

0905355 [2010] RRTA 42 (31 January 2010)

DECISION RECORD

RRT CASE NUMBER: 0905355

DIAC REFERENCE(S): CLF2009/31875

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Namoi Dougall

DATE: 31 January 2010

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under section 65 of the *Migration Act 1958* (the Act).
2. The applicant was born in Australia [in] 2009 and both her parents are PRC citizens, and the applicant's parents have asserted that the applicant is stateless.
3. [In] March 2009, an application was lodged on the applicant's behalf with the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa [in] June 2009 and notified the applicant of the decision and her review rights by letter [on the same date].
4. 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.
5. An application for review of the delegate's decision was lodged was lodged with the Tribunal on the applicant's behalf [in] July 2009.
6. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under section 11(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under section 412 of the Act.

RELEVANT LAW

7. Under section 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.
8. 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).
9. 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'

10. 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.

11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. Second, an applicant must fear persecution. Under section 91R(1) of the Act persecution must involve “serious harm” to the applicant (section 91R(1)(b)), and systematic and discriminatory conduct (section 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: section 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.
15. 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.
16. 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: section 91R(1)(a) of the Act.
17. 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.

18. 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.
19. 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

T1 –Tribunal case file 0905355, folio numbered 1-161.

T2 –Tribunal case file 0802315, folio numbered 1-197.

T3 –Tribunal case file 0904334, folio numbered 1-293.

D1 – Departmental case file CLF2009/31875, folio numbered 1-73.

D2 – Departmental case file CLF2008/1021, folio numbered 1-299.

20. Evidence was given at a hearing held [in] October 2008 in relation to the applicant's parents' application (the first hearing) before the Tribunal as differently constituted (the first Tribunal). Evidence was given at the hearings held [in] August 2009 (the second hearing), [in] August 2009 (the third hearing), and [in] November 2009 (the fourth hearing) before the current Tribunal by [the applicant's father] and [the applicant's mother]. Also at the fourth hearing evidence was given by: [five names deleted: s.431(2)]. The second, third and fourth hearings were combined hearings, with consent, with the applicant's parents' application for review. The applicant's parent gave evidence at the combined hearings on behalf of the applicant as well as themselves. A summary of the evidence on the files, including from: the Department's Movement Records and Integrated Client Services Environment (ICSE) databases; material referred to in the delegate's decision; other material available to the Tribunal from a range of sources and on the oral evidence as follows. An interpreter was present at the hearings to assist the applicants. The applicant was not represented by a registered migration agent.

Application Background

21. [In] November 2007, the applicant's parents entered Australia on subclass 459 visas which were valid until [date deleted: s.431(2)]. The visas were granted [in] May 2007.
22. [In] December 2007, the applicant's parents lodged their protection visa application (the parents' application). Certified copies of the details pages of the applicant's parents' PRC passports and pages with visas and exit and entry stamps were provided with their application.
23. Also provided with the application was a typed and signed statement dated [in] December 2007 of the applicant's father which was in English (the first statement). The applicant's father later provided a submission in which he claimed that he did not prepare the first statement. The Tribunal accepted the submission of applicant's father that did not prepare the first statement and did not rely on the first statement when making its findings
24. [In] March 2008, the applicant's father provided a statement to the Department which was typed both in Chinese and English dated [in] March 2008 and signed by the first applicant (the second statement) and supporting documentation. Also provided was an untranslated document in Chinese, the translation for which was eventually provided to the current

Tribunal and the document is the property seizure list referred to below. Also provided were photographs of what appears to be the first applicant practicing Falun Gong in a Park and handing out leaflets in front of a Falun Gong stand. The date stamp on all of the photographs was [in] March 2008. Other supporting information was provided in relation to the lives of applicant's parents in Australia including: a translation of the applicant's father's Professional Qualification Certificate Level 4/Intermediate Skills Level dated [in] July 2007 which stated that the applicant's father's occupation was Plumber; a pre-migration skills assessment application outcome letter from TRA dated [in] September 2007 which stated that for the skills assessment component of the migration process the applicant's father's occupation is General Plumber 4431-11.

