1217265 [2013] RRTA 393 (15 May 2013)

DECISION RECORD

RRT CASE NUMBER:	1217265
DIAC REFERENCE(S):	CLF2011/113736
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Rowena Irish
DATE:	15 May 2013
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

statement of decision and reasons

BACKGROUND

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants who claim to be citizens of China (PRC), applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2011. The delegate refused to grant the visas [in] September 2011, and the applicants applied to the Tribunal for review of that decision.

3. The Tribunal affirmed the delegate's decision, and that decision was set aside by the Federal Magistrates Court. The matter is now before the Tribunal pursuant to an order of the Court.

4. The first named visa applicant (referred to as the wife applicant) is the wife of the second named visa applicant (referred to as the husband applicant) and the mother of the third named visa applicant (referred to as the child applicant). The wife applicant claims to be a Mormon and to have been detained in China for attending an underground Christian gathering. She claims to have sent information back to China in relation to the Jasmine Revolution which came to the attention of the authorities. She also claims to fear harm for having breached Fujian's family planning laws for the conception of the child applicant before she was married and when the husband applicant was under marriageable age. At the time of the Tribunal hearing in the current matter the wife applicant was pregnant with their second [child].

Claims and evidence

5. The application form (completed without assistance) states that the wife applicant was born on [date deleted: s.431(2)] in Fujian, China. She speaks, reads and writes Mandarin. She claims to be a Chinese citizen (a certified copy of her passport was provided) and not to have citizenship of, or a right to enter or reside in, any other country. She lists her religion as Christian (a certified copy of her Baptism and Confirmation certificate was provided). She has been married since [2010] (a certified copy of the marriage certificate was provided). She arrived in Australia as a student [in] June 2007 and returned to China for a visit in January 2009. Her parents [and siblings] all live in China.

6. The husband applicant was born on [date deleted: s.431(2)] in Fujian, China. He is a Chinese citizen (a certified copy of his passport was provided). He completed a Part D of Form 888 stating that he had no claims of his own for protection. He lists his religion as "Christian" The child applicant is the [child] for the first and second named applicants (a certified copy of her birth certificate was provided). [Specific details of child deleted: s.431(2)]. A Part D of Form 888 was completed on [the child's] behalf stating that [the child has no claims of his/her] own for protection.

7. The Tribunal has received a copy of the recording of the interview which the first named applicant had with the delegate [in] September 2011. A summary of the discussions that occurred are set out in paragraph 26 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted: s.431(2)]. Having listened to the

recording of the interview the Tribunal accepts that this summary is an accurate and comprehensive summary of the interview.

8. The Tribunal has also listened to a recording of the hearing before the first Tribunal [in] February 2012. A summary of the evidence provided at that hearing is set out in paragraphs 27-73 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted: s.431(2)]. The Tribunal accepts that this summary is an accurate and comprehensive summary of the hearing.

9. Following the hearing [in] February 2012 the applicants submitted a copy of what appears to be a historical internet chat record dating from [July] 2011 with an English translation between the wife applicant and her [sibling]. They also submitted a statement addressing some of the concerns raised by the Tribunal at the hearing [in] February 2012.

10. The applicants appeared before the current Tribunal [in] April 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

11. Following the hearing an invitation to comment on or respond to information under s.424A was sent to the applicants by registered post on 9 April 2013. A copy of this letter is on the file (ff.56-60). Australia Post records show that the letter was delivered on 15 April 2013. The letter stated that any comments or response should be received at the Tribunal by 2 May 2013. It warned the applicants that if no response was received by that date (unless extended) the Tribunal may make a decision on the review without taking any further action to obtain the applicants' views on the information. No response was received.

Findings and reasons

12. The law upon which the findings below are based is set out in Attachment 1.

Nationality

13. On the basis of their Chinese passports, which were presented to the Tribunal, the Tribunal finds that the wife and husband applicants are citizens of the People's Republic of China.

14. On the basis of the birth certificate provided, the Tribunal accepts that the child applicant [is the [child] of the wife and husband applicants. Article 5 of the *Nationality Law of the People's Republic of China (1980)* states, in part that any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. There is no evidence before the Tribunal indicating that the child applicant is not a national of the People's Republic of China and [the child's] claims have therefore been assessed against China as [the child's] country of nationality.

15. There is nothing in the evidence before the Tribunal to suggest that the applicants have a legally enforceable right to enter and reside in any country other than their country of nationality. Therefore the Tribunal finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicants are nationals of China, the Tribunal also finds that China is the applicants' "receiving country" for the purposes of s.36(2)(aa).

