REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO. 3/91

RE ZWD

AT AUCKLAND

Before: B.O. Nicholson (Chairman)
R.P.G. Haines (Member)
G.W. Lombard (Member)
J.M. Priestley (Member)

Counsel for the Appellant: Mr J. Sullivan

Counsel for the NZIS: Mr R.J. Henshaw

Date of Hearing: 11 June 1991

Date of Decision: 20 October 1992

DECISION OF THE AUTHORITY DELIVERED BY R.P.G. HAINES

I N D E X

I N D E X (continued) Page

DECISION

INTRODUCTION

This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a national of the People's Republic of China.

Although this case was heard on 11 June 1991, delivery of a decision has been delayed by a number of factors. The principal factor is that although the appellant is a national of the People's Republic of China, he was born in Sumatra, Indonesia. In January 1959 his family left Indonesia and moved to China where the appellant resided continuously until his departure for New Zealand in December 1990. On these facts there was a real possibility that the appellant possessed more than one nationality. This was not an issue previously perceived by the parties to the appeal notwithstanding that it is a matter which specifically arises in terms of the Inclusion Clause provisions of Article 1A(2) of the Refugee Convention. As no evidence was directed to the point, the Authority, at the conclusion of the hearing, acting under paragraph 9 of the Terms of Reference of 11 March 1991, requested that the Refugee Status Section of the New Zealand Immigration Service obtain further information as to whether a person in the situation that the appellant claimed to be in would be recognized by Indonesia as being a

person of Indonesian nationality.

The Authority was subsequently advised that the initial enquiry was addressed to the New Zealand Embassy in Jakarta which, in turn, referred the request back to the Ministry of External Relations and Trade, Wellington. For reasons which are not entirely clear, that Ministry considered it more appropriate for the information to be sought from the United Nations High Commissioner for Refugees. It was not until 28 January 1992 that the UNHCR Regional Office of Australia, New Zealand and the South Pacific was able to provide information on the issue of Indonesian nationality. A copy of that response was provided to the appellant's counsel and in mid-February 1992 counsel indicated that the appellant wished to make further submissions in support of the appeal.

The second reason for the delay is that at the hearing of the appeal virtually no country information was adduced by either party and counsel for the appellant did not advance any legal submissions in support of the appeal other than to refer the Authority to various passages from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. The Authority was troubled by these omissions given that the principal ground on which refugee status is sought by the appellant is fear of persecution arising from his non-compliance with the One-Child Family Policy of the People's Republic of China and in particular, his refusal to undergo a sterilization operation. At the conclusion of the hearing, the Authority requested that counsel for the appellant file submissions addressing this specific issue with particular reference to the relevant law, supported by reference to the various applicable international Conventions. Brief submissions were subsequently filed under cover of a letter dated 12 July 1991 but were confined to citation of further

paragraphs from the Handbook on Procedures and Criteria for Determining Refugee Status as well as various Articles from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and finally, the Convention on the Prevention and Punishment of the Crime of Genocide. By letter dated 29 July 1991 the Authority's attention was drawn to an internal discussion document prepared by the Division of Refugee Law and Doctrine of the UNHCR in 1989 and once again brief submissions were advanced in reliance on that paper. Surprisingly there was no reference in either set of submissions to recent relevant jurisprudence from both Canada and the United States of America. Furthermore, no attempt was made to establish the terms of the One-Child Family Policy or its manner of implementation, notwithstanding the rather voluminous material available. As a result, the Authority was constrained to conduct its own researches both as to the law and as to the facts. The material discovered by the Authority's own researches is listed in the schedules to the letters dated 1 July 1992 and 22 July 1992 from the Secretariat to the Authority to the solicitors for both parties.

To allow the parties a fair opportunity to make submissions on both the information supplied by the UNHCR and on the information and material uncovered by the Authority's own researches, the Authority invited submissions. Only the appellant took advantage of this opportunity. His submissions have now been considered. In short, the Authority has not taken into account any information or material in respect of which the parties have not had an opportunity to be heard.

We mention that at the hearing of this appeal the New Zealand Immigration Service accepted that discrimination against overseas-born Chinese did occur in China. That concession, however, was made without the benefit of access to or consideration of the very large amount of material subsequently discovered and is at variance with that material. We do not therefore accept that the concession was properly made.

THE APPELLANT'S CASE

The appellant is a forty-six year old married man with one son born on 15 July 1979. Both of the appellant's parents are deceased and he has one brother aged 31 who is presently living in China.

The appellant's parents were both Indonesian-born Chinese and the appellant himself was born in Sumatra, Indonesia on 9 December 1946. In 1953 he started his primary schooling in Indonesia.

However, in January 1959 the family left Indonesia and migrated to China because of anti-Chinese feeling in Indonesia. None of them had previously been to China. The family settled in
Guangzhou in the Province of Guangdong. From 1961 to 1963 the appellant attended school at Guangzhou.

He said that because of his background as an overseas Chinese he was required to pay fees while attending junior high school. Most people did not have to pay such fees which were only levied for attending senior high school. He was unable to progress to senior high school because his parents were unable to afford further education.

From 1966 to 1976 The Great Proletarian Cultural Revolution threw the entire country into confusion. Formal education at tertiary level ceased from 1966 to 1972 and both primary and secondary education was greatly disrupted in this period. There was widespread violence and anarchy and there was a national campaign against the Four Olds (old ideas, old customs, old culture, old habits).

At this time the appellant's family had an uncle still living in Indonesia and the appellant told the Authority that this, coupled with the fact that the appellant's family were regarded as "Overseas Chinese", led to them being suspected as spies and traitors. They were classed as "Black Seven group". They had to report to a police station and were required to write self-criticism. A large poster was placed on the door of the family home giving notice to the public at large that the family were overseas returned Chinese, that the appellant's family were not to contact their overseas relatives and were prohibited from talking to anyone about overseas matters. In addition their house was searched and their personal documents (including the appellant's birth certificate) were confiscated by the authorities. They were further required to attend the Public Security Bureau every two days to report what they (members of the family) had been thinking. His father died in prison in 1969, he having been detained because he was a member of the Kuomintang.

The appellant himself was sent to a "practice session" set up by the government for "black-listed individuals" and was prevented from returning home for three months. He told the Authority that during this time he was brainwashed, criticized and taught to inform the authorities what he was thinking. At the end of three months he was sent back home. If there were any public meetings he was not allowed to join and had to stay inside. He was also sent to do hard labour work.

After addressing the hardship suffered by him and his family during the Cultural Revolution, the appellant's statement next referred to his marriage in April 1978, the birth of his son in 1979 and the fact that he worked as a car mechanic for a company in Guangzhou. He worked for the same company for

the next ten years through to 1989.

The appellant complained that he was controlled by his Work Unit and if he wanted to leave the city limits would have to apply to the Public Security Bureau for permission. He had to disclose where he would be going and the length of his absence. He applied on two occasions for permission to travel out of the city but on each occasion permission was withheld. No reason was given. The appellant believes that it was because the authorities were still suspicious of him as an overseas returned Chinese who might be a spy. The Authority will address this aspect of his case in more detail later in the decision.

The appellant said that he felt as if he was living in a prison. He was required to do his job, do nothing more and say nothing. The authorities would come round every month and check on him and his family to see what he was doing. The pressure was constant and he felt completely controlled by the government. His explanation for this intrusive attention was once again the fact that he was a returned overseas Chinese.

In early 1989 a second child was conceived. One day when his wife was four months pregnant, and the appellant himself was at work, representatives of the local Family Planning Unit arrived at the appellant's home and took his wife to hospital and forced her to have an abortion. The appellant has produced a Certificate of Abortion recording the date of the operation as 15 April 1989. Upon her return home the appellant's wife was in pain and very ill.

At the same time the Family Planning Unit ordered the appellant to have a sterilization operation. He was angry

and frightened and he refused. The grounds for the appellant's refusal were not articulated in evidence, though we note that he did say in one of the earlier interviews conducted by the New Zealand Immigration Service that he was afraid that the operation would make him "fat and lazy".

He said that every day members of the Unit returned to his house to threaten him. Because he was afraid he dared not go home to stay overnight, his fear being that he would be taken away by force to undergo the operation.

The appellant said that it was unusual for a husband to be required to have a vasectomy when the wife has had an abortion. He thought that perhaps because he was an overseas Chinese this may have been a factor.

In July 1989 the Family Planning Unit ordered the appellant's work unit to dismiss him from employment because of his refusal to undergo a sterilization operation. The appellant has produced in evidence a certificate from his employer. The relevant extract from the English translation is in the following terms:

> "Our company's employee, Mr ZWD, due to his violation of the family planning regulation, refused to accept the measure and failed to be educated. We hereby dismissed him from his job.
>
> 16 July 1989"

The appellant's written statement then records that for more than one year he was "prevented" from working because of his refusal to have the sterilization operation. However, in his oral evidence before the Authority he conceded that following his dismissal he did not look for a formal job. He chose

instead to help a friend repair motor vehicles and earned his living that way. Although the appellant's evidence was not clear in this respect it would seem that the appellant stayed away from home during this eighteen month period, visiting his wife only every eight to ten days.

At the end of 1990 the appellant was introduced to a man who said that he could arrange for the appellant to go to Canada. Friends and relatives of the appellant who sympathized with his situation lent him money for the fare. The appellant also sold a number of possessions. On 23 December 1990 the appellant commenced his journey. First he boarded a goods truck which took him to a deserted house where he stayed for the next twenty days. Thereafter he was taken by his "guide", Mr Z, to "an airport". The appellant did not have, nor did he ever come into, possession of any travel documents as Mr Z said that he would take care of everything, including the passport. When the arrangements were first entered into the appellant did give this man a photograph but the appellant never sighted a passport in his own name.

At the first airport the appellant and Mr Z boarded an aircraft. Thereafter the appellant only remembers travelling in four different aircraft. The longest flight was the one to New Zealand. He has no idea of the route taken to reach this country.

On arrival at Auckland Airport Mr Z told the appellant to wait for him at an eating establishment in the transit lounge. He said that he would return in an hour's time. He did not return. The appellant remained in the transit lounge overnight and then approached the authorities. They in turn had nothing to confirm when or how the appellant had arrived in New Zealand. It is thought that his date of arrival was

28 January 1991.

Eventually the appellant was arrested by the Airport Police on a charge of being unlawfully on the premises, an offence against Section 29 of the Summary Offences Act 1981.

Also on 28 January 1991 the Minister of Immigration issued a document entitled "Provisional Procedures for Determining Refugee Status Applications During the Gulf War Where There is a Security Risk". These procedures provided (inter alia):

a) That all persons arriving in New Zealand and applying for refugee status were to be held in custody.

b) The New Zealand Immigration Service was to determine only whether the applicant had a prima facie claim to refugee status. No decision was to be made as to whether the individual was in fact a refugee.

c) There was to be no appeal against a decision that a prima facie case had not been established.

d) Where the Immigration Service decided that no prima facie case had been established the applicant was to be removed from New Zealand.

e) Where a prima facie case had been established it was then necessary for the police to give what was called "a security clearance".

f) For those cases where the Immigration Service had determined that a prima facie case for refugee status had been established, but if the police were unable to state that the applicant **did not** pose a threat to

national security, then expulsion would take place.

These provisions were applied to the appellant and he was accordingly held in custody.

The Immigration Service file shows that a warrant of commitment under the then Section 128(7) of the Immigration Act 1987 was issued by the Registrar of the District Court at Otahuhu on 30 January 1991. The appellant was held in the remand wing of Mount Eden Prison pursuant to that warrant.

On 22 February 1991 a Detective Inspector of the New Zealand Police advised the Immigration Service that a security clearance could not be provided. The letter is in the following terms:

> "We are unable to provide a security clearance for this person on the following grounds:
>
> 1. He arrived in New Zealand without travel documentation.
>
> 2. We are unable to verify his: 2.1: Identity
> 2.2: Country of Origin
>
> 3. It cannot be said in view of his obvious nationality that the gentleman poses a threat arising from our concerns in relation to the Gulf War."

Subsequently, by letter dated 25 February 1991 the police advised that having completed further enquiries they were:

> "... able to provide a security clearance for [the appellant]".

The appellant was released from Mount Eden Prison on 26

February 1991.

Prior to that, on 13 February 1991 the appellant's plight was drawn to the attention of his now solicitors. As a result the appellant was represented at the Refugee Status Section interview held at Mount Eden Prison on 16 February 1991, though his solicitor had little time to obtain proper instructions. A formal refugee application was lodged with the Immigration Service on 21 February 1991.

As explained in the appellant's memorandum of 11 June 1991, his claim for refugee status is based on three separate grounds from which it is claimed a well-founded fear of persecution arises:

a) He has resisted undergoing a sterilization operation with the result that he was dismissed from his employment.

b) He has been persecuted throughout his life for being an overseas-born Chinese, suspect in the eyes of the government as a spy or traitor.

c) He obtained illegal travel documents to escape from China, and if he were to be returned to that country he would be persecuted for his illegal act. The combination of this illegal act and his suspect nationality leads him to fear further harsh persecution at the hands of the government.

A further interview by the Refugee Status Section took place on 3 April 1991 following the appellant's release from custody. At this interview the appellant stated that his wife has reported that checks have been made since his

departure. Family Planning as well as the police had visited many, many times and asked for the appellant. Each time his wife would say that he had "gone away" and his whereabouts were unknown.

The appellant's application for refugee status was declined by the Refugee Status Section of the Immigration Service in a letter dated 10 May 1991. The grounds for the decline were two-fold:

1. The appellant did not participate in any of the demonstrations against the government.

2. He did not express a political opinion.

Regrettably, neither ground for decline addresses the three specific grounds of the refugee application.

However, as this appeal is by way of a de novo hearing, the Authority has been able to correct this error.

Additional evidence tendered on appeal included:

a) A letter from the appellant's wife dated 23 February 1991 in which she confirms that she was not allowed to have their second child and was required to undergo an abortion, that the appellant refused to undergo a vasectomy and was as a result dismissed from his employment. She further advises that following the appellant's departure from China members of the local Family Planning Unit continue to call at their home enquiring as to his whereabouts.
b) A letter from the appellant's wife dated 19 April 1991 reporting that she had had a further visit from members

of the Family Planning Unit who demanded to know when the appellant would be returning home. They told her that the appellant would not be able to escape from them.

c) Subsequent to the hearing of the appeal, by letter dated 15 August 1991, counsel for the appellant advised that the appellant had been told by his wife during a telephone discussion that she had been discharged from her employment. The account of the telephone discussion continues:

> "The Public Security has been looking for me [the appellant]. They went to our house to threaten my wife and to find my whereabouts from her. She is very scared. My son is also being affected because he cannot have proper care. My wife took him to stay with a friend temporarily."

