FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZNCK v MINISTER FOR IMMIGRATION & ANOR *[2009] FMCA 399*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming fear of persecution in China because of the Chinese one child policy – whether the Tribunal erred in its consideration of the application of the policy in Fujian province to the applicant and his family considered – jurisdictional error found.

WORDS AND PHRASES – "Persecution", "serious harm", "Convention nexus".

Migration Act 1958 (Cth), s.91R

Applicant A & Anor v Minister for Immigration & Anor (1997) 190 CLR 225
Applicant S v Minister for Immigration (2004) 217 CLR 387
SZJTQ v Minister for Immigration [2008] FCA 1938
SZMFJ v Minister for Immigration (No 2) [2009] FCA 95
SZMTP v Minister for Immigration & Anor [2009] FMCA 121
VTAO v Minister for Immigration (2004) 81 ALD 332

Applicant:	SZNCK
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3448 of 2008
Judgment of:	Driver FM
Hearing date:	30 April 2009
Delivered at:	Sydney
Delivered on:	28 May 2009

REPRESENTATION

Counsel for the Applicant:	Mr N Poynder
Solicitors for the Applicant:	Lewis Law
Counsel for the Respondents:	Mr G Johnson
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) A writ of certiorari shall issue quashing the decision of the Refugee Review Tribunal made on 5 December 2008.

(2) A writ of mandamus shall issue requiring the Refugee Review Tribunal to redetermine the application before it according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3448 of 2008

SZNCK
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal"). The decision was made on 5 December 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from China and had made claims of persecution based upon the Chinese one child policy. The following statement of background facts is derived from the applicant's written submissions filed on 22 April 2009.

2. The applicant is a national of the Peoples' Republic of China who first arrived in Australia on 12 May 2008 as a seaman on board a

ship.[1] On 10 June 2008 he lodged an application for a protection visa with the first respondent ("the Minister").[2]

3. The basis of the applicant's claims for protection were that he and his wife had breached China's "one-child" policy by having a second child.

4. In his statement accompanying the application[3], the applicant claimed that the Chinese authorities had imposed the following punishment on his family:

   a) When the local leaders of the school district (where the applicant's wife was employed as a teacher) found out that she was 5 months pregnant they organised their staff to go to their home to arrest his wife so as to have her undertake an abortion, but she escaped and hid.[4]

   b) Subsequently, officers of the family planning committee and staff of the school district went to their home many times to arrest the applicant's wife, and they threatened to stop her salary payment. The applicant's wife stayed in hiding and avoided arrest.[5]

   c) After the birth of their second child on 19 August 2007, staff from the family planning bureau, from the school district, and from the education bureau visited the applicant's wife in hospital and showed an *"extremely bad"* attitude and *"said a lot of dirty words"*.[6]

   d) In September 2007 the following occurred[7]:

      i) The government "exposed" the applicant and his wife on television.

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1 Court Book ("CB") 18, qn 28
2 The application documents are at CB 1-102
3 CB 31-33
4 CB 31.5
5 CB 31.6
6 CB 31.9
7 CB 32.1

ii) The applicant's wife was "discharged" from her employment (copies of documents confirming the termination of her employment were provided[8]).

iii) Staff from the family planning bureau came to their home to inform them that they were to pay a fine of RMB240,000, at a time when their total family income was RMB40,000. This compared with fines imposed on their neighbours in a similar situation of only RMB10,000-20,000.

e) The applicant and his wife could not afford to pay the fine and their case was submitted to the People's Court. On 19 October 2007 the Court issued a summons to them but they refused to pay (a copy of the summons and other court documents were provided[9]). A few days later the Court telephoned to request that they attend. The applicant's parents went on their behalf and requested that the fine be lowered; however the court officer *"made it clear to my parents that our home looked rich and therefore we have to pay a much higher fine"*.[10]

f) The applicant and his wife sent a "reconsideration application" to the Fuzhou Population and Family Planning Committee but it was rejected.[11] A copy of a Decision on Administrative Reconsideration of the Committee was also provided by the applicant.[12]

g) Thereafter *"the court tried many times to arrest us"*, but the applicant's wife remained in hiding.[13]

h) In early January 2008 the applicant was home on holiday from his work as a seaman when the Court sent staff to their home to arrest them, but he escaped and thereafter lived in a rented place.[14]

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8 CB 62-63 and 85
9 CB 87-89
10 CB 32.4
11 CB 32.5
12 CB 72-77
13 CB 32.5
14 CB 32.6

i) When the court staff were unable to arrest the applicant or his wife, they telephoned his father, telling him that they would withhold all of the applicant's official documents, stopping him from exiting or entering China.[15]

j) Subsequently the applicant's father "spent money", asking the court officials not to be too hard on them and asking them to *"postpone executing their policy on me"*.[16]

k) On 7 January 2008 the applicant discovered that in November 2007 the family planning officials had gone to his employer to investigate, and that his employment contract had not been renewed. He subsequently obtained employment with another company and escaped to Australia.[17]

l) The applicant also provided copies of photographs of court staff visiting their house on 3 April 2008.[18]

m) The applicant claimed that the Chinese Government would not provide household registration for either of his children, which meant that they would not be allowed to attend school.[19]

