Law School of Peking University have come across several problems when dealing with domestic violence cases.

Evidence is difficult to collect because domestic violence usually happens behind closed doors.

Without witnesses, statements from victims alone cannot be treated as evidence.

Many still treat violence as a mere family dispute, and consider it normal. Victims are often misunderstood, and usually blamed if they take their husbands to court.

Neighbourhood and residents' committees usually refuse to provide information when lawyers try to collect evidence.

Some public security officers regard a husband beating his wife as an everyday occurrence, although some cities' police stations have put such cases on file for investigation in recent years ('Anti-domestic violence drive needs legal support' 2005, Human Rights Without Frontiers, source: *People's Daily*, 23 August 2005, http://www.hrwf.net/china/ext/cn_pr_aug23_05.pdf – Accessed 9 September 2009

46. The US Department of State's 2008 *Country Reports on Human Rights Practices* – *China* states, amongst other things:

In response to an increased awareness of domestic violence, there were a growing number of shelters for victims. During the year the ACWF reported 27,000 legal aid service centres, 12,000 special police booths for domestic violence complaints, 400 shelters for victims of domestic violence, and 350 examination centres for women claiming to be injured by domestic violence had been established nationwide. Most shelters were government run, although some included NGO participation.

In August a district court in Wuxi, Jiangsu Province, issued a precedent-setting court order on the protection of personal safety, prohibiting a husband from intimidating or beating his wife who had tried to divorce him and who, he claimed, had not provided him with a son. A second, similar order was issued in September at a district court in Changsha, Hunan Province. The two protection orders were based on guidance issued by the SPC in May, intended for rulings on family cases involving domestic violence.

.....

Experts pointed out that in addition to the new guidance, 25 of 33 provinces and administrative regions have adopted their own legislation to combat domestic violence. In July seven ministries, including the MPS, the Ministries of Civil Affairs and Health, as well as the ACWF issued new guidelines on the prevention and elimination of domestic violence, which lay out specific actions to be taken to raise awareness of the issue, properly handle domestic violence cases, protect victims, and provide legal assistance where needed (US Department of State 2009, *Country Reports on Human Rights Practices* – China, 25 February, Section 5

47. The All-China Women's Federation reports in an article entitled 'Advances in Legal Aid for Women and Children':

With the growth of social awareness and promulgation of the Law on the Protection of Rights and Interests of Women and Regulation on Legal Aid, legal aid has expanded to cover domestic violence. The service also helps women who have been subjected to abuse, desertion, who seek divorce on the grounds of bigamy, and in cases of defaults in compensation payments. Legal aid is also applicable to child custody and illegal adoption.

Ministries jointly issued this July the Opinions on Preventing and Deterring Domestic Violence which promote legal aid for victims of domestic violence. The Opinions

encourage and support legal service institutions in the reduction or waiving of legal fees for those in straitened economic circumstances.....

... Although legal aid for women and children has improved greatly, there is scope for progress. Criteria for "economic difficulty" sometimes disqualifies women from the legal aid they need.

Applicants are assessed on the basis of their entire household income thus failing to take into account that they have no independent economic resources. This puts victims of domestic violence at a tremendous disadvantage because abused women seldom have any say in use of the family property, and their husbands are hardly likely to help finance lawsuits against themselves.

Economic restraints on legal aid need to be re-examined and adjusted to cover this type of situation, and a more gender-specific perspective included in the re-examination and adjustment process. One expert suggests that the economic status of an applicant be determined on basis of the individual's own possessions, rather than of the household (Yu, H. 2008, 'Advances in Legal Aid for Women and Children', Women of China website, source: *China Women's News*, 25 December http://www.womenofchina.cn/Issues/Rights_Protection/208160.jsp – Accessed 10 September 2009

48. The US Department of State's 2008 *Country Reports on Human Rights Practices – China* stated:

Fuzhou City's first circuit court to safeguard women's rights and interests was recently set up in the Minhou County Court. Comprised of eight excellent judges, including women, the circuit court invited the director of the Minhou women's federation and the heads of women's federations from 16 townships to be special jurors. The special court will serve the needs of women suffering from domestic violence and solve the difficulties these women have come across in the legal procedure in a shorter time.

At the opening ceremony, five units including the Minhou County Court and the Provincial Dongfang Auctioneer donated 9,000 yuan to the "Opposing Domestic Violence Rescue Foundation" under the Fuzhou Women's Federation ('Circuit Court for Women Opens in Fuzhou' 2007, *All-China Women's Federation*, 25 July <http://www.women.org.cn/english/english/whatisnws/07-25-01.htm> – Accessed 11 September 2009 –).