THE ISSUES

The Inclusion Clause in Article 1A(2) relevantly provides that a refugee is a person who has a:

> "... 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.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be

> deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

Usually the issues would be articulated in the following terms:

1. Is the appellant genuinely in fear?

2. If so, is the harm feared of sufficient gravity to amount to persecution?

3. If so, is that fear well-founded?

4. If so, is the persecution he fears persecution for a Convention reason?

This is the formulation we employed in Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB (11 July 1991).

The appellant's birth in Indonesia, however, introduces an additional issue which can be formulated as follows:

5. Does the appellant have more than one nationality?

This additional issue arises as the Convention requires a person who has more than one nationality to first avail himself of the protection of each one of the countries of which he is a national unless in relation to any one or more of such countries he can establish a well-founded fear of persecution. Thus, even if an individual has a genuine fear

of persecution in one state of nationality, he may not benefit from refugee status if he is a citizen of another country that is able to afford him protection. Only if the protection of each and every country of nationality is unavailable, does the surrogate protection system provided by the Refugee Convention come into play.

It is this issue which will be addressed first.

WHETHER THE APPELLANT HAS MORE THAN ONE NATIONALITY

According to the International Commission of Jurists Report Indonesia and the Rule of Law: Twenty Years of "New Order" Government (1987) 151 most Chinese Indonesians obtained Indonesian nationality by force of the first Law on Nationalities in 1945. In 1958 the second Law on Nationalities became effective. The first Law on Nationalities was based on the principle of *"jus soli"* and considered as nationals all those who were born in Indonesia and living there unless they had repudiated Indonesian nationality. Article 5 of the Dutch-Indonesian Independence Agreement 1949 stipulated that at the moment of the transfer of sovereignty all Dutch nationals who were not of Dutch origin would obtain Indonesian nationality unless they repudiated this within a specified period. Article 18 of the agreement specified this period as being two years after the transfer of sovereignty which took place on 27 December 1949.

Both this report and the Minority Rights Group report The Chinese in Indonesia, The Philippines and Malaysia (first published in June 1972; revised edition February 1982) at 4 confirm that there was, however, a complication. According to both an old Manchu law as well as the Republic of China's

Nationality Act of 1929 all overseas Chinese had been considered by subsequent Chinese governments as Chinese nationals. On the basis of this law all Chinese Indonesian nationals continued to have a double nationality. The following quote is taken from Indonesia and the Rule of Law: Twenty Years of "New Order" Government at 152:

> "To end this situation Indonesia and China concluded in 1954 the so called "Sunarjo-Chou En Lai" treaty which was ratified by Indonesia in 1958. At the end of 1960 the two countries agreed upon the executive details which included an obligatory choice for either nationality before December 15, 1962.
>
> Children under age would again have an opportunity of choice when becoming of age. These choices had to be made through filling out prescribed forms and submitting them to the courts."

According to the Minority Rights Group report The Chinese in Indonesia, The Philippines and Malaysia at 11 this dual citizenship agreement was described in 1970 as "one of the greatest blunders ever committed in Indonesia's recent diplomatic relations" as the agreement:

> "... imposed on all Indonesian citizens of Chinese ethnic origin a second, but dominant, nationality, the nationality of a country for which the overwhelming majority of them was absolutely alien, of a country they had never even visited but whose nationality they were assumed to possess, invalidating even their original Indonesia nationality."

It is also recorded in The Chinese in Indonesia, The Philippines and Malaysia at 4, 10-11 that in 1959 the Indonesian government introduced a regulation outlawing

retail trade by aliens living in rural areas. The decree was crudely enforced against Chinese traders often without much attention to whether they had claims to Indonesian citizenship or not, and destroyed the livelihoods of hundreds of thousands of people. It is estimated that more than 100,000 Chinese left Indonesia for China in the course of the next year, the great majority of them hounded out, forced to leave behind virtually everything they owned.

The appellant's account of his departure for China in 1959 is therefore consistent with what is generally known of events in Indonesia.

Returning, however, to the issue of nationality, the International Commission of Jurists report Indonesia and the Rule of Law: Twenty Years of "New Order" Government continues at 152:

> "On April 10, 1969 Indonesia unilaterally denounced the 'Sunarjo-Chou En Lai' treaty. Theoretically this could not affect the position of the Chinese who had opted for Indonesian nationality, as December 15, 1962 had already passed. The only group which legally could be affected were those children under age who had been promised another opportunity for choice. However, in connection with the denunciation of the treaty the Minister of Justice issued a circular letter to the courts which declared void all these forms irrespective of the date of delivery. The result is that many Chinese who had already given up their Chinese nationality but whose applications had not been finalized yet were barred from obtaining the Indonesian nationality. The registration procedures requesting foreigners and stateless persons who want to obtain Indonesian nationality to produce various kinds of documents and forms are extremely slow and are open to many forms of abuse through official corruption. The result is that there are at present in Indonesia almost 80,000 stateless persons of Chinese origin who are in a

> legal limbo and whose rights are at the mercy of any petty official."

In view of the uncertainties inherent in this confused situation, the Authority is of the opinion that the proper inference to be drawn from this review is that the appellant does not possess Indonesian nationality. This is a conclusion in the appellant's favour and he is accordingly not required to seek the protection of the Government of Indonesia.

We turn now to the nationality law in the People's Republic of China.

We propose to be guided by the summary in Plender, International Migration Law (Revised 2nd ed 1988) at 37:

> "Nationality in the People's Republic of China is now governed by the Nationality Law of 1980, the first legislation on this subject since the Kuomintang's enactment of 1929. The Law of 1980 draws no distinction between the diverse nationalities (or ethnic groups) that make up the population of the People's Republic. On the contrary, it provides expressly that persons belonging to any of the nationalities of China have Chinese nationality. Thereby it complements the Law of National Autonomous Regions, which contains special protective provisions for ethnic minorities in frontier regions. The Law of 1980 applies the principle of unity of nationality at the international as well as the domestic level. Article 3 provides that the People's Republic will not recognize dual nationality for any Chinese national. China applies this policy notwithstanding its (apparent) continued adherence to the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930. The latter provides in Article 3 that a person having two or more nationalities may be regarded as its national by *each* of the States whose

nationality he possesses.

It is the Chinese tradition to apply the principle of *jus sanguinis* as the primary rule governing the acquisition of nationality at birth. The Law of 1980 adheres to the tradition but modifies it by use of the principle *jus soli* so as to reduce the size of the overseas born population of Chinese nationals. It remains the case, however, that a native of China does not necessarily obtain Chinese nationality *jure soli* even if he would otherwise be stateless. A person born in China whose parents are Chinese nationals, or one of whose parents is a Chinese national, has Chinese nationality. A child born abroad whose parents are Chinese nationals acquires Chinese nationality at birth unless the parents are settled abroad at the time of the birth and the child then obtains foreign nationality. A person born in China whose parents are stateless or of uncertain nationality but are settled in China has Chinese nationality.

Article 7 of the Nationality Law provides that aliens or stateless persons who are willing to abide by China's Constitution and laws may acquire Chinese nationality upon approval of their applications, provided that they are close relatives of Chinese nationals or they have settled in China or they have other 'legitimate reasons'. A person whose application for naturalization is approved must forfeit his other national status. No period of residence is specified as a condition of naturalization. The naturalization of a married person does not bring about a sympathetic nationalization of the spouse; nor does the naturalization of a parent bring about a sympathetic naturalization of the child. A parent may, however, apply for the naturalization of a child, and the latter forfeits his Chinese nationality on reaching adulthood, if he is then settled abroad and acquires a foreign nationality of choice."

The conclusion drawn by the Authority from this passage is that the appellant has Chinese nationality. It follows that in order to establish his claim to refugee status he must establish a well-founded fear of persecution for a Convention

reason in relation to his country of nationality, namely the People's Republic of China.

The situation would not be different even if the appellant was stateless because it is clear that China is a country of "former habitual residence". Even if it were not, we would necessarily **assume** that it was as it is an assumption in the appellant's favour. For if the appellant were indeed a stateless person with no right to return to any state, he could not qualify as a refugee because he is not at risk of return to persecution. This is an issue which we have discussed in some detail in Refugee Appeal No. 1/92 Re SA (30 April 1992) at 83 to 89. We adopt and apply what we have said there in relation to Statelessness and Country of Former Habitual Residence.

Overall, our conclusion is that the appellant is not a person of more than one nationality and that therefore there is no requirement that he avail himself of the protection of Indonesia. In the light of the findings we have made, it is not possible for him to seek out the protection of that country.

We turn now to the principal issue of this appeal, namely the One-Child Family Policy in the People's Republic of China.

THE ONE-CHILD FAMILY POLICY: A DESCRIPTION

According to the document published by the Immigration and Refugee Board Documentation Centre, Ottawa, Canada China: Country Profile (December 1991) at 67 the one-child family policy was introduced:

> "... to cope with the hard Malthusian reality of

> having to provide for 22 percent of the world's ever-growing population using only 11 percent of the world's finite arable land - a situation created largely by the disastrous population polices of Mao Zedong, who especially in the 1950s encouraged large families in order to fuel the 'human waves' he felt were needed to protect China from its enemies."

Dissenting opinions have been expressed, see for example Hartmann, Reproductive Rights and Wrongs: The Global Politics of Population Control and Contraceptive Choice (1987) at 147:

> "The decision to launch the one-child policy was prompted not by the specter of Malthusian disaster, but rather by the ambitious new economic strategy initiated by the post-Mao leadership, who, among other things, are opening the country up to Western investment. Today in China slogans proclaim 'It Is Glorious to Get Rich', in marked contrast to the radical egalitarianism of the Mao era. The current regime wants to launch China firmly in to the modern industrial era and aims to attain a per capita GNP of $1,000 by the year 2000 - more than three times the level today.
>
> To achieve this extraordinary target would require exceptionally high rates of economic growth and, in the Chinese leadership's view, very low rates of population growth. The Chinese have calculated that the country's optimal population size is between 630 and 700 million people, and hope to reduce the population to this level in the next 100 years. This will require stringent enforcement of the one-child family in the beginning, followed by a gradual relaxation to a two-child norm.
>
> The Chinese government has resurrected Malthus in order to justify its population concerns."

In this regard we note that in 1978 China launched the "Four Modernizations" reform: the drive to modernize industry, agriculture, science and technology, and national defence. China's leaders have acknowledged and stressed the close

links between those reforms and family planning, arguing that reduced population growth will make it easier to increase income levels: Whyte & Gu, Popular Response to China's Fertility Transition (1987) 13 Population and Development Review 471, 472.

In Hartmann's opinion, before the one-child family policy, China achieved substantial reductions in its birth rate through economic and social change, coupled with a highly effective family planning programme: op. cit. 144 and that:

> "The case of China today demonstrates the need for an ethical bottom line in population policies. By using punitive measures to impose its population policy, the government has trespassed too far into the personal lives of its citizenry, violating basic human rights." op. cit. 148

Some commentators allow that states may claim for themselves a right or interest in the size and composition of their population, and its age distribution, since these have economic, political and social ramifications. The extent and modes of legal regulation of fertility which a particular country adopts will reflect the importance attached by that country to such ramifications: Douglas, Law, Fertility and Reproduction (1991) 1. Although most developed countries have no specific policies to raise or lower population growth rates, France, Belgium, West Germany, and the former socialist countries of Eastern Europe concerned with negative population growth and ageing societies, have begun using monetary incentives (such as higher family allowances and bonuses for child birth) to induce people to have more children, even though concern for women's rights and maternal child health makes contraception, voluntary sterilization and abortion permissible.

But with few exceptions, the countries of South East Asia are concerned with the effect of rapid population growth on their prospects for development. As a result, these nations have adopted policies, laws and programmes to reduce fertility. Fifteen Asian countries, accounting for the vast majority of the region's population, have official policies to reduce population growth rates: Isaacs, Reproductive Rights 1983: An International Survey (1982-83) 14 Colombia Human Rights Law Review 311, 313, 317, 350. Clearly there are contrasting cultural and social conditions in Asia as compared with Latin America, Africa and the Middle East.

Against this context it is possible to turn to the detail of the one-child family policy of the People's Republic of China.

In considering the events of which the appellant speaks, we have had regard to the description of the one-child family policy which appeared in the Department of State Country Reports on Human Rights Practices for 1989. Its report on the People's Republic of China was described by the Lawyer's Committee for Human Rights Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1989 (1990) 37 as "excellent". Although the Critique at 39 addresses some criticisms to the report's summary of China's population control policy, the criticisms are in the main directed at the issue of ethnic minorities and eugenic regulations, neither of which are relevant to the present case. We observe that the Department of State Country Reports on Human Rights Practices for 1990 is in very similar terms to the 1989 report and the Lawyer's Committee for Human Rights Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1990 (1991) at 51

addresses no criticisms to the description of the population control policy and observes that:

> "The 1990 report on the People's Republic of China (PRC) generally lives up to the increasingly high standards of the Department of State's China reports in recent years."

The following quotes are accordingly taken from the Department of State's Country Reports on Human Rights Practices for 1989 at 808-810:

> "Personal and family life are extensively monitored and regulated by authorities. Most persons depend on their work unit for employment, housing, ration coupons, permission to marry or have a child, and other aspects of ordinary life. The work unit, along with the neighborhood watch committee, monitors activities and attitudes.
>
> ...
>
> The Chinese Government maintains a comprehensive and highly intrusive family planning programme. Individual and family decisions about bearing children are controlled by the State, with severe sanctions against those who deviate from official guidelines. The Central Government sets an annual nationwide goal for the number of births to be authorized. This is then apportioned among provinces, and further down through prefecture, county, town, and district levels. Ultimately, each work unit (village, factory, or government office) receives a target figure for births over the next few years. As the allotments are quite small, couples wishing to have a second child often must wait many years before receiving permission. In some areas, newly married couples have also been required to wait years before having their first child.
>
> While strongly encouraging all couples to have only one child, Chinese policy allows two or more children for many rural families. Members of ethnic minorities, particularly in remote areas,

are also generally not subject to the same strict limitations imposed on the Han majority.

Implementation of the policy varies widely from place to place and from year to year. In many areas, couples apparently are able to have several children without incurring any penalty, while in other areas enforcement has been excessively harsh. Periodic campaigns exhort all Chinese to have fewer children, to have them later in life, and to space them more widely. When national targets are not met, officials call for stricter implementation, and some have advocated more coercive methods than central government policy currently authorizes. Local officials have great discretion in how, and how severely, the policy is implemented.

Under China's national Marriage Law, women may not legally marry before aged 20; men before aged 22. In practice, early marriages are discouraged, and the press frequently extols the virtues of later marriage. Lack of available housing and other social concerns are often cited as additional reasons to delay marriage.

Couples are not allowed free choice about whether to practice family planning, how many children they may have, or when they may have them. In practice, most couples have little choice concerning the form of birth control to use.