5. The applicant subsequently provided further information to the respondent, including:

a) A statement from his father[20] saying that *"nearly every week"* staff from the Court and Family Planning Bureau drove to his home or telephoned them asking after the applicant and his wife and harassing them about the unpaid fine. The father claimed that one official told him that if the fine was not paid they would blockade and seal off the father's house and they would freeze the bank accounts of all family members, and take away all their belongings. He also stated that the officials had been going to the applicant's maternal grandmother's house to arrest him and his wife, and that their children had

15 CB 32.7
16 CB 32.7
17 CB 32.9
18 CB 99-102
19 CB 32.10
20 CB 111-113

been refused registration which would prevent them from going to school.

b) A statement from the applicant's wife[21] saying that she had had to remain in hiding since the applicant had left China, that she has no form of income and no access to funds, that she dared not take her child to a doctor if he was sick and she could only go to hospital at night, and that she had to avoid contact with her relatives and friends due to the harassment that they had received from the officials. She stated that she had also been informed that her village committee wanted to force her to undergo a *"ligation of oviduct"*. She also stated that *"a person in the know"* had revealed to her that following the Olympic Games the court staff and riot police would forcibly acquire the applicant's parents house *"as a pledge"* for the fine.

6. On 22 July 2008 and again on 10 September 2008 the applicant was interviewed by an officer of the Minister's Department. The interview records have not been reproduced; however there is a summary of the interviews in the decision of the Tribunal.[22]

7. By a decision dated 16 September 2008[23] a delegate of the Minister refused the application for a protection visa, primarily on the basis that the applicant had managed to obtain a passport and had left China legally, which indicated that he was of no adverse interest to the authorities.[24]

8. On review by the Tribunal, the applicant provided further information, including a statement from the applicant[25] in which he made the following claims:

a) The reason that he had been able to obtain a passport was because, at that time, his appeal was still under consideration so their was no reason to refuse his application for a passport.[26]

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[21] CB 136
[22] CB 230-232
[23] CB 144-158
[24] CB 156-157
[25] CB 171-175
[26] CB 173.4

b) Shortly before he had left China in April 2008, his father had been invited to meet with a Mr Hong, who was head of the Administration Department of the Court, to try and settle the outstanding fine. Mr Hong had threatened that they would inform Customs to block the applicant's exit from China, they would seal off their home, and that the applicant's wife would have to undergo a ligation of the oviduct. The applicant's father thereupon bribed Mr Hong to allow one more month to pay the fine, which gave the applicant time to escape China.[27]

c) The applicant repeated his wife's claim that, unless the fine was paid and the wife underwent a ligation of the oviduct, following the Olympic Games the authorities would forcibly acquire the house of the applicant's parents and all their possessions.[28]

9. On 1 December 2008 the Tribunal convened a hearing into the application.[29]

The decision of the Tribunal

10. By a decision dated 5 December 2008 the Tribunal affirmed the refusal of a protection visa.[30]

11. In its decision the Tribunal first summarised the relevant law[31] then, under the heading, "Claims and Evidence", it referred to the material provided by the applicant, his departmental interviews, his application to the Tribunal and supporting material, and the Tribunal hearing.[32] The Tribunal then referred to the relevant "county information" regarding China's one-child policy".[33]

12. Under the Findings and Reasons section of the decision, the Tribunal made the following observations and findings.

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[27] CB 173.5-174.4
[28] CB 174.10-175.3
[29] A transcript of the hearing has been filed with the Court
[30] CB 224-250
[31] CB 225-227 [8]-[17]
[32] CB 227-242 [18]-[69]
[33] CB 242-246 [70]-[78]

13. It accepted that a fine had been imposed on the applicant and his wife for breach of the family planning regulations, and that his wife had lost her job as a result of the breach (although it did not accept that the applicant had lost his job as a result of the breach). It accepted that the authorities may impose "punitive actions" against the applicant and his wife if they fail to pay the fine, including loss of his father's house and land, detention for non-payment of the fine, and prevention from leaving the country. It found that such matters may amount to persecution within the meaning of s.91R(1) of the *Migration Act 1958* (Cth) ("the Migration Act").[34]