Credibility concerns

16. The Tribunal had a number of concerns about the evidence provided by the wife applicant. The Tribunal accepts the difficulties of proof faced by applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraphs 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

17. The Tribunal sets out below its concerns about the wife applicant's credibility.

18. **First**, the Tribunal found the wife applicant's evidence in relation to her parents' employment history to be inconsistent and unpersuasive. As put to the applicants under s.424A, in her student visa application lodged [in] July 2009 the wife applicant provided a letter from [a business] dated [June] 2009 stating that her mother has been working there as a manager since June 2002 with an annual income of 68,000RMB. While the Tribunal is willing to accept that this document is a false document provided to support the student visa application, the Tribunal considers that the provision of a fraudulent document in support of the wife applicant's student visa application reflects poorly on her credibility.

19. As put to the applicants under s.424A at the Departmental interview [in] September 2011 she claimed that her mother was in charge of a small tea shop. At the current Tribunal hearing she initially claimed that her mother was involved in the family transport business but then claimed that her mother was mainly a housewife. She then claimed that her family had been running the tea business since early 2008 and that it closed in early 2012. She claimed that the business closed at the beginning of 2012 because once they were caught for having the gathering there no-one was willing to come to the meeting point so the tea business closed. However when the Tribunal put to her that the arrest for the gathering was in 2009 and the business did not close until 2012 she then stated that the business was still doing OK but not as well as it should have been.

20. She initially claimed that her mother was the only person in the business but then later claimed that she had a partner in the business and that the business was originally owned solely by the partner but then later her mother joined. As put to the applicants under s.424A, her evidence that the tea shop opened in early 2008 appears contrary to her evidence at the previous Tribunal hearing [in] February 2012 where she initially claimed that the tea shop opened in 2009 and then later she claimed that it opened in early 2007. It also appears contrary to her claims at the previous Tribunal hearing that her grandmother was involved in the business, which was also put to the applicants under s.424A. The Tribunal finds it surprising that she did not previously mention her mother having a partner in the business.

21. As put to the applicants under s.424A at the Departmental interview the wife applicant claimed that her father works delivering goods. At the previous Tribunal hearing [in] February 2012 the wife applicant claimed that her father works for a [transport] company where he had been working for the past 10 years (as put to the applicants under s.424A). At the current Tribunal hearing she claimed that her father works [in a different field involved with] the transport business for someone else and that he has been doing this since 2009. She then later claimed that he had been doing this since 2010. When questioned about why she would say in the interview [in] September 2011 that he was working delivering goods, she stated that this was referring to when he worked in the transport business but did not explain why she would claim that was his current job in 2011, when he stopped doing that in 2009 or 2010.

22. **Second** at the Tribunal hearing the wife applicant's evidence in relation to when her family stopped supporting her financially, and why, was inconsistent and unpersuasive. She initially claimed that they stopped supporting her in June or July 2010 because they found out that she got married and that this was the only reason that they stopped supporting her. This evidence is inconsistent with the wife applicant's evidence at previous Tribunal hearing (as put to her in the s.424A letter) where she claimed that they stopped giving her money in about September 2009 because she was dating a man. It is also inconsistent with her written statement where she claimed that:

> Then our family business met difficulty and went bankrupt due to the constant harass of police.

23. When it was put to the wife applicant at the Tribunal hearing that she had previously stated that it was due to her family business going bankrupt that her family stopped supporting her she changed her evidence and stated that this was also a reason and that her family were running a transport business before delivering stock and that her mother worked for the business with her father and some other family members. However the business stopped because of a downturn in business because it is not as popular anymore which happened to other transport companies also. When the Tribunal put to her that in her statement she claimed that it went out of business because of the harassment by police, she responded that this was only for a short period of time in January 2009 when she returned to China.

24. The Tribunal found the wife applicant's evidence in relation to her family's financial situation and when and why they stopped supporting her financial to be so inconsistent and changeable that it raises doubts for the Tribunal about whether her family have stopped supporting her as claimed.

25. **Third** the Tribunal found the wife applicant's evidence in relation to her family's knowledge of her relationship with the husband applicant to be inconsistent. She initially claimed that they stopped supporting her in 2009 because they did not approve of her relationship. However she later claimed that her family only found out about the relationship [in] 2010 when she was [pregnant]. When this inconsistency was put to her at the hearing she changed her evidence and stated that they knew about the relationship in 2009 but she was not pregnant then. She also claimed at the previous Tribunal hearing in February 2012 that their families were not aware that they had gotten married (as put to her under s.424A). However at the current Tribunal hearing she stated that they did know about the marriage but do not support it.