49. In 'Domestic Violence in Spotlight' 2007, China.Org.CN website, it states:

The Ministry of Public Security confirmed yesterday that police will handle cases of domestic violence differently to regular family disputes.

The move is part of a regulation to be issued by the ministry on how to deal with family violence, and it aims to better protect victims, a document from the ministry's public security management bureau, said.

The document said the setting of a new case type would help the police better understand the severity of such incidents so they might take appropriate and timely action.

Police generally treat domestic violence as a family dispute, and are therefore sometimes slow to react. To redress that, the regulation places a legal duty on the police to assist victims and stipulates that police response must be immediate or they will face punishment.

Figures from the All-China Women's Federation show that about 30 percent of Chinese families, some 80 million, have experienced domestic violence. About a quarter of the 400,000 divorces registered each year result from family violence.

Besides, the federation has received about 50,000 reports of domestic violence over the past two years, with an annual growth rate of 70 percent.

"Women are the victims in most cases," Mo Wenxiu, the federation's vice-chairwoman, said.

Figures from police in Shenzhen, south China, show that in the first half of this year, 26 people died as a result of domestic abuse -- 13 percent of all the deaths resulting from crime.

However, although China has laws and regulations concerning domestic violence, they lack details for prevention and punishment.

The traditional idea is that family violence is a private matter and the variables involved prevent effective policing, Liu Bohong, deputy director of the Women's Studies Institute of China, said ('Domestic Violence in Spotlight' 2007, China.Org.CN website, source: *China Daily* 2 August <http://www.china.org.cn/english/government/219457.htm> – Accessed 02 September 2009 –

50. On the issue of visa requirements for a person seeking to enter the PRC, the website for the Embassy of the People's Republic of China states that there is no visa requirement for ordinary passport holders from Singapore, Brunei, and Japan to visit China for up to 15 days for business, sightseeing, visiting relatives and friends or transit. There are also exceptions generally for travellers in transit. In other cases a visa is required to enter the PRC. (source: <http://mm.china-embassy.org/eng/lsyw/a/t580126.htm>)

FINDINGS AND REASONS

51. The Tribunal accepts that the applicant is a national of the PRC on the basis that a certified copy of her passport issued by that country was provided in the Department's file. The Tribunal also accepts that the applicant arrived in Australia [in] August 2008 using that passport which bears an Australian Class TR Subclass 676 visa.
52. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any other country other than her country of nationality, the PRC. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.
53. The applicant's claims may be summarized as follows. The applicant is a 24 year old female. In her claim for refugee status the applicant stated she has a fear of serious harm from her father, uncle and husband if she returns to the PRC. She fears her husband will track her down if she returns to her home village in the RPC and cause harm to her. She believes that she is protected and safer in Australia with the benefit of the enforceable Violence Restraining Order issued against her husband by the Magistrates Court in Perth. She believes that she will not have the same level of protection if she returns to her home village in the PRC.
54. When determining whether a particular applicant is entitled to protection in Australia the Tribunal must make findings of fact based on the claims made by the applicant. This may involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal must recognize the difficulties faced by protection visa

applicants in providing documentary or other supporting evidence. The Tribunal should give the benefit of the doubt to an applicant who is generally credible but unable to substantiate all of their claims. The Tribunal is not required, however, to accept uncritically each assertion made by the applicant. Further, rebutting evidence need not be available to the Tribunal for it to make a finding that a particular factual assertion has not been made out.