The population control policy relies primarily on heavy doses of education and propaganda, augmented by severe psychological pressure on those who resist. Disciplinary measures against couples who violate the policy include stiff fines (often as high as a year's salary), withholding of social services, demotion, and other administrative punishments. If a unit exceeds its allocation, punishment may be meted out to the offending couples, to unit officials, and to the unit as a whole. Some local officials have reportedly destroyed or confiscated the private property of families with unauthorized children if fines are not paid ....

Physical compulsion to submit to abortion or sterilization is not authorized, but continues to occur as officials strive to meet population targets. Reports of forced abortions and

> sterilizations continue, though well below the levels of the early 1980s ....
>
> Chinese officials have consistently maintained that China does not condone forced abortion and sterilization and that officials who commit such abuses are punished. They admit, however, that such punishment is rare and have refused to provide documentation of any punishments.
>
> ...
>
> Despite a decade of efforts, officials acknowledge that population growth has significantly exceeded the national targets and that the goal of holding China's population to 1.2 billion by the end of the century will not be met. This realization, together with a recent escalation of official rhetoric, have led some observers to suggest that China may be entering a new cycle of strict enforcement of family planning policies, after a period of relative relaxation."

The most recent Country Reports on Human Rights Practices for 1991 is not materially different.

The reference in the Country Reports for 1989 to the possibility of "a new cycle of strict enforcement of family planning policies" may well be a reference to the report by Hardee-Cleaveland & Banister, Family Planning in China: Recent Trends (1988) 85-86, a shortened version of which is to be found in Hardee-Cleaveland & Banister, Fertility Policy and Implementation in China, 1986-88 (1988) 14 Population and Development Review 245, 278.

However, in a reply to the latter article, Zeng Yi, in Is the Chinese Family Planning Programme "Tightening Up"? (1989) 15 Population and Development Review 333 argues that certainly as at April 1989 there had been no "tightening up" of China's population policy. In support, Zeng Yi points (inter alia)

to the fact that in February 1989 six provinces and autonomous regions, including the appellant's province, Guangdong, adopted a policy of allowing all **rural** couples to have a second child a few years after the first. At 335 the author comments:

> "Clearly, the official policies on family planning have not been 'tightened', at least for the time being, as compared with the period 1984-86. On the contrary, they have been relaxed to some extent. For example, as mentioned in the article by Hardee-Cleaveland and Banister, the official policy in the rural areas of Guangdong Province in 1986 only allowed couples whose first child was a daughter, as well as couples meeting a few other conditions, to have a second birth. Since early 1989, however, a universal two-children-with-spacing policy has been practised in the rural areas of Guangdong."

The conclusion reached by Zeng Yi at 336 is:

> "It is clear that China's government and society are reemphasizing the importance of population control and calling for increases in the efficiency of implementation of family planning in order to reduce the gap between the observed total fertility rate and the total fertility rate of the policy ideal, as shown in Figure 1. However, the campaign to improve the efficiency of family planning should not be regarded as evidence that the policy is shifting back to a harder line."

More recently, Palmer, in The People's Republic of China: More Rules But Less Law (1990-91) 29 Journal of Family Law 325, 328-329 refers in a very general way to "new and very rigorous procedures" for birth registration:

> "It may be that these rules specify that those born to mothers who lack a 'birth permission certificate' will not be accorded proper household registration [*hokou*]. Without such a registration

it would be more difficult and more costly to gain access to schooling, medical services, rations and so on."

To place the debate in context, reference may conveniently be made to the analysis by Hull in Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Sector Report 1991 No. 4 at 26-29:

"The development of fertility control policies and plans since 1950 has seen a series of campaigns which might be grouped as follows:

1. First Campaign, 1953-59. A classic clinic-based promotion of birth control. The government was largely preoccupied with the establishment of communes and the collectivization of agriculture. Family planning was inhibited by lack of infrastructure, technological problems, and ideological indirection.

2. Second Campaign, 1962-66. Following the collapse of the Great Leap Forward and the period of famine, economic planning was reorganized. Formation of the Family Planning Office of the State Council, with provincial level offices to promote family planning in conjunction with the health departments.

3. Third Campaign, 1971-79. *Wan, Xi, Shao*; Family Planning was codified as a 'Late, Sparse, Few' with advocacy directed at the delay of marriage, spacing of births, and recommendation of 'at most two, best only one' birth per couple.

4. Fourth Campaign, 1979-84, 'One Child per Family' campaign combining comprehensive sets of incentive and disincentive measures based in the work unit. 1981 saw the establishment of the State Family Planning Commission and 1983 marked a year of strong enforcement of family planning policies, with large increases in family planning operations (IUD, sterilization, abortion) and reports of

coercive abuses in local areas. This provoked serious local opposition to programme inflexibility.

5. Fifth Campaign, 1984-1988, Document 7 of 1984, and Document 13 of 1986. Modified One-Child policy, allowing more than one child in certain circumstances, with some provinces and regions adopting a de facto two-child policy. The State Family Planning Commission discouraged coercion, but continued to urge local officials to meet family planning targets. Impact of these messages varied widely by region and local conditions.

6. Sixth Campaign, 1988-1991. Expansion of legalistic approaches to control. Continuing attempt to formulate a Population Law. Implementation of the Administrative Procedural Law. Expansion and regularization of provincial and lower level regulations on family planning (Tien 1990).

Each of these campaigns has had its own distinctive character reflecting the period in which it was formulated. They are not stages in the development of the family planning programme so much as different styles of family planning emerging in different stages of the development of governmental structures in China. This distinction is important as it helps to explain the fragility of family planning policy in the face of administrative and socio-economic changes, and the difficulty of promoting reforms in the family planning programme which are seen to contradict basic government policy and procedures.

...

The current period must be distinguished from the original one-child policy because of two major re-orientations of programme implementation. The family planning reforms begun in 1984 adopted an entirely new approach to family planning, and by extension, population planning. While the Fourth Campaign was essentially an aberration in the context of the post-1978 economic reform period, the Fifth Campaign represents a partial correction of that deviation of style by allowing discretionary adjustments to family size targets on

> the basis of cases of hardship established by individual couples. The Sixth Campaign - to the degree that it can be separated as a distinctive development - represents the consensus of both conservatives and reformers that China needs to develop legal instruments of control to replace the authoritarian and often arbitrary exercise of power by functionaries pursuing government goals (see O'Brien 1990 for a detailed analysis of legislative development in China). Such initiatives coincided with calls from the leadership for a more vigorous implementation of the programme in the face of demographic pressures for increased fertility."

Addressing the present policy implementation, Hull concludes at op. cit. 33 that the less stringent modified one-child policy will prevail for the rest of the century:

> "For the time being the government is committed to a family planning policy which retains some elements of the one child campaign, but allows a number of exceptions to relieve social pressure and discontent among people whose level of socio-economic development attaches high value to offspring, and particularly sons. Greenhalgh (1986: 508) believes that this mixed policy will be maintained for the rest of the century. We have no reason to doubt that it will, but would only add that the decision to maintain the policy is not a demographic issue so much as a political question turning on the total development of governmental power and the economic reforms in China. If the past is a guide to the future, there is not likely to be an easy or settled answer to this question."

The Authority's researches have not uncovered further advances in the debate as to whether the family planning policy is in fact being tightened up. It may, however, be an unproductive avenue to explore further. For it is more relevant to focus on what is known of the means by which the one-child family policy is enforced. Is there persuasion only, or is coercion employed? It is this issue which will

be examined next.

Having reviewed a wide range of literature on the subject, the Authority has concluded that one of the better and more objective analyses of the one-child family policy is that by Hardee-Cleaveland and Bannister in Family Planning in China: Recent Trends (1988). In making this assessment we have taken into account both the work by Hull, Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Section Report 1991 No. 4 as well as the vigorous criticism of this work mounted by Aird, Foreign Assistance to Coercive Family Planning in China: A Response to *Recent Population Policy in China*, Australian International Development Assistance Bureau, Sector Report 1991 No. 4.

The references which follow are taken from Hardee-Cleaveland and Bannister. The references in italics cross refer to the shorter article by the same authors Fertility Policy and Implementation in China, 1986-1988 (1988) 14 Population and Development Review 246:

1. In urban and many rural areas, women who have not been sterilized and who are still considered fecund are monitored quarterly or even monthly by various means, including the "granny police", to see that they are not pregnant and their IUD is in place or they are using some other effective birth control method. In such localities, any unauthorized pregnancies are detected early, and the authorities immediately begin applying severe economic, political, and personal pressure on the couple: 22.

2. Official policy (as distinct from practice) is that

couples with two children must have one partner sterilized, and those with unauthorized pregnancies must undergo abortion: 28.

3. Each province has an announced system of rewards and penalties for those complying with or disregarding family planning regulations: *255*.

4. High-ranking Chinese officials have conceded that abuses have occurred in the family planning programme: 31; *256*.

5. While no individual cases of forced abortions or sterilizations have been found in the Chinese press during the period 1986-1988, there is evidence that the family planning programme is continuing to pressure couples with unauthorized pregnancies to have abortions and those with two children to undergo sterilizations, in order to meet family planning targets set by the state and the provinces: 52; *256*.

6. In addition to mass mobilization drives, the family planning programme carries out propaganda and education work to convince couples of the need for family planning and to argue that small families enjoy a higher quality of life. The line between education and compulsion is, however, easily crossed when Chinese officials and family planning workers make repeated (and often unwelcome) visits to women and their families in order to elicit compliance with family planning regulations: 60; *259*.

7. Chinese authorities claim that whenever family planning abuses have been discovered, the "Chinese government did not cover up but openly exposed and condemned these misdeeds. People involved were criticized and even

subjected to disciplinary or legal punishment." But Hardee-Cleaveland and Banister state:

> "So far, we have been unable to discover any instance of a Chinese official or family planning worker having been punished or even reprimanded for carrying out mandatory family planning. On the contrary, there are frequent reports of family planning cadres being criticized or punished for not meeting family planning quotas, or for 'sabotaging' family planning."

67; *263*.

8. China's stated national policy has always been that the country's family planning programme is voluntary, not compulsory, that people are persuaded but not forced to practice birth control, and that China combines the voluntarism of the masses with state guidance or direction in family planning. Any instances of coercion that come to light are attributed to local cadres exceeding their instructions. Public statements like these have not varied, even during 1979-82 when required abortions in the second and third trimester were mandated by several provinces. Even in 1983, the peak year of compulsion in which China carried out a nationwide campaign of mandatory sterilization, abortion, and IUD insertion characterized by a degree of heavyhandedness (sic) in family planning unprecedented in the world, official statements that China's programme is voluntary continued to be issued: *270-271*.

As another commentator has put it, while higher state officials continue to criticize coercion and claim that choice should be voluntary, nonetheless they have maintained the quantitative limits under the one-child family policy

that motivate provincial policies and regulations and in turn, the excesses referred to; nor did the state officials abolish these provincial regulations. These facts suggest that compulsory abortion persists under national policy if not under national law: Savage, The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries (1988) 40 Stanford Law Review 1027, 1091. However, as will be shown, no universal agreement is to be found on the issue of coercion. See particularly the opposing arguments presented by Hull, Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Sector Report 1991 No. 4 on the one hand and Aird, Foreign Assistance to Coercive Family Planning in China: A Response to *Recent Population Policy in China*, Australian International Development Assistance Bureau, Sector Report 1991 No. 4 on the other.

The information on coercion is varied and contradictory, and often coloured by the observer's view of the policy. There is much force in the observation made by Clarke in The Chinese Population Policy: A Necessary Evil? (1987) 20 New York University Journal of International Law and Politics 321, 345 that:

> "In assessing the coerciveness of the Chinese population policy, one must take into account the fundamental difference in the role the individual plays within Chinese society. This difference does not justify violations of human rights, but it does explain how the policy came into existence and must be taken into account in evaluating what Westerners may perceive as the harshness of the policy or its implementation. 'The Chinese programme relies on an incessant drumbeat of persuasion and peer pressure, which is undergirded by individuals' sense of responsibility to society and family, which supersedes any perception they may have of

their own personal rights'."

Clarke concurs (op. cit. 347) that the coercing of abortions is not part of the official policy, but notes that incidents of coerced abortions, however, have been reported. This is a result of the top-down political structure of Chinese politics. Lower level officials have sometimes resorted to extreme measures in order to meet population quotas set by their superiors. Clarke concludes op. cit. 348:

> "The Government has made attempts to stop coercion since the implementation of the one-child policy, but with varying degrees of commitment and success. In 1985 the Communist Party Central Committee issued a directive on family planning, one purpose of which was to end incidents involving coerced abortion. The government recently stated that 'China firmly opposes coercion and command in family planning'.
>
> In November 1986 a US Congressional delegation went to China to study the one-child policy and to investigate charges of coercion:
>
> > 'As for coercion, the delegation not only found that it is condemned by officials but also that the government had severely penalized local officials who violated official policy .... Chinese officials readily admitted that some overzealous local officers went off the deep end and practised coercion when the one-child policy was first implemented, in 1980. But they say, and Western observers agree, that such instances are increasingly infrequent and that the uproar in the Western media focused government attention on the problem.'"

The Authority believes there is validity to Clarke's observation (op. cit. 353) that it is often difficult for Westerners to comprehend the pressures of over-population,

since Western nations are faced with ageing societies and decreasing birth rates. The fact that abuses have occurred under the one-child policy does not justify the conclusion that there should be no effort to control population. The problem, as always, is the balancing of the legitimate demands of the state against the human rights dimension. This is no easy task given the problems of interpretation presented by China's family planning policy and its implementation. We cite by way of example the following extract from Hull, Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Sector Report 1991 No. 4 at 5:

> "It is virtually impossible to tease out areas of consensus among Western experts over exactly what is happening in the Chinese Family Planning programme, and what it signifies. This is at least in part due to the very deep contradictory feelings they have concerning the nature of the Chinese Communist system, and their opposing opinions about the proper stance of Western governments toward a regime which operates under obviously illiberal principles.
>
> The problems of interpretation of the family planning policy changes have been exacerbated since the June 1989 violent attack on demonstrators in Tiananmen Square. In the traumatic aftermath most Western scholars have been less sympathetic to the Chinese claims that the 'population problem' justifies strong dramatic action, and that the government's approach enjoys broad community support. It should be stressed that the changing attitudes of Western scholars are not based on a significant re-evaluation of the demographic problems facing China. If anything, it is becoming clear that China's fertility decline has stalled and that population growth is a major (though not the only) factor in growing pollution, resource depletion and environmental degradation. Most negative Western reaction then, focuses on issues of human rights and physical repression, rather than scepticism over the salience of population pressure in development problems."