26. At the current Tribunal hearing the wife applicant initially claimed that her family would force her and the husband applicant to separate if they were to return to China, consistently with her claims at the previous Tribunal hearing in February 2012. However when the Tribunal asked why they would do this unless they were willing to support her then she changed her evidence and claimed that the husband applicant's family were the ones who would force them to separate.

27. **Fourth** the Tribunal found the wife applicant's evidence in relation to her attendance at church in Australia to be inconsistent and unpersuasive. As put to the applicants under s.424A, she claimed at previous Tribunal hearing in February 2012 that she stopped going to church in mid-2008. However at the current Tribunal hearing she claimed that she continued attending church in Australia until she went to China in January 2009. She claimed at the previous Tribunal hearing in February 2012 that she was baptised in 2007 because she knew that she would hold onto that religion until the end (as put to her under s.424A). However, she stated at the current Tribunal hearing that she only started believing in the religion after the birth of her child and that she had previously only attended church in Australia because they helped her. She claimed at the previous Tribunal hearing in February 2012 that she attended sermons in May and July 2010 and thought she should join the church again but was pregnant and so she only attended sometimes as it was inconvenient (as put to her under s.424A). At the current Tribunal hearing she stated that she only started attending church again in May 2011 when her [child] was [young].

28. She consistently claimed that she stopped attending church in Australia for a period of time because her father disapproved of it. The Tribunal finds this unpersuasive as the wife applicant had chosen to disobey her father's wishes in relation to her husband over a number of years and cannot see why she would chose to obey her father about her religion but disobey him about relationship. When this was put to the wife applicant at the hearing she claimed that it was because she was reliant on her father to pay for her studies in Australia. However, she had stated that he had stopped supporting her financially since mid 2009 which does not explain why she did not attend church until 2011.

29. The wife applicant's evidence about why she started attending church in Australia was also inconsistent. As put to her under s.424A, in the Departmental interview [in] September 2011 she claimed that she wanted to attend church in Australia because she had friends who went with their parents to the family church in China. However at the current Tribunal hearing she claimed that she wanted to attend church in Australia because her mother had instructed her to seek out a church in Australia as they would help her.

30. **Fifth** the Tribunal found the wife applicant's evidence about her detention to be inconsistent, vague and unpersuasive. As put to her under s.424A, she claimed in the Departmental interview [in] September 2011 and at the previous Tribunal hearing in February 2012 that the gathering where she was detained was held at the family home. However at the previous Tribunal hearing she also referred to it being held at the tea shop. When this was put to her at the previous Tribunal hearing she claimed that the tea shop and home were at the same place. However at the current Tribunal hearing she claimed that the tea shop and home were not the same place and that the gathering was at the tea shop. The Tribunal considers this to be a very significant fact and would expect her to be able to recall accurately where the gathering was and whether the tea shop was in her home or not. Her inability to do so causes the Tribunal to doubt that any tea shop exists.

31. At the current Tribunal hearing she claimed that she was taken to a police station 20 minutes drive away. This appears to be inconsistent with her evidence at the Departmental interview that she was taken to a detention centre 40 minutes drive away (as put to her under s.424A).

32. At the current Tribunal hearing she claimed that her mother was detained for one week and did not have to pay any money to be released. This appears to be inconsistent with her evidence at the Departmental interview and previous Tribunal hearing where she claimed that her mother had to pay 2000RMB to be released because she was supposed to be detained for 15 days but paid to be released early (as put to her under s.424A).

33. At the current Tribunal hearing she claimed that while in custody they only asked her why she attended the meeting and nothing else. However she later claimed that they thought she was evangelising. The Tribunal does not accept as credible that the police would only ask her about why she attended the meeting if they thought she was evangelising. In such circumstances it would expect them to ask her about her overseas activities, whether she was evangelising and her other church activities. Furthermore, this appears to be inconsistent with her evidence at the previous Tribunal hearing that the authorities questioned her about whether she attended church overseas (as put to her under s.424A).

34. At the current Tribunal hearing she claimed that her father had organised payment of the bail for her. This is consistent with her claims at the Departmental interview (but not at the previous Tribunal hearing) where she claimed that her grandmother organised the payment of the bail for her (as put to her under s.424A).

35. **Sixth,** the Tribunal found the wife applicant's evidence in relation to the claimed material sent to China to be unpersuasive and inconsistent. She claimed in her written statement:

> Recently, I have been discussing about Chinese Christian joining the Jasmine Revolution in China with some Chinese Christians online. I have sent out some information and photos. But not long ago, one of my friends was taken by the police. My family was also searched and warned.