14. The Tribunal did not accept that the applicant had been required to pay a higher fine because his father's house looked rich; rather the fine had been calculated in accordance with their income and there was nothing to suggest that the value of the house had any impact on the calculation of the amount.[35] The Tribunal noted that the applicant had been allowed to pay the fine in instalments of RMB200,000 and RMB10,000, although he may have found these amounts to be excessive.[36]

15. The Tribunal considered that:

> *…the enforcement of the family planning laws does not bring the applicant within the terms of the definition of a refugee in the Refugees Convention because what is feared is punishment for the breach of a law of general application and not persecution directed at the applicant for a Convention reason.*[37]

16. The Tribunal did not accept that the family planning law was discriminatory in its intent; rather:

> *The Tribunal is of the view that it is appropriate and adapted to achieving a legitimate object, that is population planning. While there are variations on the implementation of the law in different provinces, there is nothing to suggest that the law has a discriminatory impact (in that it is not directed in any group on its face or in the way in which it*

[34] CB 246 [80]
[35] CB 246 [81]
[36] CB 246-247 [81]
[37] CB 247 [82]

applies) on members of a group recognised by a Convention or that it is enforced in a discriminatory way.[38]

17. The Tribunal considered that

> *…the mere fact that the applicant and his family would be penalised for a breach of the family planning regulations does not in itself bring… the applicant within the terms of the definition of a refugee in the Refugees Convention. This is because the enforcement of a generally applicable criminal law does not ordinarily constitute persecution: see* Applicant A & Anor v MIEA & Anor *(1997) 190 CLR 225, per McHugh J at 354.*[39]

18. The Tribunal rejected that argument that the law had been applied discriminatorily because the fine imposed on the applicant was excessive and he was unable to pay the amount. It considered that the amount of the fine had been calculated in accordance with Article 39 of the *Fujian Family Planning Regulation* as two to three times of his annual income, based on his actual income, and without distinction between rural and urban dwellers.[40] The Tribunal went on:

> *The Tribunal further finds that any other actions of the authorities arising from the non-payment of the fine, including the confiscation of property and land, intended arrest, loss of government employment, preclusion from exiting the country and other actions were taken in accordance with the relevant laws.*[41]

19. On the enforcement of the family planning laws, the Tribunal continued:

> *The Tribunal also finds that other actions taken by the officials with respect to the enforcement of the law were taken in accordance with the relevant laws cited above. Thus, the law provides for the dismissal of a government employee (the applicant's wife) while the US State Department Report on Human Rights refers to such measures as the confiscation and destruction of property*

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38 CB 247 [83]
39 CB 247 [84]. The reference to McHugh J's judgment in *Applicant A v Minister for Immigration* (1997) 190 CLR 225 should probably be to p 258.
40 CB 247-248 [85]
41 CB 248 [85]

and detention of family members. Thus, all actions referred to by the applicant, including the imposition of a high fine, the threat of property confiscation, attempted arrests, forced tube ligation and all other matters described by the applicant, including the claimed future harm arising from these matters, appear to be carried out in accordance with the relevant laws. The Tribunal finds that these are laws of general application and that they are not applied discriminatorily in the applicant's case. The Tribunal also finds that any future harm the applicant fears as a result of the breach of the one child policy arises from the application of the law of general application.[42]

The application and the evidence

20. The applicant relies upon an amended application filed on 26 March 2009. That application contains the following grounds and particulars:

> *The decision involved jurisdictional error.*
>
> *The decision maker failed to determine the application for review in accordance with the law.*
>
> *The second respondent misconstrued the law of general application causing it to fall into jurisdictional error.*
>
> *Particulars*
>
> 1. *The second respondent considered that "other actions" arising from non-payment of a fine imposed on the applicant and in enforcement of the Fujian Provincial Population and Family Planning Ordinance (2002), including the confiscation of property and land, arrest, loss of government employment, preclusion from exiting the country, and forced tube ligation of the applicant's wife, had been or would all be carried out in accordance with the relevant laws: see decision at [85]-[86].*
>
> 2. *The second respondent failed to enquire, or to make findings on, whether these "other actions" were an appropriate and adapted, in the sense of*

[42] CB 248 [86]

proportionate, means of achieving the objective of population planning.

21. I received as evidence the court book filed on 6 February 2009 and a supplementary court book filed on 12 February 2009. I also received the affidavit of Gareth Lewis made on 25 March 2009, to which is annexed a transcript of the hearing conducted by the Tribunal on 1 December 2008.

Submissions

22. The applicant contends that the Tribunal fell into error by conflating the concept of a law of general application with a Convention nexus. The Tribunal's decision was based on its consideration of whether the serious harm which the applicant feared, and which the Tribunal found, arose from the enforcement of a law of general application. The applicant concedes that dealing with the issue of persecution before a Convention nexus (here, membership of a particular social group) was not necessarily an error[43]. The applicant concedes that consideration of a law by reference to the question of whether it is a law of general application bears more on the harm feared as a result of breaching the law, in relation to the question of whether persecution is involved, than it does to whether persons who have breached the law constitute a particular social group. The applicant also concedes that if the Tribunal decides that the serious harm likely to result from a law of general application does not involve discrimination, in the sense discussed by McHugh in *Applicant A v Minister for Immigration* (1997) 190 CLR 225, the claim must fail in any event without the need to consider a Convention nexus[44].