It is equally important to understand the one-child family policy in the context of Chinese culture itself. Culture has been shown to have been the most important facilitating factor for the effective implementation of the family planning policy in China. It is also important to recognize that the cultural patterning of Chinese children in the 1950s and 1960s, who became the parents of the 1970s and 1980s, was really little different from that which had existed through four millennia: Zou, Qingfeng, From Family Planning Policy Formulation to Grass Roots Implementation: A Chinese Case Study (1990, unpublished thesis submitted in partial fulfilment for the requirements for the degree of Master of Social Science in Demography at the University of Waikato, Hamilton, New Zealand) at 45:

> "The basic philosophy driving the Chinese peasant of the modern period was simply traditional ideas done up in a new 'socialist' package. Informal acculturation, it is argued here, passed down to Mao's subjects ideas, and in general would not have been foreign to Confucius (ca.551-ca.479 BC)."

Addressing the system whereby family planning policy is set by central government but promoted by a downward devolution of responsibility, Zou, Qingfeng states at p.56:

> "Ideas relating to strategies for the limitation of family size are heavily, if not totally, based on antecedents in Chinese history. In other words, the making of family planning policy and strategies was facilitated by cultural values and norms.
>
> These cultural values can be seen as follows: (1) policy statements draw heavily on Chinese

> traditions, and on Chinese thought and institutions, all of which are derived from Confucianism, the ethics of Chinese society (Chan, 1963). Thus the policy prescriptions are in no way in conflict with the world-view or the daily life of the bulk of the highly homogenous Han Chinese population. Moreover, they cover aspect of Chinese life from structural organization through to social behaviour as was indicated in Chapter Five. This factor ensured that pronouncements of central government are immediately meaningful in a cultural sense, even for the most remote Han Chinese peasants. (2) Reinforcing this is another Chinese tradition, to accept the authority of the leader, the so-called 'Mandate of Heaven' of the Human God of the Chinese people. Because of this, pronouncements of the central authority are readily accepted by the entire population, even when the people may not agree with the basic premises underlying them. Together these two points support one of the major arguments being put forward in this thesis: the role of culture as a facilitating or mediating variable."

The conclusion reached by Zou, Qingfeng at 109-110 is that the family planning programme in China has been structured on a strong and solid cultural base. The participation of every agency, administrative, political, communal work place, or whatever, gave this real force, both intensively and extensively. Family planning is given a high priority as a social obligation of all citizens:

> "Thus, the government has charged all its agencies and all mass organizations with the 'responsibility' for family planning work, not just the Ministries of the SFPC [the State Family Planning commission (China)] and the MOPH [Ministry of Public Health]. Beyond this, in effect the government has charged the entire society through the institutions in which people work and live, with the same responsibility.
>
> The notion of 'responsibility' for family planning should be seen in its broader Chinese context. In

> China, the ideal of personal or group responsibility is a fundamental structure for motivating changes of greater effort across a wide range of development sectors.
>
> Moreover, family planning has been seen as a key development strategy. Drawing on Chinese cultural traditions, this has been phrased as a 'merit' which exceeds all other merits. ...
>
> The key 'leading role' as it is termed for family planning, has been played by the Party Organization. It is the modern inheritor of the 'divine force' attributed historically to cultural authority, typically the Emperor, an analogy made by Mao Zedong himself (1961). The critical instrumental roles were played by the SFPC and the MOPH. Following the structuring of the programme in this way, the whole society was 'dutybound' to join in the family planning programme. The programme was thus more than a mere means of diffusing fertility regulation; it became a moral imperative for the Chinese people, and was equal to the most important societal goals."

Thus, when confronted with two different sets of norms, namely familial and pro-natalist values and acceptance of authority and devotion to communal goals, the People's Republic of China has exploited a cultural predilection to an acceptance of authority. By this means the familial and pro-natalist values have had to cede to the communal goal of lowering population growth. The method chosen to achieve this end has been grounded in Chinese culture, so as to ensure that it is not in conflict with the norms of the society.

These factors must not be overlooked when assessing claims of "forceful intervention" in family life in China. See, for example, Wolf, The Preeminent Role of Government Intervention in China's Family Revolution (1986) 12 Population and Development Review 101, 115. Conceding that he did not see

in the course of his research in China any evidence whatsoever of the use of physical force, Wolf continues:

> "I use the adjective 'forceful' only to emphasize that the Chinese birth control programme is more than simply a propaganda campaign waged through the medium of slogans and posters depicting happy couples with one child. The heart of the programme consists of unremitting social pressure that isolates the individual from the community and thus leaves him with no choice but to comply."

It does not appear from Wolf's article that he has taken into account that the one-child family policy is heavily, if not totally, based on antecedents in Chinese history. However, the Authority accepts that those antecedents may not always be of the "positive" kind, as, for example, the long tradition of female infanticide in China and the traditional preference of Chinese couples for sons, the implications of which are discussed by Hull in Recent Trends in Sex Ratios at Birth in China (1990) Volume 16 Population and Development Review 63.

But before drawing conclusions on the one-child family policy it is necessary first to refer to a specific aspect of the appellant's case, namely his belief that he and his wife have been treated more severely under the policy by virtue of the fact that he is an overseas Chinese. According to Greenhalgh in Shifts in China's Population Policy, 1984-86: Views from the Central, Provincial and Local Levels (1986) 12 Population and Development Review 491, 496 provincial regulations on second children specifically accept as a reason for allowing a second child:

> "8. Both spouses are returned Overseas Chinese.

8a At least one spouse is Overseas Chinese or returned Overseas Chinese."

In the period 1984 to 1986 these regulations applied in the provinces of Anhui, Shaanxi and Qinghai.

Confirmation of these policies is to be found in Davin, "The Single-Child Family Policy in the Countryside" in Croll et al., (eds), China's One-Child Family Policy (1985) 37, 50-51.

While the appellant would no doubt point to the fact that the his province of Guangdong is not numbered amongst those applying the two regulations in question, it must nonetheless be said that the fact that at least three provinces discriminate positively in favour of Overseas Chinese goes a considerable distance to dispel the appellant's claim that Overseas Chinese as a class are discriminated against as a matter of policy. This proposition is, on the evidence before us, unsupportable. Greenhalgh herself in addressing these two grounds for allowing a second child, explains them as evidencing the fact that the Chinese Government has "for years been courting" overseas Chinese. To similar effect see Hull, Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Sector Report 1991 No. 4 at 31 where, addressing the post-1984 period, it is observed:

> "In Guangdong the provincial and local family planning officials instituted a de facto two-child policy, ostensibly in recognition of the economic needs of farming families, but also because of pressure from the outspoken returned overseas Chinese community who form an important minority section of the population."

CONCLUSIONS

1. State practice in controlling the size and composition of their population in many instances extends to policies intended to limit population growth.

2. China's population control policy is one of the most stringent of its kind and the policy is enforced by intrusion into matters of family, privacy and individual choice.

3. Coerced abortions and sterilizations are not part of the official policy.

4. However, compulsion to submit to abortion or sterilization does continue.

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

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

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

8. Overseas Chinese are not discriminated against in the

implementation of birth control policy. If anything, in the appellant's province of Guangdong overseas Chinese are treated with greater leniency.

THE ONE-CHILD FAMILY POLICY: THE HUMAN RIGHTS IMPLICATIONS

Addressing the question whether there is a right to reproduce Douglas, in Law, Fertility and Reproduction (1991) 22 draws attention to the fact that the Universal Declaration of Human Rights in Article 16 provides that:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."

Article 23(2) of the International Covenant on Civil and Political Rights provides:

> "The right of men and women of marriageable age to marry and to found a family shall be recognized."

A more narrow provision is found in Article 12 of the European Convention on Human Rights:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

After referring to the fact that similar proclamations are to be found in other relevant international documents, [as to which see Sieghart, The International Law of Human Rights (1983, Reprinted 1990) 199-205]. Douglas concludes:

> "Taken together they constitute a recognition of the freedom to procreate **but as yet the extent of this right has not been determined**." [emphasis added]

The Authority believes that this opinion is an accurate one. The Authority further accepts that the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly in 1979 also gives some limited recognition to the right to procreate. Article 11 paragraph 1(f) requires states to take measures to eliminate discrimination against women to ensure them the same rights and employment as men, and covering *inter alia*, the "right to protection of health and to safety in working conditions", "including the safeguarding of the function of reproduction".

Addressing the related issue of the right to control one's fertility, Douglas opines at op. cit. 24:

> "There has been little explicit recognition of a right to control one's fertility."

Although allowing that such right might be extrapolated from the right to privacy, Douglas points out that the European Commission on Human Rights has ruled that pregnancy is not solely of the mother's private concern, because of the interests of the developing foetus, so that states are entitled to regulate abortion. Similarly, in relation to Article 12 of the Universal Declaration of Human Rights which provides that no-one shall "be subjected to arbitrary interference with his privacy, family ...", in Douglas' view it would seem that provided the state has a reasoned policy concerning contraception and abortion, it could not be

accused of *arbitrary* interference.

In her discussion of the topic at op. cit. 24 Douglas points to the fact that express recognition of the right to procreate or control fertility appears in the Proclamation of Teheran which was proclaimed by the International Conference on Human Rights in 1968, convened to review the progress made since the Universal Declaration had been adopted. Article 16 of the Proclamation states that parents "have a basic human right to determine freely and responsibly the number and the spacing of their children". A similar principle is to be found in the Declaration of Mexico on the Equality of Women and Their Contribution to Development and Peace, issued by the World Conference of the International Women's Year in 1975. These principles appear to be codified in Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women in which state parties undertake to ensure:

> "The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."

The conclusion reached by Douglas at op. cit. 25 is:

> "Such statements offer a clear pronouncement of a freedom to control fertility *and* to procreate according to individual wish.
>
> Accordingly there does seem to be international recognition of human rights to procreate, and to control fertility. This may be largely aspirational, as we saw in Chapter 1, since many states seek to regulate and control the fertility of their citizens, sometimes prohibiting contraceptive measures and sometimes requiring them to be used. But at least lip-service is now paid to its existence."

Irrespective of the issue whether there is international recognition of a human right to procreate, and to control fertility, the fact of the matter is that family planning is nevertheless practised on an extremely wide scale. By 1981 almost the entire developed world and the vast majority of developing countries, containing more than ninety percent of the developing world's population, were supporting family planning, either by means of a government programme or by assisting non-governmental family planning activities: Isaacs, Reproductive Rights 1983: An International Survey (1982-83) 14 Colombia Human Rights Law Review 311, 322.

In the context of a refugee application it is difficult to know how far to pursue the question whether there is in fact an internationally-recognized human right to procreate and control fertility, as the evidence is far from conclusive and in the Chinese context, the prohibition is not on procreation per se. **At least** one child is permitted. The question is whether limitations on family size beyond one child is an infringement of an internationally-recognized human right. Family planning is an emotional issue and any discussion of "the law" will be determined by the cultural and social conditions of the specific country or region in question. As mentioned, many Asian and a few Latin American countries, perceiving that rapid population growth threatens their prospects for development, have enacted stringent laws to reduce the birth rate. By contrast, the governments of most African, Middle Eastern, and Latin American countries, concerned with neither reproductive rights nor population growth, have prohibited abortion and have limited access to voluntary sterilizations and (particularly in sub-Saharan Africa and the Middle East) have failed to make contraception

widely available. Equally, in Europe a number of countries are concerned with negative population growth and ageing societies and have begun to induce people to have more children.

For these reasons we believe that any discussion of the jurisprudence under the European Convention on Human Rights must proceed with some caution. The conclusions to be drawn from it may be of limited validity, reflecting as they might value judgments made from a Western European perspective.

As earlier mentioned, Article 12 of the European Convention provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. A comment on this article is to be found in van Dijk & van Hoof, Theory and Practice of the European Convention on Human Rights (2nd ed 1990) at 440-447. For present purposes, the principal points made are as follows:

1. The qualification "according to the national laws governing the exercise of this right" indicates that Article 12 does not guarantee an absolute right. On the contrary, national legislatures have been allowed "considerable scope" for subjecting the exercise of the right to certain conditions. Far-reaching limitations as to the exercise of the right may therefore result. (op. cit. 440-441).

2. With respect to the right to found a family, Article 12 does not guarantee a socio-economic right to, for instance, sufficient living accommodation and sufficient means of subsistence to keep a family. It merely implies a prohibition for the authorities to interfere

with the founding of a family, for instance by prescribing the compulsory use of contraceptives, ordering a non-voluntary sterilization or abortion, or tolerating the performance thereof. The qualification that "the national laws governing the exercise of this right" means that a state may regulate the enjoyment of the right, but may not exclude it altogether or affect it in its essence. (op. cit. 446).

3. The question whether the right to found a family also implies the right to increase the family, or on the contrary has been realized with the birth or adoption of the first child, has so far been expressly left open by the Commission of Human Rights. But in the opinion of the authors the question has to be answered in the former sense in that after the birth of their first child some parents will take the view that they have thus founded the family they wanted, but for others this is the case only after two or more children. Since the Convention does not provide any indication in this respect and could not very well do so,

> "... it must be assumed that in national law, too, no limit may be set, since such a limitation would affect the right in its essence for some people, even apart from the possible conflict of Article 9 [freedom to manifest one's belief subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety etc. or for the protection of rights and freedoms of others]. **In our view, family planning can therefore at most be stimulated on a voluntary basis**." [emphasis added]

op. cit. 447-448.

Similar views are expressed in Hernández, To Bear of Not to Bear: Reproductive Freedom as an International Human Right (1991) 17 Brooklyn Journal of International Law 309, 348:

> "This author's thesis denounces all coercive abortion legislation as a violation of the human right to reproductive freedom. Any state practice that forecloses the *individual's* exercise of his or her right to reproductive choice in pursuit of a *state* objective to control population - either increase *or* decrease growth - constitutes an impermissible interference with an internationally protected right. Of course, denial of the individual's reproductive freedom by state practice that cedes to religious ideology is similarly violative of an individual's human rights."

However, the debate is far from one-sided. See particularly Demeny, "Human Rights in a Changing Political and Socio-Economic Environment" in Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, Geneva, 3-6 April 1989 (1990) 75. He points out that the superiority of the "Western European" view, let alone its sole legitimacy, cannot be taken for granted, *a priori*. These societies presently regard the right of couples to determine the number of their children as sovereign and inalienable, rather than subject to social control. But as he cogently points out at op. cit. 81:

> "... granting that right is based on the confident if unacknowledged assumption that the average couple will exercise their right in moderation. Should that assumption turn out to be invalid by a significant margin, the implicit social contract underlying the granting of such an inalienable right would be subject to re-negotiation."

Demeny suggests at op. cit. 81 that:

> "The relevant human rights issues in such a situation therefore should properly centre not on the apparent severity of particular rules that have been adopted concerning reproductive rights but on the nature and legitimacy of the process that generated those rules and on the political arrangements and institutions that carry out and supervise their execution. Measured by such criteria, a successfully enforced one-child policy, for example, may be found consistent with accepted international human rights standards, while a four-children policy may be found in clear violation of it. The point is not that the likelihood of such paradoxical findings is high but, rather, that population policies and their human rights records should be assessed in the broader context of civil and political rights."