55. In assessing the applicant's credibility, the Tribunal must be mindful of the effects that persecution and fear may have on the applicant. A person who experiences these things might be inclined to be suspicious and wary and believe that harmful things might be certain to happen when in fact the reality might be that things might not turn out so bad. The Tribunal was mindful of this in considering the applicant's claims and evidence.
56. The Tribunal notes that the applicant arrived in Australia [in] August 2008 on a tourist visa, gave birth to her son on [date deleted: s431(2)], separated from her husband [in] December 2008 and applied for a Protection Visa [in] April 2009. The Tribunal found that the period that elapsed between her separation and the applicant lodging a claim for a Protection Visa does not militate against her claim. The Tribunal accepts that the applicant may have been unaware of the possibility of making a claim for such a visa and only found out about that when she entered the women's refuge after separating from her husband.
57. The applicant claimed to have suffered domestic violence at the hands of her husband after she arrived in Australia. The evidence before the Tribunal, including the Violence Restraining Order issued by the Magistrate's Court in Perth [in] March 2009, satisfies the Tribunal that the applicant suffered domestic violence at the hands of her husband while in Australia. The Tribunal is also satisfied that the harm suffered by the applicant is "serious harm" for the purposes of the definition of a refugee under the Convention.
58. A question for the Tribunal is whether there is a real chance of the applicant suffering harm at the hands of her husband in the reasonably foreseeable future if she returns to the PRC. A further question the Tribunal must consider is whether the harm feared is for one or more of the reasons enumerated in the Convention definition, that is, race, religion, nationality, membership of a particular social group or political opinion. The phrase "persecution for reasons of" serves to identify the motivation for the infliction of the persecution and involves two concepts, that of persecution and that of causal connection to the relevant characteristic of the person persecuted. The Tribunal's role, amongst other things, is to determine whether there is a relevant causal connection between the harm feared by an applicant and a ground in the Convention, given the specific circumstances of each case. In *Applicant A & Anor v MIEA & Anor*, Gummow J said that the phrase "for reasons of" serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it. The reason for the persecution must be found in the singling out of one or more of five attributes, namely race, religion, nationality, membership of a particular social group or political opinion.¹ In *MIMA v Haji Ibrahim* McHugh J similarly emphasised that the Convention requires the Tribunal to ascertain the motivation for the allegedly persecutory conduct which an applicant for refugee status fears.²

¹ *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 284, per Gummow J.

² (2000) 204 CLR 1 at [102].

59. The relevant Convention nexus can be satisfied by either the discriminatory motivation of the perpetrators of the harm or the discriminatory failure of state protection. Therefore, where the immediate harm appears to have no Convention nexus as in the circumstances of this case, it becomes necessary to consider whether there is a discriminatory failure of state protection attributable to a Convention reason. For example, in *MIMA v Khawar & Ors*³ the applicant claimed to have been subjected to domestic violence and denied state protection because she was a woman. The majority⁴ found that such circumstances could come within the Convention even though the harm by the private individuals was unrelated to the Convention. If the persecution was characterised as a combination of serious harm by private individuals and a failure by the state to provide protection against such harm, the Convention nexus requirement could be satisfied by the motivation of *either* the private individuals or the state.⁵ If the persecution was characterised as the failure of the state to provide protection against non Convention related domestic violence, then the reason for the inactivity of the state must be one or more of the Convention grounds.⁶
60. 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.
61. The Tribunal finds that there is no evidence that the harm that the applicant experienced at the hands of her husband or the harm she fears in the future from her husband is because of a Convention reason. The Tribunal accepts the applicant's claim that she may be a member of a particular social group, namely women in China or the particular social group comprised by single women or single mothers in China, however, the Tribunal finds that the husband's motivation to cause harm to the applicant is due to his personal relationship with her and not because she is a member of one or more of these particular social groups. What is required is that a Convention reason is the essential and significant motivation for the harm, however on all the evidence before the Tribunal it finds there is no nexus between the motivation for the harm feared and a Convention reason. The applicant's claim therefore fails the test under s91R(3)(a) of the Act.
62. The Tribunal does not accept the applicant's claim where she says that because the police in the PRC are under resourced or because the roads are too narrow in her village to permit police access, that this evidences a discriminatory withholding of state protection from the applicant. As referred to above, there is country information indicating that more needs to be done to provide better protection in the rural areas in the PRC (for example, country information includes reference to "*....enforcing these policies and laws remains a big challenge, because law enforcers are unable to deal with cases of domestic violence effectively and victims may not get adequate judicial support. Furthermore, after the silence is broken, victims of domestic violence need further support to help them step out of violence.....Provisions related to domestic violence are included in several national policies and laws. However, these laws do not*

3 (2002) 210 CLR 1.

4 Gleeson CJ and McHugh, Gummow & KirbyJJ; Callinan J dissenting.

5 (2002) 210 CLR 1 at [31] per Gleeson CJ, and at [120] per Kirby J.