23. The applicant's argument begins with the analysis of what was described as "settled law" by a majority of the High Court[45] in *Applicant S v Minister for Immigration* (2004) 217 CLR 387 at 402-403 [43]-[45]. The Court there considered that whether the application of a law constituted persecution ultimately depended upon whether the treatment afforded on the basis of the law is

[43] see *VTAO v Minister for Immigration* (2004) 81 ALD 332 at [22]-[24] per Merkel J
[44] see *SZJRU v Minister for Immigration* [2009] FCA 315 at [50] and [58]
[45] Gleeson CJ, Gummow and Kirby JJ

appropriate and adapted to achieving some legitimate object of the country concerned. In that case the Court noted that the criteria were expanded on in *Chen Shi Hai v Minister for Immigration* (2000) 201 CLR 293 by reference to whether different treatment is involved and whether that treatment offends the standards of civil societies which seek to meet the calls of common humanity.

24. The applicant contends that, in the present case, the Tribunal's finding at [83]-[84] that China's one child policy was a law of general application that was appropriate and adapted to achieving the legitimate object of population planning, was not the end of the issue. The applicant contends that the Tribunal fell into error in its consideration of the so called "other actions" taken by the authorities for non payment of the fine imposed upon the applicant which, at [85], it accepted would include confiscation of property and land, arrest, loss of government employment, preclusion from exiting the country and, at [86], relating to the enforcement of the law, forced tubal ligation of the applicant's wife. The applicant contends that, whether or not it was open to the Tribunal to find that these actions had, or would be carried out in accordance with the relevant laws, it was also required to consider whether the harm feared by the applicant, as a consequence of such actions, was an "appropriate and adapted, in the sense of proportionate" means to achieve the objectives of population planning[46].

25. The applicant contends that the Tribunal failed to consider whether these "other actions" taken by the authorities to enforce the payment of the fine imposed and the family planning laws were appropriate and adapted and therefore fell into error.

26. The Minister points out that the Tribunal accepted that the harm experienced or feared by the applicant and his wife "may amount to persecution within the meaning of s.91R(1)" of the Migration Act[47]. The Minister contends that the Tribunal's decision resulted not from any doubt about whether the harm was so serious as to amount to "persecution" but, rather, from the Tribunal not being satisfied that the Convention reason requirement was met[48]. The

[46] see also *VTAO* at [37]-[41]
[47] at [80] of the Tribunal's reasons
[48] Tribunal's reasons at [82]-[86]

Minister contends that the place of the inquiry called for by the applicant bears on the identification of what may amount to "persecution" rather than to identify whether there was a Convention nexus[49]. The same distinction between "persecution" and the Convention reason is seen in the reasoning of McHugh J in *Applicant A* at 256.5-250. The Minister also relies on *Chen v Minister for Immigration* (2000) 201 CLR 293 at [10], [20] and [24]-[25]. The Minister contends that the Tribunal accepted that the forms of harm relied upon by the applicant may be so serious as to amount to persecution, but rested its decision upon its non satisfaction as to the separate Convention reason requirement. The Minister contends that it was therefore not necessary to further answer the inquiry now posed by the applicant.

27. The Minister's submissions also address a query raised by me at the first court date hearing in this matter on 3 February 2009. I queried whether the decision of his Honour Rares J in *SZJTQ v Minister for Immigration* [2008] FCA 1938 had any application to this case. The Minister answers that question in the negative on the basis that his Honour's decision bore on the position of a child and here there was no child involved. Hence, the Tribunal could not have fallen into the error identified by Rares J in relation to the claims of a child.

Consideration

28. The Tribunal's reasons in this case are detailed and recite at length the applicant's claims to the Department and to the Tribunal, the issues raised by the Tribunal in its letter dated 11 November 2008 issued pursuant to s.424A of the Migration Act, the applicant's response on 19 November 2008 and the matters arising at the hearing conducted by the Tribunal on 1 December 2008. The Tribunal also referred to relevant country information. In *SZJTQ* at [45]-[50] his Honour Rares J found that the Tribunal made a jurisdictional error in failing to have regard to or give any reason for rejecting recent country information in report 404 from the Department of Foreign Affairs and Trade (DFAT) concerning the

[49] see *Applicant A* at 244-255 per Dawson J

"strict" enforcement of the one child policy in Shandong province, contrary to the Tribunal's assertion in that case that there was a "considerable relaxation" of that policy. His Honour, like me, was considering a case involving the application of the policy in Fujian province, not Shandong province which Report 404 dealt with. The link to Fujian province is the following sentence in the report:

> *This information accords with information we provided in 2004 regarding family planning regulations in Fujian province.*

29. I infer that the 2004 report referred to is DFAT Report 287 released on 22 April 2004. That report contained a detailed analysis of the application of the one child policy in Fujian province. It appears in the court book at pages 21-74. The Report was relied upon by the Tribunal.