And unless it be thought that enforced population policy is only to be found in China, reference should be made to the fact that in 1976 the national population policy of India permitted state legislatures to enact laws for compulsory sterilization. During the following national emergency period, several million forced sterilizations were performed: Andorka, "The Use of Direct Incentives and Disincentives and of Indirect Social Economic Measures in Fertility Policy and Human Rights" in Population and Human Rights: Proceedings of the Expert Group Meeting on Population and Human Rights, Geneva, 3-6 April 1989 (1990) 132, 136.

If the debate as to coercive population control cannot be resolved at the general level (i.e. whether there is an internationally-recognized human right for the individual to procreate without limitation and to control fertility) it may suggest that the terms of reference of the enquiry are too broad and unmanageable. It may be more constructive to focus

the issue more narrowly upon the invasion of the individual's physical integrity. It is to this that we now turn.

A strong argument can be mounted that **compulsory abortion** and **compulsory sterilization** are in breach of Article 5 of the Universal Declaration of Human Rights:

> "No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

See van Dijk & van Hoof, Theory and Practice of European Convention on Human Rights (2nd ed 1990) 241 and Aleinikoff, The Meaning of "Persecution" in United States Asylum Law (1991) Volume 3 International Journal of Refugee Law 5, 22-23.

However, an unqualified statement cannot be made that enforced **sterilization** *per se* constitutes inhuman treatment or an unjustifiable infringement of a human right for there are competing considerations, including public interest factors.

In Douglas, Law of Fertility and Reproduction (1991) 23 the author opines that it is doubtful whether a breach of the European Human Rights Convention would occur where, for example, a mentally handicapped woman complains about sterilization as such procedure would be justified as being for the protection of her own health under Article 8. So too, where the woman is too impaired to be able to contract a valid marriage, or to care for a child, it is doubtful whether preventing her from bearing a child could be said to infringe her right to found a family, which would seem to imply rearing as well as bearing children.

Recent Commonwealth jurisprudence tends to support this view. In the opinion of Beaudoin & Ratushny in The Canadian Charter of Rights and Freedoms (2nd ed 1989) at 360, whether we are concerned with sterilization of competent or incompetent normal persons, or of persons suffering from mental illness, it seems evident that sterilization constitutes an infringement of the right to physical integrity. But under the Canadian Charter, case law indicates that sterilization can be expressly authorized by legislation or by a superior court exercising its *parens patriae* jurisdiction. Reference should also be made to the recent decision of the House of Lords in In Re F. (Mental Patient: Sterilization) [1990] 2 AC 1 which ruled affirmatively that a mentally handicapped woman unable to consent to a sterilization operation could nevertheless be sterilized if it was in her best interests. Those interests being determined not by the woman herself, but by a medical practitioner. For a discussion of that issue as well as the question of persons under the age of majority see further Douglas, Law of Fertility and Reproduction (1991) 49-71. Recent Australasian jurisprudence includes Re X [1991] 2 NZLR 365 (Hillyer J.) and Secretary, Department of Health and Community Services v JWB (1992) 106 ALR 385 (High Court of Australia).

Involuntary sterilization **is** permitted when sanctioned by society. In Western societies that authority is vested by the relevant rule or regulation not in the individual concerned, but in either a judge or a medical practitioner. Other societies might vest that authority in some other person or body. Either way the individual affected does not make the decision. This could be said to be as much a "denial" of the rights of the individual as a denial by, say, a local cadre in China seeking to achieve what he or she

perceives to be the officially sanctioned (if unarticulated) consequence of national policy.

CONCLUSIONS

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

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

3. Recognition of the right is largely aspirational.

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

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

The issue of persecution will now be addressed.

THE ONE-CHILD FAMILY POLICY AND THE REFUGEE CONVENTION

The Refugee Convention does not offer protection to **all** individuals facing persecution, but rather, only those individuals who face a real chance of persecution "**for reasons of** race, religion, nationality, membership of a particular social group or political opinion".

The issue is whether there is the required link between the persecution feared by the appellant and the Convention.

As mentioned earlier in this decision, we face the difficulty that the appellant did not clearly articulate the grounds of his opposition to the family planning policy, nor did he advance religious or political grounds in support of his case. That being so, there falls for consideration the question whether he is a member of a particular social group. We will examine that issue at the conclusion of this chapter.

The necessity of establishing a link between the Convention and the feared consequences of non-compliance with the Chinese one-child family policy has been considered in both the United States of America and Canada. Refugee status has been denied by the United States Board of Immigration Appeals, but granted by the Canadian Immigration and Refugee Board [Refugee Division], albeit on cumulative grounds. We propose to refer to both decisions.

The decision earliest in time is that of the Board of Immigration Appeals in Matter of Chang Int. Dec. 3107 (BIA 12 May 1989); Interpreter Releases, 10 July 1989. A short abstract of the case is also to be found at IJRL/0039 (1990) Volume 2 International Journal of Refugee Law 288. Mr Chang's case was that he and his wife had been forced to leave their commune because they had two children and did not agree to stop bearing more children. He had been ordered to undergo a sterilization operation but he himself did not want to be sterilized. He feared that if he returned to China he would be forced to submit to the operation. His wife had avoided sterilization only because she suffered from an illness.

The Board found that the Chinese policy was not persecutive on its face as there was no evidence that its implementation through economic incentives and sanctions, peer pressure, education and birth control was a "subterfuge for persecuting any portion of the Chinese citizenry" on one of the Convention grounds. The Board pointed out that the policy did not prevent couples from having children but strived to limit the size of the family. Exceptions in certain cases were allowed. In the Board's opinion, even implementation through involuntary sterilization would not constitute persecution, unless applied in a persecutory manner:

> "The population problem arising in China poses a profound dilemma. We cannot find that implementation of the 'one couple one child' policy in and of itself, even to the extent that involuntary sterilizations may occur, is persecution or creates a well-founded fear of persecution 'on account of race, religion, nationality, membership in a particular social group, or political opinion'. This is not to say that such a policy could not be implemented in such a way as to individuals or categories of persons so as to be persecution on account of a ground protected by the Act. To the extent, however, that such a policy is solely tied to controlling population, rather than as a guise for acting against people for reasons protected by the Act, we cannot find that persons who do not wish to have the policy applied to them are victims of persecution or have a well-founded fear of persecution within the present scope of the Act." Matter of Chang p.10

By this we understand the Board to be saying that victims of coerced sterilization suffer only as a result of the government's efforts to contain population growth and not as a punishment for opposition to the population policy itself.

However, as observed by Anker in The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law (2nd ed 1991) at 118-119 the Board did note that the application of the family planning policy could in fact be persecutive or could give rise to a well-founded fear of persecution for a Convention reason, if:

1. It were applied selectively or especially severely to persons on the basis of any of the five statutory grounds enumerated in the Immigration and Nationality Act:

> "For example, this might include evidence that the policy was being selectively applied against members of particular religious groups or was in fact being used to punish individuals for their political opinions. This does not mean that all who show that they opposed the policy, but were subjected to it anyway, have demonstrated that they are being 'punished' for their opinions. Rather, there must be evidence that the governmental action arises for a reason other than general population control (e.g., evidence of disparate, more severe treatment for those who publicly oppose the policy)." Matter of Chang p.11.

2. No governmental redress were available:

> "Finally, if the applicant claims that the punishment occurred at the hands of local officials, he must normally show that redress from higher officials was unavailable or that he has a well-founded fear that it would be unavailable." Matter of Chang p.11.

For present purposes there is no material difference between the provisions of the Immigration and Nationality Act and the Refugee Convention.

Importantly, the Board accepted the Chinese Government's assertions that it uses economic incentives and birth control education, but forbids coercive techniques. It further accepted that the Chinese policy was non-discriminatory.

The Board further held that parents who oppose the one-child family policy do not constitute a social group. The Board reasoned that:

> "If a law or policy is not inherently persecutive (as would be, for example, a law enacted to punish individuals because of their religious beliefs), one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it. This is true even where questions of conscience or religion may be involved. In the United States, there are numerous cases upholding the imposition of religiously neutral laws against persons whose religious beliefs conflict with them. [citations omitted]." Matter of Chang p.12-13.

At least two commentators agree that coercive population control policies do not give rise to a valid claim for refugee status, see: Negroni, Closing the Population Loophole: A Look at China and India (1989) 3 Georgetown Immigration Law Journal 501 and Tobin, Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers (1990) 30 Virginia Journal of International Law 1007.

We are in general agreement with the Board but believe that

more emphasis should be given to the distinction between policy on the one hand, and implementation of that policy on the other. A particular policy may not be inherently persecutive, but may nevertheless be **applied** in a persecutory manner. See Hathaway, The Law of Refugee Status (1991) 93-97.

The decision in Matter of Chang has not escaped adverse comment on the **persecution** issue. See Aleinikoff, The Meaning of 'Persecution' in United States Asylum Law (1991) Volume 3 International Journal of Refugee Law 5, 22-23:

> "The Board was careful to note that application of the policy to someone who opposed it would not constitute persecution based on a prohibited ground. 'Rather, there must be evidence that the governmental action arises for a reason other than general population control'. The Board suggested evidence of disparate, more severe treatment for those publicly opposing the policy.
>
> To the extent the Chinese policy is, in practice, simply a set of incentives for limiting the size of families, it would be difficult to characterize its application to the general population as 'persecution'. Certainly, there is no established international human rights norm prohibiting population control measures, and the Board properly concluded that prevailing US constitutional standards should not be the measure of the persecutory nature of the policy.
>
> If the penalties imposed for violation were unacceptably severe, however, persecution could be found. The clearest case would be forced sterilization and abortion, invasive procedures that would constitute human rights abuses when performed without a woman's consent; and a general policy of imposing such measures ought to be deemed **persecution**. Indeed, here, the mass nature of the programme would add to its unacceptability rather than support a claim that the government's policy is 'neutral'. Deprivations of fundamental human rights are not to be excused, simply because the

government oppresses all equally."

[emphasis added]

While there is much force in these comments, (and they are gratefully adopted by the Authority), it is not sufficient for the appellant to establish only persecution. The further step required of him is to show that the persecution is **for reason of** one of the Convention grounds: Grahl-Madsen, The Status of Refugees in International Law Volume 1 (1966) 192, 193, 199. This is an issue which will turn on the facts of each particular case (and we will shortly address the facts of the appellant's case).

In the United States the debate is presently at an end for all practical purposes. After the Board's ruling in Matter of Chang, the Attorney-General promulgated a new regulation, binding on the Immigration and Naturalization Service, Immigration Judges and the Board of Immigration Appeals, ordering that past or threatened forced abortion or sterilization provides a basis for asylum or withholding of deportation as persecution due to political opinion. The rule implemented President Bush's directive of November 30, 1989, that "enhanced consideration" under the Immigration and Naturalization Act be afforded to persons who feared coerced abortion or sterilization if forced to return to their countries: Anker, The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law (2nd ed 1991) 118 footnote 622. For a summary of the policy see Standards for Persecution Claims by Aliens Fleeing Forced Abortion or Sterilization Policies in Their Home Countries (1990) 4 Georgetown Immigration Law Journal 334. It is to be noted that protection has been extended to **all** foreign nationals who are victims of coercive population policies, not only to

Chinese nationals. More recently INS General Counsel has issued a memorandum outlining the role of INS trial attorneys in cases where an alien applies for asylum based on coercive family planning policies in his or her country of nationality. The November 7, 1991 memo reflects the policy of the INS to look sympathetically on such claims: 69 Interpreter Releases 297, 311 (March 9, 1992).

We turn now to the decision of the Canadian Immigration and Refugee Board [Refugee Division] in Zhou v Canada (Minister of Employment and Immigration) (1989) 9 Imm LR 2d 216, a decision delivered on 20 September 1989. Curiously, no reference is made by the Board to the decision in Matter of Chang delivered on 12 May 1989.

Mr Zhou suffered problems throughout his life because his family were landowners, his father expressed dissent against the government during The Hundred Flowers movement, his family was classed as members of the Black Seven during the Cultural Revolution, and he and his wife had violated the family planning policy. In particular, when Mr Zhou's employer learnt of the second pregnancy, their home was searched illegally and his wife was required to have an abortion. The recitation of facts continues at 220:

> "Rather than have the abortion, she fled to stay with relatives. Mr Zhou was confined by the company and then in a police station for fifteen days, where he was tortured with electric prods three or four times during that period. Mr Zhou would not disclose the whereabouts of his wife who had given birth to the second son privately. Mr Zhou's pay was cut by 50 per cent and the second child's birth was not formally registered. Mr Zhou's wages were to be reduced until the child reached the age of seven. His wife also lost her job as a result of the birth of the second child. Mr Zhou was assigned the task of collecting

> garbage. When he complained to the company manager about his incarceration and torture, he was dismissed from his employment. The dismissal notice was read into the record of the hearing. The grounds for dismissal related to contravention of the second child policy.
>
> As stated above, both Mr Zhou and his wife were dismissed from their jobs. Mr Zhou was unable to obtain a certificate to commence a private business. Mr Zhou washed dishes in a restaurant owned by a friend but when the government learnt of this the restaurant was closed down.
>
> Mr Zhou and his wife were evicted from their apartment, which was managed by the government. Unable to work and with no place to live, Mr Zhou decided to leave China. He spoke at length about his hatred of the Chinese Government, first for the damage inflicted on his family as members of "the black element" and second for the treatment he and his wife received for having had a second child. He expressed the fear that, should he return to China, he will be accused of betraying the country by leaving illegally, and his wife will be in danger since he will be considered an antisocialist."

It can be seen that there are some parallels with the appellant's own case though he has not undergone imprisonment or torture. Furthermore, the appellant's early experiences, particularly during the Cultural Revolution were not as severe as those encountered by Mr Zhou who, during the Cultural Revolution, witnessed his father and mother being beaten on many occasions. The father was also forced to do what was described as various menial and disgusting labour jobs. Mr Zhou himself also suffered specific punishment and confinement as well as having to carry the burden of watching the humiliation and persecution of his parents.

The conclusions reached by the Immigration and Refugee Board appear to be as follows.

1. The Board specifically did not decide whether there was an inherent right to procreate as they were of the view that if there was such a right, it has been superseded or abrogated in China by law and policy. In their view that law or policy is clearly one of general application and it was not within the jurisdiction of the Immigration and Refugee Board to evaluate the merits of the policy. Mr Zhou was well aware of the situation prior to the birth of the second child.

2. The experiences suffered by Mr Zhou and his family during the Cultural Revolution were general in nature and were now somewhat remote in time. As the refugee definition looked to the future the Board concluded that Mr Zhou would not in the future suffer persecution of the nature experienced during the Cultural Revolution, nor would he suffer persecution by reason of being a member, or descendant of a member of "the Black Seven" should he return to China.
3. Violation of family planning policies and the resulting economic incentives and disincentives would not normally constitute persecution.