25. [In] March 2008, the applicant's parents were interviewed (the first interview).
26. [In] March 2008, the delegate refused in separate decisions to grant the applicant's parents protection visas.
27. [In] April 2008, the applicant's parents lodged an application for review with the first Tribunal (Tribunal file number 0802315) Provided with the application for review was a statement which was typed both in Chinese and English dated [in] April 2008 and signed by the applicant's parents (the third statement). Also provided were supporting documents including a copy of the second statement and supporting documentation attached to that statement. The applicant's parents also provided a completed express mail service bill for an item that was sent from PRC to the first applicant in Australia which is post marked [in] March 2008, together with 2 Australian Post article to be collected card.
28. [In] April 2008, the applicant's parents also provided to the Tribunal two documents in Chinese, one was the property seizure list. A translation of the second document in Chinese was eventually provided to the current Tribunal and the document is the civil determination document referred to below.
29. [In] May 2008, the applicant's parents provided to the first Tribunal a further statement handwritten in English dated [in] May 2008 and signed by the applicant's parents together with supporting documentation (the fourth statement). The supporting information included the applicant's parent's letter to the UNHCR and information on persecution of Falun Gong in PRC including a copy of 'Nine Commentaries on the Communist Party' Also provided were photocopies of 2 PRC identity cards under which were statements written in Chinese. Translations of the 2 documents in Chinese were eventually provided to the current Tribunal and they are the first spouse statement of [in] May 2008 and [name deleted: s.431(2)] statement which are referred to below. The applicant's father stated in the third statement that there is only one Master of Falun Gong, Master Hongzhi Li and they do not need to certify who really practices Falun Gong. This is why he does not need anyone to prove he practices Falun Gong.
30. Also provided [in] May 2008, was information which indicated that the applicant's mother was pregnant.
31. [In] June 2008, the applicant's parents provided to the first Tribunal a further statement which was handwritten in English dated [in] June 2008 and signed by the applicant's parents (the fifth statement). The applicant's parents stated that their relationship is bigamous according to PRC Marriage Law and criminal law and that the PRC government will sentence them to 2 years imprisonment.

32. [In] June 2008, the first hearing was held.
33. [In] July 2008, the applicant's parents provided a further statement to the first Tribunal which was typed both in Chinese and English dated [in] July 2008 and signed by the applicant's parents together with supporting documents (the sixth statement). In the sixth statement the applicant's parents referred to an attached newspaper article on the treatment of Falun Gong in PRC. Also provided was a response by UNHCR to the applicant's parent's letter.
34. [In] July 2008, the applicant's parents provided a further statement to the first Tribunal which was typed both in Chinese and English dated [in] July 2008 and signed by the applicant's parents (the seventh statement). The seventh statement provided information in relation to the applicant's father's Falun Gong activities in Australia [in] July 2008.
35. [In] August 2008, the applicant's parents provided a further short statement which was typed both in Chinese and English dated [in] July 2008 and signed by the applicant's parents (the eighth statement) attached to which was further information in relation to the applicant's mother's pregnancy. The information indicated that the applicant's mother was due to give birth on [date deleted: s.431(2)].
36. [In] September 2008, the first Tribunal affirmed the delegate's decision not to grant the applicants protection visas.
37. [In] November 2008, the applicant's parents lodged an application in the FMC.
38. On [date deleted: s.431(2)] 2009 the applicant was born.
39. [In] March 2009, the applicant applied for a protection visa (the application). Provided with the application was a submission of the applicant's parents on the applicant's behalf dated [in] March 2009 (the application's submission).
40. [In] May 2009, the applicant's parents were interviewed as part of the applicant's protection visa application (the second interview).
41. [In] June 2009, the FMC set aside the decision in the applicant's parents' application and remitted the matter to the Tribunal to be determined according to law (Tribunal file number 0904334).
42. [In] June 2009, the delegate refused to grant the applicant a protection visa.
43. [In] July 2009, the applicant lodged an application for review with the Tribunal. Provided with the application were a number of documents which had also been provided with the applicant's parent's application for review. Also provided was a submission to the Tribunal dated [in] July 2009 and signed by the applicant's parents on behalf of the applicant (the RRT submission).
44. [In] July 2009, the applicant's parents provided to the current Tribunal, in both the parents' and the applicant's application for review, a number of submissions, including the former representative's conduct submission, and supporting documentation. The applicant's father provided a chronology of events which he had referenced to the documents where those events were referred to (the first chronology). Also provided was a submission typed in English dated [in] July 2009 and signed by the applicant's parents together with supporting documentation setting out the circumstances which led to the applicant's parents delaying

their departure from PRC after they obtained their visas (the delay in leaving PRC submission).