6 *MIMA v Khawar & Ors* (2002) 210 CLR 1 at [84] and [87], per McHugh & Gummow JJ.

provide adequate assistance to victims of domestic violence because of difficulties in implementation.....” , (Source:PR China Country Profile, UNIFEM website <http://www.unifem-eseasia.org/resources/others/domesticviolence/PDF/Chinapdf> – Accessed 9 September 2009.). However, other country information in respect to the amendments to the legislation and to services in urban centres and cities supports a conclusion of an improved legal system and infrastructure which provides necessary state protection against domestic violence. For example:

- The amended *Marriage Law of the People's Republic of China (1980)* and the amendments to *The Law of the People's Republic of China on the Protection of Rights and Interests of Women (1992)* in 2006 supports a conclusion of a system of law prohibiting domestic violence;
- Similarly, the issue of the first court orders on the protection of personal safety issued by Chong'an district court in Wuxi city, Jiangsu Province, on August 6, 2008 and again in the Yuelu district court in Changsha city, Hunan Province, on September 24. (Source: ‘Domestic Violence in China’ 2008, Women of China website, 10 October http://womenofchina.cn/Issues/Rights_Protection/206783.jsp – Accessed 2 September 2009) supports a conclusion of state protection against domestic violence;
- Further, the measures taken by the four Ministries (Public Security, Civil Affairs, Health, and Justice), one Party-controlled organization (All-China Women's Federation), the Party's Central Propaganda Department, and the Supreme People's Procuratorate jointly issued the Opinions on Preventing and Deterring Domestic Violence (Opinions) on July 31, 2008 are in order to provide better protection to domestic violence victims; requiring hospitals and healthcare workers to undergo training programs to prevent and curb domestic violence (Article 11); and requesting All-China Women's Federation offices to establish domestic violence hotlines (Article 13). (‘Government improves anti-domestic violence efforts; victim protection remains limited’ 2008, Congressional-Executive Commission on China, 20 December <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=115327> – Accessed 20 January 2009;
- Article 27 of the Guidance advising courts to issue protection orders to "prohibit offenders from beating, threatening, harassing, or stalking victims, or having unwelcome contact with the victims and their children," and if necessary, to require offenders to receive psychological therapy. Such protection orders can also order offenders to "temporarily move out of their residences, if necessary and if the cases meet qualifications." In addition, the Guidance provides that "during the effective period of the protection order, no party should handle valuable marital properties."
- The establishing of Fuzhou City's first circuit court to safeguard women's rights and interests recently set up in the Minhou County Court comprising judges, including women and involving the heads of women's federations from 16 townships to be special jurors. "Opposing Domestic Violence Rescue Foundation" under the Fuzhou Women's Federation (‘Circuit Court for Women Opens in Fuzhou’ 2007, *All-China Women's Federation*, 25 July <http://www.women.org.cn/english/english/whatisnws/07-25-01.htm> – Accessed 11 September 2009).

- The increased awareness of domestic violence and the growing number of shelters and services for victims including (as at 2007) 27,000 legal aid service centres, 12,000 special police booths for domestic violence complaints, 400 shelters for victims of domestic violence, and 350 examination centres for women claiming to be injured by domestic violence had been established nationwide. Most shelters were government run, although some included NGO participation. (US Department of State 2009, *Country Reports on Human Rights Practices – China*, 25 February, Section 5 ;
- Seven ministries, including the MPS, the Ministries of Civil Affairs and Health, as well as the ACWF issued new guidelines on the prevention and elimination of domestic violence, which lay out specific actions to be taken to raise awareness of the issue, properly handle domestic violence cases, protect victims, and provide legal assistance where needed (US Department of State 2009, *Country Reports on Human Rights Practices – China*, 25 February, Section 5

The Tribunal considered all this evidence and the country information evidence provided by the applicant, and while some of this country information indicates areas requiring improvement, the weight of all the evidence is that there would not be a discriminatory withholding of state protection from the applicant on account of her membership of the particular social groups “women” or “women in China” or “single women in china” or “single mothers in China”, or for any other convention reason, if she was to return to the PRC and in particular to a larger urban centre or city such as, but not only, Fuzhou.