30. Importantly, at [72] of its reasons[50] the Tribunal stated:

> *On 22 April 2004 the Department of Foreign Affairs and Trade (DFAT) reported on regional differences in the enforcement of family planning regulations within Fujian. DFAT advised family planning in coastal fishing areas is enforced less strictly than in areas with a high level of state owned enterprises. DFAT provided the following advice on the enforcement of the one child policy in Fujian:*
>
> > The Family Planning Law in Fujian is regulated by a mixture of national, provincial and local laws and rules. Enforcement is by local authorities and evidence suggests that some local governments enforce family planning rules more vigorously than others. This has created a patchwork of different rules and enforcement across the province. Family planning rules are more strictly enforced in the larger cities such as Xiamen and Fuzhou, than in the poorer countryside. The rules are also more strictly enforced in areas where state-owned industry is stronger, such as the steel making city of Sanming, than in the mountainous or coastal fishing areas. In general, however, Fujian has one of the least coercive family planning regimes in China. In rural areas of Fujian more then half of all families have more than one child. The number of one child families

[50] CB 243-244

> is greater in the larger cities. However, even here, multiple child families are not unknown.[51]

31. At [74][52] the Tribunal also referred to article 45 of the Fujian Family Planning Regulations.

32. However, the principle arising from *SZJTQ* at [29]-[32] is that the Tribunal must have regard to the most recent available material unless excused by the Migration Act. It appears from the Tribunal website[53] that the most recent relevant country reports are DFAT Report 691 issued on 31 August 2007 relating to the one child policy in Shanghai, and RRT Research Response CHN32667 issued on 7 December 2007 relating to a range of issues, including the one child policy in Fujian province. The Tribunal certainly had the former[54] and referred to it in its reasons[55]. The Tribunal did not expressly refer to the latter but appears to have had regard to it because the reasoning at [80] of its reasons is consistent with the following passage from it:

> *The family planning laws in China provide penalties for those who have breached the laws by having extra "out-of-plan" children. These penalties include fines ("social compensation fees") as well as loss of government employment, prohibition of future government employment and loss of financial benefits given to people who agree to only have one child. It has been reported that property of people who fail to pay family planning fines is sometimes confiscated or destroyed. In addition, pressure if often brought against those who have had extra children to persuade them to be sterilised. Lastly, breaches of the family planning rules could be placed in a person's personal file (*dang'an*), which would again impact mainly on their future government employment or education. Apart from this, no reports were found of continuing ill-treatment of those who breached the rules in the past.*

33. In my view, the Tribunal in this case conducted an extensive review of the available country information and made adequate reference to the most up to date information detailing the way in

[51] Department of Foreign Affairs and Trade 2004, *DFAT Report 287*
[52] CB 244
[53] *SZMTP v Minister for Immigration & Anor* [2009] FMCA 121 at [4]-[6]
[54] CB 4
[55] CB 242-243

which the Chinese one child policy is enforced in Fujian province. In my view, the Tribunal did not fall into error for the reasons identified by Rares J in *SZJTQ*.

34. Essentially, the Tribunal reasoned in this case that the harm experienced or feared by the applicant and his wife, while it may be serious harm amounting to persecution, was not persecutory in the Convention sense as it flowed from the application of a law of general application that was not applied in a discriminatory way and hence no Convention nexus was established. The Tribunal's reasoning was as follows[56]:

> *The applicant argues that he needs protection because he would be persecuted in China due to the breach of the one child policy. The applicant has provided a number of documents relating to the birth of his second child, the court documents, photographic and other material. The Tribunal accepts on the basis of such evidence that the applicant and his wife have two children and that they may have breached the family planning regulations. The Tribunal accepts that a fine has been imposed on the applicant and his wife for such breach. The Tribunal accepts that the applicant's wife had lost her job as a result of such breach because she was a government employee and the country information suggests that the relevant laws allow the dismissal of government employees for the breach of the one child policy. The Tribunal does not accept that the applicant's own loss of employment and claimed subsequent difficulties in finding employment were due to such breach, given that in the past he did work on various vessels for limited periods and also that he was able to find employment in April 2008. The Tribunal also accepts that the authorities may impose punitive actions against the applicant and his spouse if he fails to pay the fine. In particular, the applicant claims that his father's house may be 'sealed', that the land may be (or has been) taken away and also that the authorities may wish, or had attempted, to detain the applicant for non-payment of the fine and that once his information is released to Customs, he may have been prevented from leaving the country. These claims are consistent with the available country information (US State Department Report on Human Rights, 2007). The Tribunal finds that such matters may amount to persecution within the meaning of s. 91R(1).*

[56] CB246-248

The Tribunal accepts these claims and, for that reason, the Tribunal has determined not to conduct further inquiries about the applicant's situation, as suggested by the applicant.