45. Also provided to the Tribunal [in] July 2009 were the documents in Chinese previously provided to the first Tribunal without a translation. Provided with the documents were non NAATI translations of the documents. There are 2 court documents. The first consists of three pieces of a torn document. The pieces have been stuck onto another sheet of paper, however, part of the original document is missing. The translation states that the document is entitled 'Nanchung City Donghu District People's Court Paper civil determination' and is dated [in] September 2004 (the civil determination).
46. The translation of the other court document states that the document is entitled 'Donghu Districts People's Court Seizure (seizure and collection property) list and is dated [in] September 2004 (the property seizure list).
47. The applicant's father also provided [in] July 2009 a copy of his pathology results and in an accompanying submission typed in English dated [in] July 2009 and signed by the applicant's he stated that the results prove he suffers from gout. Subsequently the applicant's father provided to the Tribunal [in] July 2009 a medical certificate from [doctor's name and medical facility deleted: s.431(2)] dated [in] July 2009 which stated that the applicant's father suffers from gout with frequent exacerbations.
48. The applicant's parents also provided photographs of injuries the applicant's father claimed were inflicted by the Chinese police, his participation in Falun Gong activities in Australia [in] March 2008, [in] April 2008 and [in] July 2008. The applicant's parents also provided photographs of the applicant as well as associated documents including a copy of her birth certificate.
49. [In] July 2009, the applicant's parents provided, in both the parents' and the applicant's application for review, a copy of the Complaints Form and supporting documents they lodged with the Office of the Migration Agents Registration Authority (MARA) [in] July 2009. The documents included the former representative's conduct submission.
50. [In] July 2009, the applicant's parents provided again, in both the parents' and the applicant's application for review, copies of submissions and documents previously provided [in] July 2009 and statements. In addition the applicant's parents also provided the first spouse statement [in] May 2008 and [name deleted: s.431(2)] statement [in] May 2008 together with non NAATI translations of the documents. These statements have a photocopy of the Chinese identity card of person making the statement and under the copy of the identity card there is a handwritten dated statement. The documents also have a date and time stamp from a fax machine which indicated that the documents were faxed [in] May 2008
51. Provided [in] July 2009 to the Tribunal were further statements. [Person A], a work colleague of the applicant's father provided a handwritten statement dated [in] July 2009 ([Person A]'s statement). Also provided were two typed statements claimed to be from fellow practitioners at [Location 1] (the [Location 1] practitioners' statements). The applicant's father also provided photographs of him participating in Falun Gong demonstration in Sydney [in] July 2009.
52. [In] August 2009, the applicant's father provided, in both the parents' and the applicant's application for review, a further submission typed in English dated [in] August 2009 and

signed by the applicant's parents to the Tribunal in relation to the PRC government's surveillance of Falun Gong practitioners and the PRC government is again persecuting him and also now his son (the Australian Falun Gong practice submission). The applicant's parents also provided two documents issued by the PSB together with translations. The first document is a subpoena [number deleted: s.431(2)] dated [in] July 2009 issued to the first applicant by the Department of Public Security of Pingxiang City (the subpoena). The second document is a notification issued to the first applicant's son [name deleted: s.431(2)] by the Department of Public Security of Pingxiang City dated [in] July 2009 (the son's notification).

53. [In] August 2009, a second hearing was held with the current Tribunal which was subsequently adjourned to [date deleted: s.431(2)] August 2009.
54. Provided at the second hearing was a second chronology, in relation to both applications for review, by the applicant's father (the second chronology). Also provided was a submission on the treatment of 'black children' and unmarried mothers in PRC. The applicant's father at the fourth hearing stated that he obtained this submission from RACS. Also provided was an extract in English of the regulations on family planning of Jiangxi province downloaded from the internet [in] August 2009.
55. [In] August 2009, a third hearing was held.
56. [In] August 2009, the applicant's parents provided to the Tribunal, in both the parents' and the applicant's application for review, a submission in relation to the adverse information discussed with the applicant's parents at the third hearing (the first August response). In the first August response the applicant's father confirmed that at the third hearing he stated that he did not have any additional information to provide. Provided with the first August response were five articles downloaded from the internet [in] August 2009 from the Falun Dafa Clearwisdom.net internet site in relation to the Zhongnanhai protest on 25 April 1999.
57. [In] August 2009, the applicant's parents provided to the Tribunal, in both the parents' and the applicant's application for review, a further submission (the second August response) and provided an article in Chinese downloaded from the internet [in] August 2009 and photographs of Falun Gong protesting on 25 April 1999 and propaganda tools. At the fourth hearing the applicant's father stated that the photographs were downloaded from the internet.
58. [In] September 2009, the applicant's father provided, in both the parents' and the applicant's application for review, a further submission to the Tribunal in which he claims that his son was detained at his school [in] September 2009 for 6 months (the detention of the son submission).
59. [In] October 2009, the applicant's father provided, in both the parents' and the applicant's application for review, to the Tribunal a document in Chinese with an English translation on the imposing of social levies and maintenance fees in Jiangxi province which was downloaded from the internet [in] October 2009. Also provided was a 'notification' dated [in] July 1999 together with an English translation which is the document that banned Falun Gong.
60. Also provided [in] October 2009 was further statement from the applicant's father (the ninth statement) together with pictures of Falun Gong practise at [Location 1] with [name deleted: s.431(2)] being identified in the photographs in handwriting. Also provided was a statement