63. The applicant has claimed she fears persecution at the hands of her father and uncle. During the hearing the applicant comments indicated that she was not so concerned about serious harm from her father or uncle or even that they would insist on her returning to her husband. The applicant told the Tribunal that she was concerned that her return to live with her father in her hometown would place financial pressure upon him. From this evidence the Tribunal finds that the main reason the applicant did not want to return to her home with her father in the PRC was that her father’s income is low and it would be a struggle for him to support her and her child. The Tribunal also finds that the applicant is concerned that there may be gossip in her hometown and embarrassment for her father and uncle. The Tribunal does not accept this is ground to sustain a claim by the applicant that she has a well-founded fear of persecution from her father and uncle. The Tribunal finds that the applicant does not face a real chance of persecution in the reasonably foreseeable future on account of her father or uncle.
64. The Tribunal notes the applicant makes the claim that she will not be protected by the police in the PRC. At the hearing the applicant told the Tribunal that she had considered informing the PRC authorities about the violence she had experienced at the hands of her husband in the hope that the authorities might refuse to grant him admission into the PRC should he attempt to return there
65. The Tribunal found, as set out in the above paragraphs, that the applicant does not have a well founded fear of persecution for a Convention reason. In light of this, it is not necessary for the Tribunal to consider the question of whether it is reasonable for the applicant to relocate for the purposes of securing her safety from harm. In this case however, the Tribunal had available to it country information which indicates that the enforcement of laws on domestic violence in the PRC appears to be more advanced in urban centres than in rural or remote locations. For example the US Department of State report on the Fuzhou City circuit court, (*All-China Women’s Federation*, 25 July

<http://www.women.org.cn/english/english/whatisnws/07-25-01.htm> – Accessed 11 September 2009 and the All-China Women’s Federation website publication referring to personal court order being issued in Wuxi City and Changsa City (*China Women's News* 25 Dec <http://www.womenofchina.cn/Issues/RightsProtection/208160.jsp> Accessed 10 September 2009). The Tribunal is satisfied that the applicant is likely to find better protection against harm which her husband might seek to inflict upon her if she were in a larger urban centre than in her smaller hometown.

66. The Tribunal considered whether relocation is reasonable and whether the applicant would be safe from her husband if she relocated. The Tribunal notes the information in the country information discussion above, for example the US Department of State report on the Fuzhou City circuit court, (*All-China Women’s Federation*, 25 July <http://www.women.org.cn/english/english/whatisnws/07-25-01.htm>. Accessed 14 October 2009), suggests that the enforcement of laws against domestic violence is patchy and varies from province to province with better enforcement appearing to be available in the larger urban cities rather than in the smaller rural and remote locations. This, and other evidence satisfies the Tribunal that there has been legal reform in the PRC with the amendment of the Marriage Law and other improvements including the superior court of that country has instructed the courts to treat domestic violence seriously. The official mouthpieces/news services of the country disseminate messages that the government is acting on domestic violence and the government has provided funding to the womens’ group. The Tribunal accepts that things are improving however, the fact remains that evidence exists that this is still an area of nascent law in China and that the enforcement of the law appears to vary according to the particular location with urban and capital centres having better enforcement and services than rural locations
67. In light of all the country evidence available, the Tribunal is satisfied that the level of protection available to the applicant in larger urban areas, including Fuzhou the capital of the applicant’s province, would be such that the applicant would not face a real chance of serious harm at the hands of her husband. The Tribunal had regard to the country information which suggests there are difficulties in enforcing domestic violence laws particularly in the rural locations. The Tribunal also noted the country information which states the substantial resources and mechanisms in place to combat domestic violence and enforce laws dealing with this problem. In particular the US Department of State’s 2008 *Country Reports on Human Rights Practices – China* which states, amongst other things, that in response to an increased awareness of domestic violence, there were a growing number of shelters for victims and that during the year. The report states 27,000 legal aid service centres, 12,000 special police booths for domestic violence complaints, 400 shelters for victims of domestic violence, and 350 examination centres for women claiming to be injured by domestic violence had been established nationwide.
68. The Tribunal is satisfied that the applicant has the capacity to relocate to one of the areas where the enforcement of the domestic violence laws is more effective than in the rural areas. Based on the applicant’s evidence of her previous relocation and securing employment within the PRC, the Tribunal is satisfied that the applicant is an energetic and resourceful person and she has experience in relocating as she has moved from her hometown to Shenzhen for work as a statistician in a shoe and sandal factory. The applicant has also demonstrated her mobility by relocating to Australia. The Tribunal noted the applicant’s claim that it would take her ‘too long to find work’, however the Tribunal also notes the rate of unemployment in the PRC is presently lower than the

rate of unemployment in Australia (source: Trading Economics – Global Economics Research <http://www.tradingeconomics.com/Economics/Unemployment-rate.aspx?Symbol=CN> Accessed 15 October 2009). The Tribunal is therefore satisfied that it would not be unreasonable for the applicant to relocate to Fuzhou or some other large urban area and to be safe from her husband. The Tribunal is also satisfied that the likelihood of the applicant’s husband locating the applicant in a large and populous urban centre is less than if she was to return to her smaller rural hometown. This practical demographic protection coupled with the applicant’s husband not being a Chinese citizen or permanent resident further increases the protection for the applicant if she was to relocate.