However the Tribunal does not accept the applicant's claim that he was required to pay a higher fine because his father's house looked rich. As noted elsewhere, the fine the applicant was required to pay was calculated in accordance with the applicant's and his wife's income and there is nothing to suggest that the value of the house had any impact on the calculation of the amount. The Tribunal also accepts that the applicant had requested but was denied an opportunity to pay the fine in instalments as the applicant stated in his oral evidence that he was allowed to pay RMB 200,000 in the first instalment and RMB 10,000 in later instalments. Thus, the applicant was allowed to pay in instalments, in accordance with the law, although he may have found the amounts imposed by such instalments excessive.

The Tribunal considers the enforcement of the family planning laws does not bring the applicant within the terms of the definition of a refugee in the Refugees Convention because what is feared is punishment for the breach of a law of general application and not persecution directed at the applicant for a Convention reason. (emphasis added)

The country information cited above indicates that the one child policy and laws designed to enforce this policy apply throughout China. The law purports to be for the purpose of limiting the population of China and this is also the purpose suggested by the applicant. The Tribunal does not accept that the law is discriminatory in its intent. The Tribunal is of the view that it is appropriate and adapted to achieving a legitimate object, that is population planning. While there are variations on the implementation of the law in different provinces, there is nothing to suggest that the law has a discriminatory impact (in that it is not directed in any group on its face or in the way in which it applies) on members of a group recognised by a Convention or that it is enforced in a discriminatory way. For example, the 2004 DFAT report suggests that Fujian has one of the least coercive family planning regimes in China and that in rural areas of Fujian more then half of all families have more than one child. The Tribunal therefore finds that the one child policy is not

applied more discriminatorily in Fujian compared to other areas of China. Having regard to the country information available to it, the Tribunal finds that the one child policy is a law of general application and that its implementation does not involve discriminatory enforcement of the law so as to amount to Convention-related persecution.

The Tribunal discussed with the applicant in the course of the hearing that the mere fact that the applicant and his family would be penalised for a breach of the family planning regulations does not in itself brings the applicant within the terms of the definition of a refugee in the Refugees Convention. This is because the enforcement of a generally applicable criminal law does not ordinarily constitute persecution: see Applicant A & Anor v MIEA & Anor *(1997) 190 CLR 225, per McHugh J at 354.*

The applicant argues that the law has been applied discriminatorily in his case because the fine imposed on him and his family was excessive and he was unable to pay such an amount. The court document presented by the applicant with his application indicates that the amount of the fine was calculated in accordance with Article 39 of the Fujian Family Planning Regulation, which provides that the fine may comprise an amount that is two to three times of the person's annual income. The court order indicates that the amount of the fine was calculated, in the applicant's case, on the basis of his and his wife's salary and the applicant agreed in his oral evidence that such amounts, on which the court relied, were correct. While he argued that his wife's income was based on pre-tax amount, he agreed that it was the correct amount. The applicant's representative further suggested that the law was applied discriminatorily because the authorities relied on the applicant's actual income and not on the average income. However Article 39 allows the calculation based on the actual income where such income significantly exceeds the average income, so that in making the calculation, the authorities applied the relevant law. The representative also argues that the law was applied discriminatorily because the authorities used the rules for urban and not rural dwellers. Again, Article 39 appears to relate to the amounts of two to three times the annual income for both rural and urban dwellers and while there is a distinction between disposable and net income, there is no such distinction where the actual income is used. ***Thus, the Tribunal does not accept that the law was applied***

discriminatorily in the applicant's case. The Tribunal does not accept that the imposition of a high fine and subsequent actions amounted to a systematic and discriminatory conduct which was essentially and significantly for a Convention reason. *The Tribunal finds that the authorities acted in accordance with Article 39 of the Fujian Family Planning Regulation in calculating the amount of the fine and while that amount is a high amount and may be higher than the amount others in the applicant's neighbourhood were required to pay, the Tribunal finds that this was due to the applicant's high income and not because the applicant faced discrimination for any reason.* ***The Tribunal further finds that any other actions of the authorities arising from the non-payment of the fine, including the confiscation of property and land, intended arrest, loss of government employment, preclusion from exiting the country and other actions were taken in accordance with the relevant laws.***