in support of the applicant's father being a Falun Gong practitioner in Australia from [name deleted: s.431(2)] dated [in] October 2009.

61. [In] November 2009, a fourth hearing was held.
62. [In] December 2009, the applicant's mother spoke by telephone with a Tribunal officer. The applicant's mother stated that the applicant's father and she went to the Chinese Embassy to try and see if they could get the applicant a passport as the delegate said she would be able to get one and she will need ID in the future. The applicant's mother stated that the staff at the embassy said the applicant will never get a PRC passport because he applicant's father and she had applied for a protection visa which means they went against the PRC government. The applicant's mother also stated that she asked staff to give her a letter as to why the passport was refused and was told no.
63. [In] January 2010, the applicant's mother again rang the Tribunal in relation to the applicant's father and her going to the Chinese Embassy as described by her in her telephone conversation with a Tribunal officer [in] December 2010. The applicant's mother described the conversation they had at the Chinese Embassy in similar terms to what she stated [in] December 2009 except that the applicant's mother also stated that the staff at the Chinese Embassy had stated that the applicant is a Chinese national.

The applicant's claims

Breach of PRC family planning laws and why the applicants' daughter cannot return to PRC

64. At the second interview the applicant's father was asked why his daughter could not return to PRC and the applicant's father stated that as he and the applicant's mother are not married and he has a son in PRC. He is divorced from his first spouse but is still married to his second spouse. The applicant's father stated that his daughter cannot return to PRC as you have to register and to be able to be registered you have to meet the 4 qualifications: a legal marriage certificate; a birth permission; a birth certificate from the local hospital; and a piece of paper from the local police.
65. At the second interview the applicant's father stated that another reason why his daughter could not return was because he is a Falun Gong practitioner and he already has another child. The delegate asked what the applicant's father what would happen to the applicant if she returns to PRC and the applicant's father stated that you have to have a household registration. The applicant's father confirmed that the applicant will be taken away from him, they will be sentenced and fined. He will be fined RMB100,000 to RMB200,000.
66. At the second interview the applicant's mother stated that the applicant could not return to PRC because she was born in Australia and she and the applicant's father are not married and in an illegal de facto relationship so it is impossible to get the household register for the applicant. For the applicant's future, and as they want the applicant's father to still be able to practise Falun Gong, they have applied to remain in Australia. The applicant's mother stated that in PRC to have a baby you have to be married and have a birth permission otherwise you can be heavily fined.
67. The applicant's father after an adjournment at the second interview, stated that he cannot take the applicant to the PRC consulate to apply for a passport. In PRC for a child to apply for her

own passport she must be over 16 years old. The applicant's father stated that the applicant does not have a household registration and she does not meet the standards to apply for household registration.