4. There were, however, particular facts meriting further examination:

    a) Mr Zhou had been detained without warrant for fifteen days and tortured.

    b) He was demoted and then fired. He was effectively barred from employment of any kind. Finally, he was evicted from his apartment. In short, he was unable to work, feed his family or provide shelter

for his family.

5. The Board referred to Mr Zhou's claim that the family planning policy was carried out in an arbitrary and extreme manner due to his family background. In effect, he claimed that there was persecution on the basis of a social group, that is membership in the "Black Seven". The Board accepted both that the "Black Seven" group was a social group and that persecution of that group can and does continue to the present time.

6. The decision of the Board was that the **cumulative effect** of the harassment suffered by Mr Zhou constituted persecution. They further accepted that there was a reasonable chance or serious possibility of persecution should Mr Zhou return to China. He was accordingly determined to be a Convention refugee.

In our view the decisions of Chang and Zhou are not to be seen in opposition to each other. Indeed, they appear to have proceeded very much upon common principles. The facts which led to Mr Zhou being granted refugee status were not present in the Chang case, namely detention and torture, dismissal from employment, eviction from accommodation and membership of the "Black Seven" group.

THE ONE-CHILD FAMILY POLICY: CONCLUSIONS ON PERSECUTION

1. China's birth control policy is applied to the general population.

2. That policy is not inherently or on its face persecutive.

3. However, forced or involuntary sterilization and abortion constitute human rights abuses and may amount to persecution.

4. Persons in fear of such persecution are only protected by the Refugee Convention if the persecution is "for reasons of race, religion, nationality, membership of a particular social group or political opinion".

5. In both Chang and Zhou it was held that the consequences of violating family planning policies *per se* did not constitute persecution for a Convention reason.

We turn now to the issue whether there is the required link between the persecution feared by the appellant and the Convention. We examine first the issue of the appellant's origins.

PERSECUTION AS AN OVERSEAS-BORN CHINESE

Earlier in this decision we have set out the appellant's case and in particular the difficulties he claims to have encountered as a result of his background as an overseas Chinese, a group which he contends is a particular social group under the Convention. These difficulties include:

1. The requirement that he pay fees while attending junior high school. Normally such fees are not charged until senior high school. It is implicit that as a result the appellant was unable to progress to senior high school because of his parents' diminished financial capacity.

2. During the Cultural Revolution members of the

appellant's family were classed as Black Seven and suffered a number of punishments as a result.

Tragic though the appellant's experiences may have been, we are forced to observe that those experiences are now rather remote in time. As observed in Zhou v. Canada (Minister of Employment and Immigration) (1989) 9 Imm LR 2d 216, 221 experiences during the Cultural Revolution were a fact of the times. But the objective basis for a well-founded fear is prospective and looks to the future. The Authority is of the opinion that there is no real chance that the appellant will undergo similar experiences again.

3. In the ten years that the appellant lived in Guangzhou between 1979 and 1989 he was refused permission on the two occasions he applied to travel out of the city. He believes that this was because the authorities were still suspicious of him as an overseas returned Chinese.

The appellant's case in this respect was not articulated further. No attempt was made to distinguish the appellant's situation from that of ordinary Chinese citizens, all of whom are required to carry a *hukou* or residence card. Without a *hukou* there is no legal opportunity to work, receive rations or social security, or reside in a given area. According to the Department of State Country Reports on Human Rights Practices for 1990 at 858, the government uses the identification card system to control and restrict residence patterns within the country. Citizens are registered as residents of a particular jurisdiction and assigned to a specific work unit. Change of residence or work place is very difficult and can, in most cases, be done only with

government permission and agreement by the work unit. The report acknowledges that the government has placed travel restrictions on several released detainees and religious figures but in our opinion it would be fanciful to suggest that the present appellant, a person of relative insignificance (measured in terms of civil or political status), would be treated alike to persons at a wholly different level of significance.

Our conclusion is that refusal on two occasions in ten years does not amount to a significant infringement of his human rights.

4. Next the appellant referred to the intrusive attention of the local authorities who would check on him and his family every month. Finally, he said it was unusual for a husband to be required to have a vasectomy when the wife had had an abortion. He thought that perhaps because he was an Overseas Chinese this may have been a factor.

In our opinion, however, the evidence earlier referred to would suggest that Overseas Chinese are treated in some provinces with greater leniency viz-a-viz the family planning policy than are ethnic Han Chinese. As has been mentioned earlier in this decision, the evidence collected by Greenhalgh in Shifts in China's Population Policy, 1984-86: Views from the Central, Provincial and Local Levels (1986) 12 Population and Development Review 491 shows that some provincial regulations discriminate positively in favour of returned overseas Chinese. As we observed, this goes some considerable distance to dispel the appellant's

claim that Overseas Chinese as a class are discriminated against as a matter of policy. Support for Greenhalgh is to be found in Davin, "The Single-Child Family Policy in the Countryside" in Croll et al., (eds), China's One-Child Family Policy (1985) 37, 50-51 and in Hull, Recent Population Policy in China (December 1991) Australian International Development Assistance Bureau, Sector Report 1991 No. 4 at 31.

Once more it must be observed that the appellant's evidence was rather sparse. The visits may have been linked to the monitoring of compliance with family planning regulations. But even if they were not, the visits by themselves would not establish persecution.

The Authority, having reviewed a considerable amount of material on the implementation of the family planning policy of the Chinese Government, cannot place any weight upon the appellant's contention as it does not square with facts presently available. The consequences visited upon the appellant were not due to his overseas origins, but rather due to his non-compliance with the family planning policy.

The conclusion we have reached is that while the appellant may well have suffered discrimination as a result of being overseas born, he has not suffered persecution as a result. Therefore, even if we were to assume that overseas-born Chinese are a social group, the appellant's case in this respect is in any event bound to fail. On the findings we have made, a real chance of persecution in the future is entirely absent.

We turn now to the issue whether the appellant's opposition

to the family planning policies of the People's Republic of China is sufficient to provide the required link between the feared persecution and the Convention.

PERSECUTION AS AN OPPONENT OF FAMILY PLANNING POLICIES

There has been no evidence to suggest that opponents of China's family planning policies are imputed with a political or religious belief; and for that reason the only remaining possible Convention ground available to the appellant to support his application is the ground of membership of a particular social group. This ground is not to be confused with the separate but related ground which we have already dismissed, namely the appellant's claim that as an overseas-born Chinese he has a well-founded fear of persecution.

The question we must address is whether the appellant's disagreement with or opposition to family planning policies is within the protection of the Refugee Convention via the "particular social group" limb of the definition clause contained in Article 1A(2). This is a complex issue and as we have not previously had occasion to examine the social group category in any detail, it will be necessary to explore the question at some length.

The Authority is of the view that any analysis of the "particular social group" category must begin with an appraisal of its origins. Only then can an assessment be made of the debate as to the proper meaning and scope of the social group category. This is an approach we have previously adopted in relation to the Convention: Refugee Appeal No. 1/92 Re SA (30 April 1992) at 67-68 where we made reference to the relevant articles of the 1969 Vienna

Convention on the Law of Treaties.

The notion of "membership of a particular social group" was absent from the terminology, and probably the practice relating to refugee protection, from the beginning of the century and made its first appearance in 1951: Prat, "The Notion of "Membership of a Particular Social Group": A European Perspective" in Coll & Bhabha (eds), Asylum Law and Practice in Europe and North America: A Comparative Analysis (1st ed 1992) 71. However, as one commentator has observed, the place given to the protection of "social groups" in the Refugee Convention, while unusual, is by no means unique: Plender, International Migration Law (Rev. 2nd ed 1988) 422. Article 2 of the 1948 Universal Declaration of Human Rights includes "national or social origin, property, birth or other status" as prohibited grounds of distinction and this form of words is repeated in Article 2 of the 1966 Covenants on Economic, Social and Cultural Rights and Civil and Political Rights; it also appears in Article 26 of the latter Covenant, which calls for equality before and equal protection of the law: Goodwin-Gill, The Refugee in International Law (1983) 30. The phrase is also repeated in a number of regional human rights instruments including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14) and the American Convention on Human Rights (Article 1(1)).

Why then did the notion of "membership of a particular social group" make its appearance in 1951? This question is addressed by Prat in "The Notion of "Membership of a Particular Social Group": A European Perspective" in Coll & Bhabha (eds), Asylum Law and Practice in Europe and North America: A Comparative Analysis (1st ed 1992) 71-74. We have been particularly assisted by M. Prat's analysis and for that

reason we intend to refer to it in some detail.

M. Prat first refers to the proceedings of the conference that led to the adoption of the Refugee Convention of 25 July 1951:

> "If one consults the various documents that were discussed with the Ad-Hoc Committee as well as the ECOSOC or during the 3rd session of the General Assembly, one realizes that "membership of a particular social group" does not enter into any of the suggested definitions.
>
> So when, how and why did this notion make its appearance?
>
> In his commentary on the Geneva Convention [Robinson, Convention Relating to the Status of Refugees: Its History, Contents and Interpretation (1953) 53], Robinson merely points out that "the criterion of social group was included by the conference following a Swedish amendment". One is thus naturally tempted to examine the *Travaux préparatoires* in the hope of discovering the circumstances in which the amendment intervened and the reasons for this addition to the draft."

M. Prat op cit 72 then refers to the minutes of the various meetings at which the "social group" category was raised.

The minutes of the meeting held on 3 July 1951 (A/Conf.2/SR.3) reproduced in Takkenberg & Tahbaz, The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees Volume 3 (1990) 213, 219 merely report the words of the Swedish delegate in the following terms:

> "Mr Petren (Sweden) wished to make two general observations on Article 1.
>
> In the first place, experience had shown that

> certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included."

The Minutes of a later meeting held on 13 July 1951 (A/Conf.2/SR.19) Takkenberg & Tahbaz op cit 371, 377 contain the following record of Mr Petren's contribution:

> "Turning to the Swedish amendment (A/Conf.2/9), he pointed out that the first part suggested the inclusion in sub-paragraph 2 of paragraph A of a reference to persons who might be persecuted owing to their membership of a particular social group. Such cases existed, and it would be as well to mention them explicitly."

As M. Prat observes in "The Notion of "Membership of a Particular Social Group": A European Perspective" op cit 72, no explanation was given by Mr Petren on the situations in question and on the experience he refers to. Furthermore, this matter was not the subject of any discussion.
The Swedish amendment (A/Conf.2/9) was adopted without debate on 16 July 1951 by fourteen votes to none, with eight abstentions: A/Conf.2/SR.23 Takkenberg & Tahbaz, The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees Volume 3 (1990) 414, 417. In relation to this process, M. Prat in "The Notion of "Membership of a Particular Social Group": A European Perspective" op cit 71, 73 observes:

> "The reason for this modification of the draft convention thus remains unexplained, and from a reading of the *Travaux préparatoires*, one scarcely obtains an understanding of the contents and boundaries of the notion of social group.

What is one to think of this?

In his work The Refugee in International Law, Guy Goodwin-Gill suggests an explanation of this Swedish amendment, which while justifying it, does not allow one to appreciate its scope. He notes:

> "The 1951 Convention is not alone in recognizing ***social*** factors as a potential irrelevant distinction giving rise to arbitrary or repressive treatment. Article 2 of the 1948 Universal Declaration of Human Rights includes "national or social origin, property, birth or other status as prohibited grounds of distinction ....".

Should one conclude that simply because the notion of membership of a particular social group appears in a fundamental text of humanitarian law, it should be reproduced, in the definition of the term ***refugee*** as one of the possible reasons for persecution?

This explanation, though logical, is unsatisfactory as regard the contents of the notion itself. The ambiguity and lack of clarity surrounding the origin of this notion have influenced subsequent analyses, all of which stress that it cannot stand alone but must complement another reason for persecution. Goodwin-Gill speaks of overlapping and notes that the fear of persecution is not founded on this criterion alone, but also on several others.

This is also the opinion of Atle Grahl-Madsen [The Status of Refugees in International Law Vol. 1 1966 219-20]:

> "The reason of ***membership of a particular social group*** was added by the Conference of Plenipotentiaries as an afterthought. Many cases falling under this term are also covered by the terms discussed above (i.e. nationality, race, religion), but the notion of ***social group*** is of broader application than the combined notions of racial, ethnic and religious groups, and in order to stop a possible gap, the conference felt that it would be as well to mention this reason for

persecution explicitly."

And to make it clearer, he adds:

> "Nobility, capitalists, landowners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority, even members of certain associations, clubs or societies, all constitute social groups of various kinds.""

M. Prat observes that this enumeration allows one to understand how it came to be understood that the notion of membership of a certain social group was relevant only when it was combined with one or several of the other reasons listed in the Refugee Convention.

In his view it is this explanation which is put forward in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979 and 1988 eds). Paragraph 77 provides that:

> "A ***particular social group*** normally comprises persons of similar background, habits or social status."

A request for refugee status based on fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality. Thus paragraph 78 provides:

> "Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies."

But the authors of the Handbook also stress the lack of force of this criterion alone:

> "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status." [para 79].

For the sake of completeness, we set out the full text of paragraphs 77 to 79 below.

> "77. A *particular social group* normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.
>
> 78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.
>
> 79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution."

These paragraphs from the Handbook will be referred to again shortly in the context of a discussion of recent jurisprudence and opinion which suggests that the "social group" category may not necessarily be restricted in quite the way apparently suggested by M. Prat's interpretation of the Handbook.

Before referring to this jurisprudence we need to mention the very important observations made by Goodwin-Gill in The Refugee in International Law (1983) 30-31. Writing ten years ago, he observed that jurisprudence on the interpretation of the term "social group" was sparse. That, however, is fortunately no longer the case. He then went on to suggest the following method of interpretation:

> "A superficial linguistic analysis suggests people in a certain relation or having a certain degree of similarity, or a coming together of those of like class or kindred interests. **A fully comprehensive definition is impracticable, if not impossible**, but the essential element in any description would be a factor of **shared interests, values or background - a combination of matters of choice with other matters over which members of the group have no control**. In determining whether a particular group of people constitutes a "social group" within the meaning of the Convention, attention should therefore be given to the presence of uniting factors such as ethnic, cultural, and linguistic origins; education; family background; economic activities; shared values, outlook, and aspirations. Also relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by state authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities of the state. The notion of social group thus possesses an element of open-endedness which states, in their discretion, could expand in favour of a variety of different classes susceptible to persecution. Whether they would be prepared to do so is another matter, but in arguing for expansion appropriate reference could be made to the unifying factors of the group in question and to the elements of distinction which make it the object of persecution."
>
> [emphasis added]

Goodwin-Gill's formulation of "a combination of matters of choice with other matters over which members of the group have no control" is adopted to a large degree in the decision of the United States Board of Immigration Appeals in its decision in Matter of Acosta (Interim Decision 2986, March 1, 1985). The following passage from their decision has been taken from Hathaway, The Law of Refugee Status (1991) 160:

> "We find the well-established doctrine of *ejusdem generis*, meaning literally, "of the same kind", to be most helpful in construing the phrase "membership in a particular social group". That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words .... The other grounds of persecution ... listed in association with "membership in a particular social group" are persecution on account of "race", "religion", "nationality", and "political opinion". Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed .... Thus, the other four grounds of persecution enumerated ... restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of *ejusdem generis*, we interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group

> either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution ....".