The Tribunal also finds that other actions taken by the officials with respect to the enforcement of the law were taken in accordance with the relevant laws cited above. Thus, the law provides for the dismissal of a government employee (the applicant's wife) while the US State Department Report on Human Rights refers to such measures as the confiscation and destruction of property and detention of family members. Thus, all actions referred to by the applicant, including the imposition of a high fine, the threat of property confiscation, attempted arrests, forced tube ligation and all other matters described by the applicant, including the claimed future harm arising from these matters, appear to be carried out in accordance with the relevant laws. The Tribunal finds that these are laws of general application and that they are not applied discriminatorily in the applicant's case. The Tribunal also finds that any future harm the applicant fears as a result of the breach of the one child policy arises from the application of the law of general application. (emphasis added)

35. There is a good deal of confusion surrounding the meaning of the word "persecution". The Tribunal found at [80] that the harm experienced or feared by the applicant and his wife "may amount to persecution within the meaning of s.91R(1)" of the Migration Act. That section provides:

> *(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
>
> *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
>
> *(b) the persecution involves serious harm to the person; and*
>
> *(c) the persecution involves systematic and discriminatory conduct.*

36. Counsel for the Minister submitted that at that point the Tribunal was directing its attention to the seriousness of the harm rather than to any Convention nexus. I reject that submission. Section 91R(1) deals with all relevant elements of Convention related harm and not simply the seriousness of the harm. The Tribunal's statement that the matters relied upon by the applicant may amount to persecution within the meaning of the section can be no more than a hypothetical statement, otherwise the applicant would have been successful on the review. The following sentence (at [80]) that the Tribunal accepted the applicant's claims could be no more than a statement that the Tribunal accepted the factual accuracy of the claims, for the same reason. If the Tribunal accepted that the claims met the standard established by s.91R(1), then the Tribunal would not have needed to say any more. The applicant would have been successful.

37. There are circumstances where persecution is used in terms referring to the seriousness of harm rather than to persecution under the Convention but it is often necessary to also consider the issue of a Convention nexus. For example, in *Applicant A* at page 244 Dawson J said:

> *What the appellants in truth object to is not the one child policy* per se*, but its enforcement by officials in their area by forcible sterilisation. The right to personal security comes closer to sustaining that objection and appears to have a*

> *stronger foundation in international law. Article 3 of the Universal Declaration guarantees the "right to ... security of person". The appellants also refer to Art 5 of the Universal Declaration and Art 7 of the ICCPR, which are directed to cruel, inhuman or degrading treatment or punishment. No doubt forcible sterilisation involves significant bodily intrusion without consent and has important consequences.*
>
> *For my part, however, I do not see how those considerations assist the appellants, since they merely suggest that the persecution which they fear is serious and may infringe internationally recognised human rights. That is not the issue in this appeal. The issue is whether that persecution is for one of the five Convention reasons.*

38. Further, McHugh J in *Applicant A* at page 258 expressed the distinction between "serious harm" and "Convention nexus" by reference to "persecution":

> *Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group. Ordinarily, the persecution will be manifested by a series of discriminatory acts directed at members of a race, religion, nationality or particular social group or at those who hold certain political opinions in a way that shows that, as a class, they are being selectively harassed. In some cases, however, the applicant may be the only person who is subjected to discriminatory conduct. Nevertheless, as long as the discrimination constitutes persecution and is inflicted for a Convention reason, the person will qualify as a refugee.*

39. His Honour continued at page 259:

> *However, where a racial, religious, national group or the holder of a particular political opinion is the subject of sanctions that do not apply generally in the State, it is more likely than not that the application of the sanction is discriminatory and persecutory. It is therefore inherently suspect and requires close scrutiny. In cases coming within the categories of race, religion and nationality, decision-*

> *makers should ordinarily have little difficulty in determining whether a sanction constitutes persecution of persons in the relevant category. Only in exceptional cases is it likely that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving a legitimate government object and not amount to persecution.*

40. Accordingly, while "persecution" may be taken to be a synonym for "serious harm" in certain contexts, more accurately, it means serious harm for a Convention reason.