68. In the application submission the applicant's parents stated that for the birth of a PRC child to be registered in PRC, their parents must be legally married. The applicant's parents stated that the PRC government does not recognise children of parents who are unmarried and cohabitating. The applicant's parents stated that a marriage certificate and a birth permit must be produced. The applicant's parents also stated that a birth certificate from the local hospital and a census register certificate from the local police station must also be produced. The applicant's parents claimed that without the four conditions being met the applicant will never have PRC nationality and will not have study permit, living permit and working permit. The applicant's parents also stated they will be fined more than RMB100,000. The applicant's parents also stated that the applicant can not get a PRC passport or PRC identity card in PRC. He also stated that as the applicant was born in Australia she has no reason to go to PRC embassy.
69. The applicant's parents, in the RRT submission, stated that they are Han and, therefore, only allowed one child. The applicant's parents also stated that they will have to pay more than RMB100,000 in fines and will be put in gaol.
70. In the RRT submission the applicant's parents claimed that their daughter does not have any proof of identity from the PRC government and is stateless. The applicant's parents refer to the delegate making investigations with the Chinese Embassy or Consulate General and referred to page 3 of the delegate's decision. The applicants also referred to the delegate stating at the second interview that the contents of his daughter's application would be kept secret. The Tribunal has considered what was stated in the delegate's decision and the delegate on page 3 of the decision does not state the delegate investigated anything to do with the daughter's nationality at the PRC Embassy or Consulate General. Rather the delegate referred to the applicants' claim that they would have difficulties obtaining documentation from the PRC Consular General and then referred to Article 5 of the PRC Nationality Law which stated that any person born abroad whose parents are both PRC national shall have PRC nationality.
71. The applicants, in the daughter's RRT submission, claimed that the delegate fabricated information in relation to PRC family planning policy. The applicants stated that they are Han and, therefore, only allowed one child. The Tribunal has considered the country information contained in the decision. The country information relevance to the circumstances of the applicants could have been explained in more depth, however, delegate did referenced where the country information was sourced and there is nothing to suggest that the information was fabricated.
72. In the daughter's RRT submission the applicants also disagreed with findings of the delegate. The applicants stated that the delegate did not have a basis for the finding that their daughter would not be subject to serious harm and systematic mistreating amounting to persecution as her parents would pay the relevant fines or relocate to an area in PRC where the one child policy is not so strictly observed. Further, the applicants stated that the delegate was naïve to think that the applicants could move to avoid persecution as the PRC government controls all cities in PRC.

73. As referred to above, the secondary applicant spoke by telephone with a Tribunal officer [in] December 2009. The secondary applicant stated that the first applicant and she went to the Chinese Embassy to try and see if they could get their daughter a passport as the delegate said she would be able to get one and she will need ID in the future. The secondary applicant stated that the staff at the embassy said her daughter will never get a PRC passport because first applicant and she had applied for a protection visa which means they went against the PRC government. The secondary applicant also stated that she asked staff to give her a letter as to why the passport was refused and was told no. The applicant's mother contacted the Tribunal again [in] January 2010 about her and the applicant's father going to the Chinese Embassy. The applicant's mother described the conversation they had at the Chinese Embassy in similar terms to what she stated [in] December 2009 except that she also stated that the staff at the Chinese Embassy had stated that the applicant was a Chinese national.
74. [In] August 2009, the applicants provided to the Tribunal the RACS submission and an extract in English of the regulations on family planning of Jiangxi province downloaded from the internet [in] August 2009.
75. [In] October 2009, the applicants provided to the Tribunal a document in Chinese with an English translation on the imposing of social levies and maintenance fees in Jiangxi province which was downloaded from the internet [in] October 2009. The translation of this document is not complete as it refers to paragraphs 1, 3, 5, 6, 8, 10, 11, 12, 15, 20 and 28. In relation to paragraph 6 there appears that there are subparagraphs but only subparagraph 6 is quoted and it states: 'birth from remarriage, birth from bigamous marriage, levies will be seven times more of the basic calculation index' The calculation index was not provided by the applicants.
76. At the third hearing the Tribunal discussed with the applicant's parents their claims in relation to whether the applicant could be registered which is set out below.

The parents' claims including in relation to the applicant's father's Falun Gong practice

77. The Tribunal in relation to all of the applicant's parents' claims, which are summarised below, the Tribunal relied on all of the evidence and information provided to the Tribunal (Tribunal file numbers 0904334 and 0802315) and set out in the Tribunal's decision in relation to the parents' application for review (Tribunal file number 0904334).

Country information on Jiangxi Province family planning laws

78. Country information indicates that individuals who have children in breach of family planning laws must pay a Social Compensation Fee in order for their child to obtain household registration. The information below relates to PRC generally as well as to some provinces, however, there is no specific information in relation to Juangxi.
79. On 7 December 2007 The Department of Foreign Affairs and Trade (DFAT) reported that:
According to the official policy, parents wishing to obtain a residency permit for their children in a particular area will generally be subject to the one child policy, regardless of where their children were born. This means that a Chinese person wishing to register their overseas born children would generally be required to pay the stipulated fine (Department of Foreign Affairs and Trade 2007, *DFAT Report No. 746 – China: RRT Information Request: CHN32483*, 7 December).