In relation to the above, Hathaway, in The Law of Refugee Status (1991) at 161 concludes:

> "This formulation includes within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights."

The next United States decision is that delivered by the Ninth Circuit Court of Appeals in Sanchez-Trujillo v Immigration and Naturalization Service 801 F.2d 1571 (9th Cir. 1986). The Court held that young, urban working class Salvadoran males of military age (18-30) who had not joined the armed forces and had not expressed overt support for the El Salvadoran government were not cognizable as a particular social group subject to persecution within the meaning of the Refugee Act. The Court at p.1574 articulated a four-part test for evaluating a social group claim:

> "In determining whether the petitioners have established eligibility for relief premised upon group membership, four questions must be answered.

> First, we must decide whether the class of people identified by the petitioners is cognizable as a "particular social group" ... Second, the petitioners must have established that they qualify as members of the group. Third, it must be determined whether the purported "social group" has in fact been targeted for persecution on account of the characteristics of the group members. Finally, we must consider whether such "special circumstances" are present to warrant us in regarding mere membership in that "social group" as constituting per se eligibility for asylum or prohibition of deportation."

The "special circumstances" requirement was derived from paragraph 79 of the UNHCR Handbook, being special circumstances where mere membership can be a sufficient ground to fear persecution notwithstanding the prima facie rule that "mere membership" in a particular social group will not normally be enough to substantiate a claim to refugee status.

At p.1576 the Court found the UNHCR Handbook's definition unhelpful, and while agreeing that the "social group" category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion or political opinion, the Court was nevertheless of the view that the term could not be without some outer limit:

> "The statutory words "particular" and "social" which modify "group" ... indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "*particular social* group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their

> identity as a member of that discrete social group."

As noted in Anker, The Law of Asylum in the United States: A Guide to Administrative Practice and Case Law (2nd ed 1991) 147 the Court's conclusion and emphasis on the necessity of a "voluntary associational relationship" for group cognizability has been criticized for adopting an overly restrictive view of the social group membership category. See by way of example Compton, Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar - *Sanchez-Trujillo v INS*, 801 F.2d 1571 (9th Cir. 1986) (1987) 62 Washington Law Review 913, 926-927 and Graves, From Definition to Exploration: Social Groups and Political Asylum Eligibility (1989) 26 San Diego Law Review 739, 769. By stressing voluntary association as the key, the Court failed to recognize the importance of the persecutor's perception in defining a social group. In other words, there was no recognition of the fact that characteristics that "invite" persecution have a major role in identifying the group. But the model posed by the 9th Circuit is based solely on the internal characteristics of the group, such as the "voluntary associational relationship". Thus the cognizability analysis is performed in a vacuum. The emphasis of the critics is that the Sanchez-Trujillo standard for cognizability - the existence of a voluntary associational relationship, an internally-defining factor, has no origin in the Refugee Convention. The point is made by Goodwin-Gill in The Refugee in International Law (1983) at 30 with considerable clarity:

> "Also relevant are the attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by state authorities. The importance, and therefore the identity, of a social group may well be in

> direct proportion to the notice taken of it by others, particularly the authorities of the state."

In the result, the decisions of the Board of Immigration Appeals and the decision of the 9th Circuit Court of Appeals have been set up as opposites, the Board of Immigration Appeals stressing immutable characteristics as defining groups, but the 9th Circuit viewing voluntary association as the key.

Neither decision has found favour with commentators. The criticisms of Sanchez-Trujillo have been referred to. Matter of Acosta, on the other hand, was criticized by Graves op cit 769-774 on the basis that the *ejusdem generis* method of interpretation limited "social group" to characteristics meeting one or the other of the remaining four criteria for Convention grounds. This ignored the fact that the term "social group" was, in Grave's opinion, "intended to compensate for the narrow category's inability to encompass the full range of persecution. She, in turn, cited as authority for this latter proposition not only the article by Compton, but also an article by Arthur Helton, Persecution on Account of Membership in a Social Group as a Basis for Refugee Status (1983) 15 Colum.Hum.Rts.L.Rev. 39. But as will be shown, this liberal approach has not to date carried the day.

In our opinion, there is much force in the point that the Sanchez-Trujillo formula is deficient for failing to recognize the importance of the persecutor's perception in defining a social group. Nevertheless, the four part test developed in Sanchez-Trujillo is a useful tool for analyzing a social group claim provided this important proviso is taken

into account. In our view the first and third steps of the test should be read together with the result that if one of the group's unifying "first step" characteristics invites persecution, this characteristic should be enough to give the group cognizability for the purposes of refugee status. In short, the government's perception is an external factor which goes toward identifying the group.

That having been said, however, it is our opinion that the jurisprudential basis of the social group category must be approached from a significantly different perspective than that adopted in Sanchez-Trujillo. We refer in particular to the analysis of this topic by Hathaway in The Law of Refugee Status (1991) at 157 to 161. Herein, we believe, is a more persuasive and satisfactory method of interpreting "particular social group".

In Chapter 5 of his text Hathaway explains the inter-relationship between the five recognized grounds of persecution and civil and political rights (op cit 136):

> "The modern refugee definition gave voice to this premise by moving away from protection on the basis of named, marginalized groups, and toward a more generic formulation of the membership principle. Given the prevailing primacy of the civil and political paradigm of human rights, it was contextually logical that marginalization should be defined by reference to norms of non-discrimination: a refugee was defined as a person at risk of serious harm *for reasons of* race, religion, nationality, membership of a particular social group, or political opinion. The rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state."

Thus:

a) If the harm feared by the applicant "cannot somehow be linked to her socio-political situation and resultant marginalization, the claim to refugee status must fail". (op cit 136-137).

b) Refugee law requires that there be a nexus between who the claimant is or what she believes and the risk of serious harm in her home state. (op cit 137).

Thus, in Canadian jurisprudence, the link between fear of persecution and civil or political status needs to be clearly established (op cit 139). There must be some causal connection between civil or political status and risk, though it is not required that the totality of the risk faced by the claimant be specific to persons of her civil or political status (op cit 140).

We agree with Hathaway's opinion that recognition of these doctrinal considerations will not result in ossification of the Convention:

> "The particular historical context which led to the linkage between refugeehood and civil or political status notwithstanding, the analysis which follows will show that it is largely possible for a liberal interpretation of the five enumerated grounds to sustain the Convention's vitality." (op cit 140)

It is against this background that Hathaway approaches the position "most forcefully put by Arthur Helton" that membership of a particular social group is to be viewed as an

essentially all-embracing "safety net", requiring only some recognizable similarity of background among group members (op cit 158). Of the liberal position, Hathaway concludes (op cit 159):

> "The notion of social group as an all-encompassing residual category is seductive from a humanitarian perspective, since it largely eliminates the need to consider the issue of a linkage between fear of persecution and civil or political status. Yet this is precisely the reason that Helton's analysis cannot stand ... The liberal attempt to give life to the notion of social group has therefore gone too far ....".

In Hathaway's opinion, there is a middle ground position which avoids reading "membership of a particular social group" as either redundant or all-inclusive. This middle ground position, he believes, was defined by the United States Board of Immigration Appeals in its decision in Matter of Acosta. It will be recalled that the decision in that case included within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past, temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.

Hathaway's central thesis is expressed in the following paragraph (op cit 161):

> "By basing the definition of "membership of a particular social group" on application of the *ejusdem generis* principle, we respect both the specific situation known to the drafters - concern for the plight of persons whose social origins put

> them at comparable risk to those in the other enumerated categories - and the more general commitment to grounding refugee claims in civil or political status. Beyond that, the linkage between this standard and fundamental norms of human rights correlates well with the human rights-based definition of "persecution". Most important, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection .... the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Rather, a "particular social group" must be definable by reference to a shared characteristic of its members which "is fundamental to their identity"."

We find Professor Hathaway's thesis convincing and we accordingly adopt his formulation of the principles according to which "membership of a particular social group" is to be interpreted.

As an aside we mention that paragraph 79 of the UNHCR Handbook must be read with caution as it may mistakenly be taken to mean that the social group category can only succeed on its own in "special circumstances".

These conclusions represent our most detailed consideration of "membership of a particular social group" to date, although we have, on previous occasions, had cause to consider the issue. Our first examination of the topic was in Refugee Appeal No. 11/91 Re S (5 September 1991) at 7-10 where, following a brief examination of the issue, we expressly left open what in the New Zealand context is to be accepted as a particular social group. The discussion, however, nevertheless very much favoured the analyses made by both Hathaway and Goodwin-Gill. Since then the jurisprudence

has been developed incrementally. In Refugee Appeal No. 18/91 Re SA (15 November 1991) 5 and Refugee Appeal No. 33/91 Re TS (December 1991) 4-5 we left open the question whether persons apparently in possession of money constituted a particular social group but later, in Refugee Appeal No. 24/91 Re HS (9 June 1992) 4 we held, in reliance on both the Hathaway and Goodwin-Gill opinions, that persons of substantial financial standing could not be regarded as a social group within the meaning of the Convention. We found that persecution aimed at a person simply because he has money is not persecution for a Convention reason. Such was the conclusion also reached in Refugee Appeal No. 69/92 and 70/92 Re VS and SK (23 July 1992); Refugee Appeal No. 76/91 Re SS (1 May 1992) at 5; Refugee Appeal No. 87/91 Re USP (9 June 1992); and Refugee Appeal No. 82/91 Re BS (30 March 1992) at 5 - a case where the arrests by police were for no other purpose than to extort money from the appellant's family.

In the decision of Refugee Appeal No. 25/92 Re AS (9 July 1992) we expressed grave doubts as to whether, on the particular facts, a supportable argument could be advanced that persons who had been members of the Bangladesh Awami League were a particular social group.

In Refugee Appeal No. 52/91 Re SJ (5 November 1991) at 11 we were able to dispose of the case without having to consider the question whether ex-servicemen constituted a particular social group. On the other hand, in Refugee Appeal No. 61/92 Re KR (22 July 1992) at 4 we rejected an argument that taxi drivers constituted a social group.

In Refugee Appeal No. 79/91 Re ZH (30 March 1992) the appellant was involved in a dispute over water rights. He claimed, that he was in fear of persecution as a member of a

social group, namely his family and also a member of the land-owning classes. On the facts, we rejected both submissions as the harassment to which the appellant had been subjected was not due to his membership of a particular family group, but rather because of a neighbouring family's wish to acquire the appellant's land because of quarrels over water rights. We saw no merit in the argument that the appellant was part of a land-owning social group.

We have, however, recognized that immediate family members do constitute a particular social group: Refugee Appeal No. 17/92 Re SSS (9 July 1992) at 7.

In this review of our own jurisprudence, we have deliberately left to one side the question of gender and in particular whether women may constitute a particular social group. That is not because the principles are necessarily different, but rather, because the "mix" of considerations will necessarily vary. It is sufficient to say that we have previously accepted that gender-based groups are examples of what Hathaway refers to as "social subsets" defined by an innate and immutable characteristic. Thus gender is properly within the ambit of the social group category. So, in Refugee Appeal No. 80/91 Re NS (20 February 1992) at 10 we followed the Canadian decision of Incirciyan (cited in Hathaway, The Law of Refugee Status at 162) which recognized a particular social group "composed of single women living in a Moslem country without the protection of a male relative". On the facts of the particular appeal we held that NS was a member of a particular social group consisting of Moslem women living separate from their husbands in a Moslem community with no accommodation and no male family or financial support available to them and with a reputation for having transgressed the mores of their community.

For a further examination of the gender issue useful reference may be made to Hathaway, The Law of Refugee Status (1991) 162; de Neef & de Ruiter, Sexual Violence Against Women Refugees: Report on the Nature and Consequences of Sexual Violence These Women Have Suffered Elsewhere (1984); Sexual Violence: "You Have Hardly Any Future Left" (1988) (VluchtelingenWerk); Neal, Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum (1988) 20 Columbia Human Rights Law Review 203; Indra, Ethnic Human Rights and Feminist Theory: Gender Implications for Refugee Studies and Practice (1989) Volume 2 Journal of Refugee Studies 221; Greatbatch, The Gender Difference: Feminist Critiques of Refugee Discourse (1989) Volume 1 International Journal of Refugee Law 518; Castel, Rape, Sexual Assault and the Meaning of Persecution (1992) Volume 4 International Journal of Refugee Law 39; and see also Fullerton, Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany (1990) 4 Georgetown Immigration Law Journal 381 at 437 where reference is made to the position of women who have been recognized or not recognized, as the case may be, as being members of a particular social group. Not to be overlooked is Conclusion No. 39 of the Executive Committee of the High Commissioner's Programme Refugee Women and International Protection which:

> "*Recognized* that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention."

Generally speaking, then, it can be said that the New Zealand jurisprudence to date has necessarily developed on a case by case or incremental basis and the present decision should be seen as part of that ongoing process. Without exception, we have followed and applied Matter of Acosta as well as the opinions of both Hathaway and Goodwin-Gill.

Given that this present decision is the first occasion on which we have engaged upon an extensive examination of the issue, it would be as well for us to refer to other international jurisprudence by way of cross-reference.

Turning first to our nearest neighbour, Australia, the most recent reported decision is that of Olney J. in Morato v Minister for Immigration, Local Government and Ethnic Affairs (1992) 106 ALR 367. The decision of the 9th Circuit Court of Appeals in Sanchez-Trujillo was followed, Olney J. holding that the concept of membership of a particular social group "involves the idea of a group of people who can demonstrate cohesiveness and homogeneity". He added that the combination of "particular" and "social" was sufficiently meaningful to indicate that what is meant is a group of people who can be readily identified by reason of some shared social characteristic. On the facts, he found that police informers did not constitute a social group.

While the decision may well have been correct on the facts, we believe that the decision suffers to a degree by its reliance upon Sanchez-Trujillo and its failure to explicitly recognize the importance of the persecutor's perception in defining a social group. It also fails to emphasize the need for there to be a link between the fear of persecution and the asylum seeker's civil or political status. For that reason we believe that the jurisprudential value of Morato is

limited.