41. In *Applicant S* the High Court addressed the issue in relation to "black children" in China and stated at [43] and [45]:

> *The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in* Applicant A. *His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is "appropriate and adapted to achieving some legitimate object of the country [concerned]". These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in* Chen. *As a matter of law to be applied in Australia, they are to be taken as settled. This is what underlay the Court's decision in* Israelian. *Namely, that enforcement of the law of general application in that particular case was appropriate and adapted to achieving a legitimate national objective.*
>
> *The joint judgment in Chen expanded on these criteria:*
>
> > Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object *depends* on the different treatment involved and, *ultimately, whether it offends the standards of civil societies which seek to meet the calls of common humanity*. Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different

> treatment involved is undertaken for the purpose of achieving some legitimate national objective. *(emphasis added)*
>
> *That ultimate consideration points to the answer in the present case.*

42. In *SZJRU v Minister for Immigration* [2009] FCA 315 his Honour Besanko J found that the Tribunal erred in proceeding on the basis that forced sterilisation flowed from the enforcement of a law of general application as a penalty as there was no evidence to support the finding[57]. At [64] his Honour said:

> *It seems to me that it would be open to the Tribunal to conclude that the appellant belonged to a particular social group, being those women who became pregnant in contravention of China's family planning laws and who have been required to have that pregnancy terminated. The Tribunal found the appellant had a well-founded fear of serious harm (that is, forced sterilisation) and it seems to me that it would be open to it to conclude that the harm was for reasons of her membership of the social group and not for the reason of the application of a law of general application. In those circumstances, the appeal must be allowed and the matter remitted to the Tribunal.*

43. His Honour's reasoning drew on the decision of Merkel J in *VTAO v Minister for Immigration* (2004) 81 ALD 332. His Honour referred to that decision at [44]:

> *Merkel J held that, as far as the parents' claim was concerned, the Tribunal had committed a jurisdictional error. It had failed to consider the correct question in determining whether the parents were members of a particular social group. The correct test was (at 345 [32]):*
>
> ...whether, over time, the singling out of parents of 'black children' for discriminatory treatment under China's family planning laws might have been absorbed into the social consciousness of the community with the consequence that a combination of legal and social factors (or norms) prevalent in the community indicated that such parents form a social group distinguishable from the rest of the community: cf *Applicant S* at ALR 251; ALD 550 [31].

[57] see *SZJRU* at [63]

44. That is consistent with the reasoning of her Honour Jagot J in *SZMFJ v Minister for Immigration (No 2)* [2009] FCA 95 at [10]. It is an error to assume that the enforcement of a non discriminatory law of general application is incapable of constituting persecution for any reason within the scope of the Convention.

45. In the present case, the applicant had not specifically articulated his membership of a particular social group but it may reasonably be surmised that the claims made by the applicant supported a contention that he feared harm as a member of the particular social group of parents of a child born in breach of China's one child policy. The applicant claimed, and the Tribunal accepted, a fear of (among other things) the sealing of his home and the confiscation of part of his land for non payment of the fine for having the child in breach of the policy. The Tribunal accepted the fact of that claim and that it might amount to persecution under s.91R(1). The Tribunal needed to consider whether that harm did indeed amount to Convention related harm.

46. The Tribunal found at [85][58] that the fine imposed upon the applicant and his family was not excessive but was in accordance with the law as applied in Fujian province. The Tribunal also found that "any other actions" of the authorities arising from non payment of the fine, including the confiscation of property and land, intended duress, loss of government employment, preclusion from exiting the country and other actions" were taken in accordance with the law. The difficulty is that the Tribunal did not base that finding on evidence apart from the US State Department report on human rights which referred to measures such as the confiscation and destruction of property and the detention of family members. The country information available to the Tribunal stated that such measures could not be taken without court approval, but that that requirement was not always followed[59]. The fact that such incidents occur does not mean that the actions of the authorities in confiscating the land and detaining individuals were taken in accordance with the relevant laws. Neither does it mean that the action is taken in a non discriminatory fashion. The Tribunal

[58] CB 247
[59] [77] at CB 245

proceeded on the basis that "all actions referred to by the applicant, including the imposition of a high fine, the threat of property confiscation, attempted arrest, forced tube ligation and all other matters described by the applicant, including the claimed future harm arising from these matters **appear** to be carried out in accordance with the relevant laws". That, however, was merely an assumption.

47. The Tribunal cannot assume that action taken in consequence of non payment of a fine imposed according to law is itself taken in accordance with law and is not discriminatory. Neither can the Tribunal assume, without evidence and consideration, that such action is appropriate and adapted to the circumstances in accordance with international standards. I agree with the applicant's submissions that the Tribunal fell into jurisdictional error. There was a constructive failure to exercise the Tribunal's jurisdiction in relation to the applicant's claims as there was in *VTAO* at [69]. There was a false assumption that the enforcement of a law of general application which was itself non-discriminatory could not constitute persecution for any reason within the scope of the Convention as there was in *SZMFJ* at [10]. The statement in relation to forced tube ligation at [86] (although it bore directly on harm feared by the applicant's wife rather than himself) was also an error in light of the decision of the Federal Court in *SZJRU*. This is on the basis that the Tribunal assumed that that penalty flowed from the law as a non discriminatory application of it, rather than testing whether that was indeed so.

48. I will order that the applicant receive relief in the form of the constitutional writs of certiorari and mandamus.

49. I will hear the parties as to costs.

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 28 May 2009