80. A 2004 DFAT report on family planning in Fujian states that “evidence suggests that the problem of registration of children can be overcome by payment of an extra fee of several hundred or thousand RMB” (Department of Foreign Affairs and Trade 2004, *DFAT Report 287 – RRT Information Request: CHN16609*, 22 April).

81. A DFAT report dated 15 October 2004, which contains advice concerning registering children in Guangdong states that:

The Guangdong's family planning regulations do not specify penalties or discriminatory treatment directed at children born outside of marriage. The penalties are directed at the parents (see D above). **Following payment of these penalties, all registered children are entitled to access health and educational facilities. If the penalties are not paid, the child remains unregistered** (Department of Foreign Affairs and Trade 2004, *DFAT Report No. 330 – RRT Information Request: CHN16967*, 15 October).

82. A Chinese speaking Tribunal officer reviewed the Chinese language version of the *Jiangxi Provincial Population and Family Planning Ordinance 2002*. The Tribunal officer advised that the family planning ordinance does not specify the amount of the social compensation fine levied for out of plan births (*Jiangxi Provincial Population and Family Planning Ordinance* (Promulgated 29 July 2002, Effective 1 September 2002) Jiangxi Province Population and Family Planning Commission)

83. The US Department of State (USDOS) 2007 *China Profile of Asylum Claims and Country Conditions* provides information on social compensation fines in Jiangxi province. The report provides the following relevant information:

Jiangxi Province

According to a Xinhua News Agency report in February 2004, new provincial regulations state that couples without an official marriage certificate who produce offspring will be fined 1.05 times the baseline income for their locality.^a If one or both of the members of the couple is younger than the lawful marriage age, the fine rises to 1.75 times the baseline. Couples who give birth in violation of the ‘one child policy’ will face fines of up to 3.5 times the average annual local per capita income.^b The average annual income of Jiangxi’s urban residents in 2003 was roughly 6,900 renminbi (*about \$830*);^c for rural households, the figure was around 2,000 renminbi (*about \$240*)^d (US Department of State 2007, *China: Profile of Asylum Claims and Country Conditions*, Political Asylum Research and Documentation Service website, May http://www.pards.org/paccc/china_may_2007.doc – Accessed 4 March 2008).

84. At the third hearing the Tribunal asked where the applicant’s father obtained his submission on ‘black children’ and the first applicant stated RACS. The Tribunal discussed with the applicants the country information set out above and that the country information suggests that if a fine or compensation is paid a child can be registered and then the child will be able to access education and health services. The Tribunal stated that if the Tribunal does not believe the applicant’s father is a Falun Gong practitioner then they can return to PRC with the applicant and the issue is whether they can pay the fine so the applicant can be registered and then access private education and health. The Tribunal referred to the country information and stated that the country information is a little out of date but suggests the fine would be up to 3.5 times the local per capita income which was for an urban resident was RMB6,000 and for a rural resident it was RMB2,000. The Tribunal referred to the applicant’s father stating he earned in PRC RMB2,000 a month which indicates that the applicant’s father had the ability to earn enough to pay the compensation fine or had the resources to pay the fine. The applicant’s father stated that whatever he says the Tribunal

does not believe and the fine will be RMB100,000 not RMB2,000. The Tribunal stated that it would be 3.5 times the average income so 3.5 x RMB2,000. The applicant's father stated his house is gone, he had diseases and they have incurred debts. He borrowed RMB20,000 before he left and for his parents health care he spent more than RMB30,000. Their child is so little so how can they survive in another city. The applicant's father stated he has been suffering from this pain every day. He does not have any money even to catch the bus and if whatever he says is not taken to be true then there is no point in living.

85. However, in contrast to the applicant's father's statements set out above, the applicant's father provided to the Tribunal a statement from [Person A] dated [in] July 2009 in which [Person A] stated that the applicant's father has worked at a furniture factory with him from February 2008 until now. The applicant's father also stated at the fourth hearing that he practised Falun Gong on the weekends because he works and he referred to buying a second hand car. The applicant's father also provided to the Department: a translation of his Professional Qualification Certificate Level 4/Intermediate Skills Level dated [in] July 2007 which stated that the applicant's father's occupation was Plumber; and a pre-migration skills assessment application outcome letter from TRA dated [in] September 2007 which stated that for the skills assessment component of the migration process the applicant's father's occupation is General Plumber 4431-11.
86. The applicant's father also has claimed at the second and third hearings that he worked in PRC as a plumber for the water company for 21 years. He then worked at [Business A] from October 2005 to October 2007 where his title was Business Manager and there were four people in the Department which was known as [Department name deleted: s.431(2)]. The applicant's father also stated that at [Business A] he earned, when the business was going well he could earn RMB2,000 to RMB4,000, however, sometimes it can be as low as a few hundred but the average is RMB2,000.
87. The applicant's mother at the third hearing stated that at [Business A] she did office work, typing and simple translations. Her salary was RMB900 to RMB1,000. In Australia she worked in a restaurant for 3 to 4 months and left when she became pregnant.