69. The Tribunal does not accept the applicant’s proposition that the applicant’s husband’s dual nationality (Burmese and Australian) can “allow him to travel freely in Asia and cross borders without detection.” The country information does not support this proposition, to the contrary, the country information is that the applicant’s husband will be required to obtain a visa to enter the PRC and the visa application requires that a person disclose, amongst other things, whether a person has a criminal record in China or any other country. There is no visa requirement for ordinary passport holders from Singapore, Brunei, and Japan to visit China for up to 15 days for business, sightseeing, visiting relatives and friends or transit. There are also exceptions generally for travellers in transit. However, in other cases, a visa is required to enter the PRC. (source: Embassy of the People’s Republic of China: <http://mm.china-embassy.org/eng/lsw/a/t580126.htm>)
70. The applicant claimed that the applicant would not attract sympathy from the community or service providers because she has left her husband and has a child. She also claimed that there would be discrimination against the child generally. The Tribunal considered the country information available in respect to the growing divorce rate in the PRC and notes according to country information that divorce is now common in China and that old stigmas attached to divorce and divorcees are fading, particularly in the major cities. As stated above, country information (‘Domestic Violence in Spotlight’ 2007, China.Org.CN website, source: *China Daily* 2 August <http://www.china.org.cn/english/government/219457.htm>) indicates that approximately 400,000 divorces take place in China every year and a quarter of these are due to domestic violence. The Tribunal accepts this, and other country information, as evidencing a change in attitude towards single mothers and towards divorce in the PRC and in the light of this evidence the Tribunal does not accept the applicant will experience significant discrimination amounting to persecution or that it would be unreasonable for her to relocate within the PRC.
71. The applicant claimed that if she was to relocate to another area within the PRC she may not have the money for childcare. The Tribunal does not accept this claim based on its country information which indicates that day care in the PRC is comprehensive and affordable with the state subsidies generally covering at least one-third to one-half the cost of the care. Source: ‘Shanghai Journal; to Keep China Working Day Care is Pampered’ (<http://www.nytimes.com/1991/12/24/world/shanghai-journal-to-keep-china-working-day-care-is-pampered.html>) Accessed 14 October 2009.
 - a) The applicant claimed that she was concerned that her child might not be eligible for a medical card if she returns to the PRC. The Tribunal does not find that the denial of a health card is serious harm in the sense contemplated

by the Convention. The Tribunal is satisfied that health care is available for the child, as for the applicant, for a fee in the PRC. The Tribunal notes the 2007 report of the Embassy of the People's Republic of China in Australia stating: *China plans to set up a comprehensive medical insurance program over the next three years that will cover all urban citizens, including children and the unemployed. The country will introduce a national health insurance program for all urban residents, Chinese Premier Wen Jiabao said at a meeting held on Monday and Tuesday in Beijing Only employed urban residents have so far been able to join the national health insurance program. With the advent of the new program, which is to be financed by the central government, a further 200 million urban residents will be insured.* (Source: <http://au.china-embassy.org/eng/xw/t344797.htm> Accessed 15 October 2009) Further, the Tribunal notes the PRC moves towards universal health care insurance as reported in *China Plans Universal Health Care* in <http://www.nytimes.com/2009/01/22/world/asia/22iht-beijing.1.19590543.html> Accessed 14 October 2009.

CONCLUSIONS

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

DECISION

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

HUMANITARIAN CONSIDERATIONS

74. The applicant has requested, in the event the Tribunal finds that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention, that the Tribunal refer the case to the Department for consideration by the Minister pursuant to s417 of the Act. That section gives the Minister discretion to substitute a decision of the Tribunal for another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so.
75. The Tribunal considered the applicant's case and the ministerial guidelines relating to the discretionary power and has decided not to refer the matter to the Department. As the Tribunal has found it is reasonable for the applicant to relocate to an area where she will not face a real risk of harm, the Tribunal is satisfied that there is no sound basis for believing that there is a significant threat to the applicant's personal security, human rights or human dignity should she return to her country of origin. Further, the Tribunal is not satisfied that the circumstances of this case may bring Australia's obligations as a party to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT) or the Convention on the Rights of Child (CROC) into consideration.

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

Sealing Officers ID: RCHADW