In the United Kingdom, however, Matter of Acosta was followed by the Immigration Appeal Tribunal in Secretary of State for the Home Department v Otchere [1988] Imm AR 21, though the Tribunal does not appear to have had their attention drawn to the fact that paragraphs 77 to 79 of the UNHCR Handbook may not now reflect current thinking on the social group category. In R v Secretary of State for the Home Department, Ex parte Binbasi [1989] Imm AR 595 Kennedy J. referred to the Acosta test in assuming, without deciding, that homosexuals could form a social group.

As far as the European jurisprudence is concerned, there are two excellent analyses. Firstly, there is Prat, "The Notion of "Membership of a Particular Social Group": A European Perspective" in Coll & Bhabha (eds), Asylum Law and Practice in Europe and North America: A Comparative Analysis (1st ed 1992) 71. He concludes at 79:

> "While its origins are uncertain, its contents unclear and its relevance often disputed, the criterion of ***social group*** is nevertheless of undoubted usefulness."

Secondly, there is Fullerton, Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany (1990) 4 Georgetown Immigration Law Journal 381. After a thorough and very useful analysis of the jurisprudence of the Federal Republic of Germany, the surprising conclusion drawn by her is that the jurisprudential analyses in that country of what constitutes a particular social group within the meaning of the Refugee

Convention is cursory at best. The following quote is taken from p.443:

> "Although the judicial opinions surveying social group claims proffered relatively little analysis of the social group term, several courts suggested guideposts. One analysis looked for homogeneity among group members and some sort of internal group structure. Another examined whether members of the society from which the asylum seeker came viewed the group as a genuine group rather than just a collection of individuals. If so, the court enquired as to whether the group was viewed in strongly negative terms. While neither of these approaches may provide the definitive social group analysis, both can be helpful to refugee advocates ...."

The jurisprudence of the Federal Republic of Germany does not, therefore, entirely escape the criticisms of Sanchez-Trujillo. That is, while there is a welcome recognition that it is not sufficient to focus only on the internal characteristics of the group fearing persecution, and that it is necessary to also take into account how they are perceived by the community at large, there is no **explicit** recognition that also to be taken into account is the all-important factor as to how the group is perceived by their persecutors in particular.

The need to take into account the perceptions of the community at large, and of the persecutors in particular, is convincingly argued by Blum in "Refugee Status Based on Membership in a Particular Social Group: A North American Perspective" in Coll & Bhabha (eds), Asylum Law and Practice in Europe and North America: A Comparative Analysis (1st ed 1992) 81, 91, 99. She emphasizes the need to examine the perspective of the persecutor in defining social groups and

analyzing social group claims (as well as for the other bases for refugee status).

It is now possible to turn to examination of the facts of the appellant's particular case. In the present case we have chosen to address the following principal questions:

1. What is the particular social group in question?

2. Does that group have a distinct identity in the eyes of:

    a) The community at large; and/or
    b) The agents of persecution.

3. Do members of the group in question share a common immutable characteristic, i.e. a characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Expressed in a shorthand way, is the group definable by reference to a shared characteristic of its members which is fundamental to their identity?

4. Is there a link or causal connection between the fear of persecution and the civil or political status of the members of the group.

We will address each of these issues in turn.

We recognize that there is always a degree of artificiality in attempting to frame issues for consideration. But it is nevertheless necessary to attempt the exercise, if only for the purpose of clarity of thought. It is always necessary, however, to step back from the issues and to look at the

picture as a whole and to be reminded that "a fully comprehensive definition is impracticable, if not impossible": Goodwin-Gill, The Refugee in International Law (1983) at 30. The wide range of potential factors referred to in the textbooks, writings and case law should not be seen as a source of confusion, but rather, as a range of choices to assist in the fair and proper determination of the particular case at hand.

What is the group?

Unless the group is capable of reasonably precise definition, it becomes difficult, if not impossible, to address the balance of the issues. The problem faced by the appellant is that identification of the group on the present facts is virtually impossible. For the group may conceivably be defined in any or all of the following terms:

a) Persons, whether married or unmarried, whether parents or non-parents, who believe the one-child policy to be wrong, whether for political, religious or other reasons.

b) Persons **affected** by the policy, irrespective of their agreement or disagreement with the policy.

c) Married couples who do not yet have children, but who believe that they should nevertheless have an unrestricted right to procreate and to control their own fertility without interference by the State.

d) Parents per se.

e) Parents who already have one child and who would like to have a second child.

f) Parents who already have one or more children and who believe that there should be no limit to the number of children they can procreate.

g) Anyone who has been required to submit to any form of birth control measure whether by way of abortion, sterilization or otherwise.

No doubt different or further formulations are possible. Each formulation may, of course, produce possibly different answers in relation to the two further issues to be addressed.

It is our view that a coherent formulation of the group is impossible. The appellant's case must fail for this reason alone. But we will nevertheless proceed on the alternative basis that it is possible to define the group. We will, for convenience, address the broadest category in para (a) as well as the most narrow category in para (g).

Views of the community and of the agent of persecution

We have been presented with no evidence to show that the community of which the appellant is a part perceives persons in categories (a) through to (g) to be members of an identifiable social group.

The same is true in relation to the government officials who are the relevant agents of persecution.

Certainly, individuals who do not comply with official family

planning policy would be identified as such, just as persons in any society who fail to obey the law will be identified as lawbreakers. It does not necessarily follow that such persons comprise, and are recognized as comprising a distinct social group within society.

The one observation of the 9th Circuit Court of Appeals in Sanchez-Trujillo approved of by Hathaway is appropriate in these circumstances:

> "... the term does not encompass every broadly defined segment of the population, even if a certain demographic division does have some statistical relevance."

We also return to the succinct observation made by Goodwin-Gill in The Refugee in International Law (1983) 30:

> "The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities of the state."

Here, there is no evidence that Chinese society, and more importantly, the authorities of the state, identify or take notice of the individuals concerned ***as a social group***.

We believe that the appellant's case under the social group category must fail on these facts alone.

However, we will nevertheless proceed to an examination of the remaining issues.

Shared characteristic

The group of individuals who comprise categories (a), (c), (e) and (f) could be defined as having the characteristic of opposition to the one-child family policy. Such characteristic is obviously not "immutable" per se and therefore the question is whether it is so fundamental to the identity of the members of this group that they ought not to be required to change it. In this regard we have already held that the family planning policy of the People's Republic of China is not per se an infringement upon basic human rights and that the most that can be said is that while there is evidence of international recognition of a human right to procreate, and to control fertility, the extent of that right has not been determined and recognition of the right is largely aspirational. It is also significant that Aleinikoff in The Meaning of "Persecution" in United States Asylum Law (1991) Volume 3 International Journal of Refugee Law 5, 22-23 expressly acknowledges that "... there is no established international human rights norm prohibiting population control measures ...". We therefore find that opposition to the one-child family policy (or put another way, the claim to a right to have more than one child) is not a characteristic so fundamental to the identity of the individuals in question that they ought not to be required to change it.

Turning now to persons in categories (b), (d) and (g) very much the same applies. They do share a common experience, namely having been required to submit to a form of birth control measure, but there is no uniting factor. As to category (g) in particular, it is difficult to escape the conclusion that these persons are little more than a statistical group whose common experience is accidental. On the present facts we cannot accept that there is "a

particular social group" within the meaning of the Convention.

The decision of the Immigration Appeal Tribunal in Secretary of State for the Home Department v Otchere [1988] Imm AR 21, 26 is helpful in this respect as it stresses that the characteristics of the social group must exist independently of the factor of persecution. The persecution must be feared, or exist, on account of the characteristics:

> "It was agreed that the characteristics must exist independently of the fact of persecution, but nevertheless the characteristics must play a significant role in the persecution. The persecution must be feared, or exist, on account of the characteristics."

Link between the fear and civil or political status

Under this heading the question is whether the appellant's fear of persecution has a nexus with his membership of a particular social group. Because we have held under the preceding sub-headings that the appellant does not belong to any social group, it follows that there is no link between the harm feared and the civil or political status of the appellant.

CONCLUSIONS IN RELATION TO SOCIAL GROUP

1. While the appellant may have suffered discrimination as a result of being overseas-born, he has not suffered persecution as a result. Therefore, even if it were to be assumed that overseas-born Chinese are a social group, the appellant's case in this respect is in any

event bound to fail.

2. The appellant cannot establish membership of any other social group because:

   a) Coherent formulation or definition of the group is not possible.

   b) There is no evidence that the community of which the appellant is a part perceives the appellant to be a member of a particular social group. The same is true in relation to the relevant agents of persecution.

   c) There is no shared characteristic fundamental to the identity of the group in question.

   d) There is no link between the harm feared and the civil or political status of the appellant.

3. In the result, there is no evidence to show that the forced sterilization operation feared by the appellant has been required for reasons of his membership of a particular social group, or for any of the other four remaining Convention reasons.

There remains for consideration a related aspect of the appellant's case, namely his reliance on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The point can be disposed of shortly as there is no evidence to support his submission that the forced sterilization operation feared by him will constitute "torture" as defined in Article 1 of that

Convention. That being so, the obligation of non-refoulement contained in Article 3 of the Convention does not arise. However, this leaves unresolved the issue of "other cruel, inhuman or degrading treatment or punishment" which lies outside our jurisdiction as such treatment or punishment will not be inflicted for reason of one of the five grounds recognized in the Refugee Convention. This issue may well require further examination in the context of the Immigration Service assessment of the humanitarian aspects of the appellant's case.

We turn now to the issue of the appellant's illegal departure.

APPELLANT'S ILLEGAL DEPARTURE FROM CHINA

This is the final ground on which the appellant advances a claim to a well-founded fear of persecution.

For the purpose of the present case, the Authority proposes to adopt what is said on this topic in Hathaway, The Law of Refugee Status (1991) 40-43. The starting point is the proposition that the mere fact that an individual either departs his country or stays abroad without authorization does not always entitle him to refugee status. However, if two conditions are met, a genuine refugee claim may be established:

1. First, the country of origin must punish unauthorized exit or stay abroad in a harsh or oppressive manner. The appellant may very well expect to suffer a penalty for breach of, say, a passport law, but if that law is fairly administered and he faces the prospect of but

reasonable penalties, the harm feared is not of sufficient gravity to warrant protection as a refugee.

2. Second, the illegal departure or stay abroad must either be explicitly politically motivated, or the state of origin must view the unauthorized departure or stay abroad as an implied political statement of disloyalty or defiance. Whether by law or administrative practice, it must be clear that the home country disapproves of illicit emigration, and views those who breach its rules on exit or travel abroad as non-conforming dissidents. In this regard paragraph 61 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status is possibly misleading by focusing **only** upon the motive of the asylum-seeker for leaving or remaining outside the country. The focus must be **also** upon the view taken by the country of origin.

As to the evidence on this issue, none was adduced at the hearing. However, in the Immigration and Refugee Board Documentation Centre document China: Country Profile at 84 it is stated that:

> "Besides the numerous serious punishments provided for 'counter-revolutionary activities', the sentences for those who forge, alter or steal official certificates, such as passports, can range from loss of political rights to three years of fixed-term imprisonment (Article 167) [of the Chinese Criminal Code], while those who illegally cross the border face sentences up to one year of fixed-term imprisonment, detention or control (Article 176)."

As the appellant has not been involved in the forging, alteration or stealing of a passport, we consider that there

is at most no more than a bare possibility of his facing the penalties prescribed in Article 167 which range from loss of political rights to three years of fixed term imprisonment. It is more likely that he will face a sentence of up to one year of detention or control under Article 176 for illegally crossing the border. We do not consider that this maximum potential penalty is so unreasonable that the first condition referred to above is satisfied. But more importantly, there is no persuasive evidence that the appellant's illegal departure was politically motivated on his part, or that the Chinese authorities will view his unauthorized departure as an implied political statement of disloyalty or defiance. For these reasons the decision in Refugee Appeal No. 8/91 Re CL (27 August 1991) is clearly distinguishable.

We therefore conclude that this third ground of the appellant's case must fail.

CONCLUSIONS ON CUMULATIVE GROUNDS

Because the appellant's case was put to us not just on single grounds, but also on a cumulative basis, we will now address that issue.

We have looked again carefully at the appellant's case as a whole and at all of the evidence to see whether there is any basis on which a finding of refugee status might be justified. We have not been able to find any such basis.

In the case of Zhou v. Canada (Minister of Employment and Immigration) (1989) 9 Imm LR 2d 216 Mr Zhou succeeded not on the basis of the punishment feared for non-compliance with the family planning policy but rather on the basis that:

a) He had been detained and tortured.

b) He had been effectively barred from employment of any kind and evicted from his apartment.

c) On the evidence adduced before the Immigration and Refugee Board it was established that the family planning policy was carried out in an arbitrary and extreme manner due to his family background.

The facts of the present case are different in that:

a) The appellant has not been detained and tortured.

b) While both the appellant and his wife have been dismissed from their employment, there has been no evidence of eviction from their apartment. Furthermore, because the appellant conceded that following his dismissal he did not look for a formal job, it cannot be said that he has been deprived of all opportunity to work, feed his family and provide shelter for them. Indeed, the appellant was able to earn a living following his dismissal. We refer to the appellant's evidence that he earned his living by helping a friend to repair cars.

c) We turn now to the appellant's family background and in particular his membership in the "Black Seven" group. We will assume, without deciding, that this is a particular social group in terms of the Convention definition. As previously mentioned, on the evidence before us, there is no or no persuasive evidence that the family planning policy has been carried out in an arbitrary and extreme manner due to the appellant's

> family background or overseas origins. If anything, the evidence confirms what is presently known of the enforcement of the policy in China, namely that on the one hand over-zealous officials at the local level do from time to time coerce involuntary abortion and sterilization operations. On the other hand, there is also evidence that in some provinces, at least, overseas Chinese are treated leniently and allowed to exceed the otherwise strictly enforced criteria.

At the end of the day the appellant is faced with the fact that his opposition to the one-child family policy has never been articulated on religious or political grounds and we have found that the particular social group category does not assist the appellant either. Nor can he show that the motivation of the punishment feared is related to a Convention ground.

For these reasons we find that the appellant has not established, on cumulative grounds, a claim to refugee status.

We accordingly answer the four issues as follows:

1. Is the appellant genuinely in fear?
   Answer: Yes.

2. If so, is it a fear of persecution?
   Answer: Yes.

3. If so, is that fear well-founded?
   Answer: No.

4. If so, is the persecution he fears persecution for a

Convention reason?

Answer: No.

OVERALL CONCLUSION

Our overall conclusion is that the appellant is not a Convention refugee. Refugee status is declined. The appeal is dismissed.

.....

R.P.G. Haines

[Member]

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

AT AUCKLAND

REFUGEE APPEAL NO. 3/91

RE ZWD

DECISION OF THE AUTHORITY
DELIVERED BY R.P.G. HAINES

_____

Date of Hearing: 11 June 1991

Date of Decision: 20 October 1992

\rsaa\decis3A.91