Country information on bigamous relationships

88. The applicant's parents have claimed that as they are living in a de facto relationship and that they are in a bigamous relationship. As discussed at the third hearing, on the country information set out in the parent's decision, the applicant's parents are not married so they are not in a bigamous relationship.

Country information in relation to the applicant's nationality

89. The Nationality Law of China clearly defines the status of overseas-born Chinese regarding claims to Chinese nationality and/or one's ability to apply for Chinese nationality:

Article 5 states:

Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

(Nationality Law of the People's Republic of China (Adopted 10 September 1980), The Government of the Hong Kong Special Administrative Region Immigration Department website http://www.immd.gov.hk/ehtml/chnnationality_1.htm - Accessed 13 October 2008 – \\melsrv1\melref\INTERNET\chn33883.web.doc).

90. Also relevant is section 12 of the Australian *Citizenship Act 2007* which states as follows:

12 Citizenship by birth

- (1) A person born in Australia is an Australian citizen if and only if:
- (a) a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born; or
 - (b) the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.

91. The applicant's parents have claimed in the protection visa application that their citizenship is Chinese and their country of former habitual residence is PRC. They also provided with the protection visa application certified copies of the detail pages of their passports and the pages with visas and exit and entry stamps.

FINDINGS AND REASONS

92. The applicant's parents have asserted that the applicant is stateless. On the applicant's parents' claims to be citizens of PRC and their PRC passport copies of the details pages of which were provided to the Department the Tribunal finds that the applicant's parents are citizens of PRC. Article 5 of the Nationality Law of PRC state that a person born abroad one or both of whose parents are Chinese nationals shall also be a Chinese nationality unless, one or both of the parents have settled abroad and the person has acquired a foreign nationality.

93. The Tribunal has found that the applicant's parents are citizens of PRC and as she has only resided in Australia since her birth [in] 2009, the Tribunal finds, pursuant to section 12 of the Australian Citizenship Act, that the applicant is not an Australian citizen.

94. On all of the above findings the Tribunal finds, pursuant to Article 5 of the Nationality Law of PRC, that the applicant is a citizen of PRC.

95. The Tribunal also notes that the applicant's claims, as well as her parent's claims, relate to persecution the applicant and her parents will suffer if they returns to PRC

96. For all of the above reasons, the Tribunal will assess the applicant's claims against the country of PRC.

Credibility in relation to the applicant's parent

97. For the reasons given in the applicant's parent's decision (Tribunal case file 0904334) (the parents' decision), the Tribunal finds that the applicant's parents are not credible witnesses.

THE APPLICANT'S CLAIMS

98. For the reasons set out in the parent's decision the Tribunal has found in relation to the claims on which the applicant is relying as set out in the paragraphs below.

Father is a Falun Gong practitioner

99. The applicant has claimed that if she returns to PRC she will be persecuted because her father is a Falun Gong practitioner.
100. The Tribunal in the parents' decision did not accept any of the applicant's father's substantive claims as to his conduct and experiences in PRC prior to coming to Australia and the Tribunal in this decision, for the same reasons as the Tribunal in the parents' decision, also makes the same finding.
101. For the reasons set out in the applicant's parents' decision, including the Tribunal's findings that the applicant's father is not a credible witness and that the Tribunal does not accept any of his substantive claims as to his conduct and experiences in PRC prior to coming to Australia that the Tribunal finds that the applicant's father was not a Falun Gong practitioner in PRC. The Tribunal in the parent's decision accepted that the applicant's father practised Falun Gong at [Location 1], attended the study group at [address deleted: s.431(2)], and attended 2 events at the Town Hall to remember the practitioners who were persecuted on 20 July 1999. Although there is limited supporting information the Tribunal will also make its findings on the basis that the first applicant asked people to quit the communist party; and went to the Chinese consulate twice in November 1998 and four times in April and May 2009. The Tribunal in this decision will also accept that the applicant participated in Falun Gong activities in Australia as set out above.
102. For all of the reasons set out in the parent's decision, including in light of the Tribunal's finding that the applicant's parents are not a credible witness and that the Tribunal does not accept any of the applicant's father's substantive claims as to his conduct and experiences in PRC prior to coming to Australia as well as the Tribunal's finding that the applicant's father was not a Falun Gong practitioner in PRC, the Tribunal is not satisfied that the first applicant will practise Falun Gong in PRC if he returns to PRC.
103. For all of the above findings and reasons the Tribunal also finds that there is no more than a remote chance that the applicant's father will be persecuted in PRC because of his Falun Gong activities in Australia.
104. On the evidence, information, reasons and findings set out in the parents' decision, and on the above findings and reasons, the Tribunal finds that the applicant will not be persecuted either now or in the reasonably foreseeable future if she were to return to PRC with her parents because her father is a Falun Gong practitioner or her mother is associated with a Falun Gong practitioner. For similar reasons the Tribunal also finds that the applicant will not be taken away from her parents if they return to PRC.

Breach of PRC family planning law findings

105. There was no claim made by the applicant's parents that they would not pay any social compensation levy. In light of the country information the Tribunal is satisfied that the fines for couples breaching Jiangxi family planning law, with the exception of bigamous marriages and remarriage, is up to 3.5 times the local per capita income. For all of the reasons and findings set out in the parents' decision, the Tribunal is satisfied that the applicant's parents have the financial resources or would be able to obtain the financial resources to pay any fine levied as they have breached the family planning law, even if the first applicant had to pay back RMB20,000 (around AUD3,284.75) he borrowed as well as a social compensation levy

of around RMB33,666.61 (AUD5,528.17). Further, even if the fines were RMB78,553.09 (AUD12,899.47) as they were fined on the basis of a birth in a remarriage or a bigamous marriage, which the Tribunal does not accept, the Tribunal is satisfied that the applicant's parents have the financial resources or would be able to obtain the financial resources to pay any fine levied and would do so as required by Jiangxi family planning law.

106. For reasons set out in the parents' decision and the Tribunal's finding that the applicant's parents are not credible witnesses, the Tribunal is satisfied that the applicant's parents were to return to PRC and have to pay a social compensation fine, they would be able to do so and would do so when required by Jiangxi family planning laws. The Tribunal is also satisfied, particularly on the country information, that once the applicant's parents have paid any social compensation levy the applicant will obtain household registration even if she did not meet the 4 qualifications the applicant's parents claimed were needed for household registration: a legal marriage; a birth permission; a birth certificate; and a piece of paper from the local police station. The Tribunal is also satisfied, particularly on the country information, that the applicant will obtain household registration even though she was born in Australia. Further, the Tribunal is satisfied that once the applicant has obtained household registration the applicant will be able to access public education, health and welfare services in PRC.
107. Therefore, pursuant to section 91R of the Act the Tribunal finds that, if the applicant and her parents were to return to PRC, the applicant would not suffer serious harm in the reasonably foreseeable future due to her birth being in breach of PRC family planning laws. Therefore, it follows that the Tribunal is not satisfied that the applicant has a well founded fear of persecution for a Convention reason due to her parents' claimed breach of PRC family planning laws.

Visit to the Embassy and the applicant's passport

108. In relation to the applicant's mother's claim made [in] December 2009 and [in] January 2010, that she and the applicant's father had gone to the PRC Embassy and what was discussed at the Embassy, the Tribunal, in light of the Tribunal's finding that the applicants are not credible witnesses, is not satisfied that the applicants went to the Chinese Embassy in relation to their daughter's passport. In the alternative, even if the Tribunal accepts the applicant's parents went to the Chinese Embassy in relation to their daughter's passport, the Tribunal is not satisfied that they informed staff at the Embassy that they had applied for protection visas or that the staff at the Embassy stated that their daughter will never get a PRC passport because the applicants had applied for protection visas. Further, in light of the above and the country information the Tribunal is not satisfied that the applicant would not be issued with a PRC passport or travel document.

Overall finding

109. In the Tribunal's view, the evidence does not establish that there is a real chance that the applicant will suffer persecution for a Convention reason either now or in the reasonably foreseeable future if she returned to PRC. Having regard to the above the Tribunal is not satisfied, on the evidence presently before it, that the applicant has a well founded fear of persecution for a Convention reason if she returned to PRC in the foreseeable future.

CONCLUSIONS

110. 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 section 36(2)(a) for a protection visa.

DECISION

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

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 Officer's I.D. prrt44