36. As put to her under s.424A, this appears to be inconsistent with her claims at the previous Tribunal hearing where she initially claimed that she sent information by email and then that she sent a document via QQ communications to her [sister] and her sister called some friends in to look at it She initially claimed that her sister was not able to open the document, then that she did open it and then later that her sister could not open her computer. She claimed that both her sister and her friend were detained. In her submission to the previous Tribunal dated [February] 2012 she stated that she sent the information to her sister who then forwarded it to friends and that her friend was detained for much longer than her sister. However, at the current Tribunal hearing she stated that her friend was detained for one day and her sister was released the same day. She also claimed that the QQ conversation she had was not just with her sister but also with a number of friends to whom she sent the document as well. She claimed that she only sent the information on one occasion. She claimed that as a result of sending the information on the same day her computer was infected with a virus which resulted in it freezing. However when she rebooted it it worked again. She initially claimed that this happened as soon as she sent the information. However when the Tribunal put to her that it could not understand why she would agree to resend the information (as her QQ communication suggests) she then changed her evidence and claimed that she had sent the information twice and that it only occurred after she sent it the second time. The Tribunal found this unpersuasive. Also, the Tribunal does not accept that just because a computer freezes it has a virus, especially when it starts working again after being rebooted. Even if it

did have a virus there is no evidence to suggest that this was linked to sending information overseas as viruses are very common in computers.

37. Furthermore, the Tribunal does not accept that the wife applicant would send information about the Jasmine Revolution to China when she knew it was banned (which she stated at the current Tribunal hearing). This appears to be contrary to her claimed beliefs that as a Mormon one of the tenets of her faith is that she should follow the law Also she was unable to provide any persuasive reason why she would take this risk. When this was put to her at the current Tribunal hearing she stated that she showed the material to her sister and friends so that they would know better about the Chinese authorities.

38. The Tribunal found the wife applicant's evidence in relation to the claimed communications to be so vague, inconsistent and unpersuasive as to not be credible. The Tribunal does not accept that the wife applicant sent any information to China as claimed.

39. In the purported copy of a QQ conversation with her sister provided to the previous Tribunal [in] February 2012 the wife applicant agrees to send her sister the information again as her sister is no longer able to access it. This appears to be inconsistent with the wife applicant's evidence that she only sent the information once. This conversation suggests that the information was a link to a website as her sister states that "the websites looks like been hacked", which appears to be inconsistent with the wife applicant's evidence that it was a document that she sent and not a link to a website. Also, the Tribunal does not accept that the wife applicant would be willing to resend the information if her computer had been infected with a virus as a result of sending it the first time. Furthermore the QQ conversation does not refer to the information having been sent or shown to any friends or that her sister's computer or document could not be opened or that the wife applicant's computer suffered any problems. This leads the Tribunal to place little weight on the QQ conversation provided in support of the wife applicant's claims.

40. For the reasons set out above, the Tribunal finds that the wife applicant is not a credible witness, has fabricated her religious claims to give herself the profile of a refugee and has not been honest about her reasons for leaving China and coming to Australia. The Tribunal does not accept that she attended underground Christian gatherings in China, was detained in China for attending an underground Christian gathering or that she sent religious or political materials back to China.

41. In light of the Baptism and Confirmation Certificate provided for the wife applicant and the Blessing Certificate provided for the child applicant the Tribunal accepts that the first named applicant has attended a Mormon church in Australia (although it is not clear to the Tribunal how often she has been attending). For the reasons set out above the Tribunal has found that the wife applicant is not a credible witness and the Tribunal is not satisfied that she holds genuine Mormon beliefs. This, together with the inconsistencies in the evidence from the wife applicant about when she started holding genuine religious beliefs, when she was attending church in Australia and why she started attending church in Australia, leads the Tribunal to find that the wife applicant's involvement in Mormon activities in Australia was solely for the purpose of strengthening her claim to be a refugee. In accordance with s. 91R(3), the Tribunal disregards the wife applicant's conduct since arriving in Australia for the purpose of assessing her claims to be a refugee.

Claims relating to the Mormon church

42. For the reasons set out above the Tribunal finds that the wife applicant is not a genuine Mormon. Therefore the Tribunal finds that the wife applicant will not attend Mormon gatherings in China nor engage in evangelism or any Mormon related activities if she were to return to China now or in the reasonably foreseeable future because she has no genuine interest in doing so. Therefore, the Tribunal finds that there is no real chance that the wife applicant will face persecution because of her religion if she was to return to China now or in the reasonably foreseeable future.

Claims relating to attending underground gatherings in China

43. As set out above, the Tribunal does not accept that the wife applicant was detained in China for attending an underground Christian gathering. Therefore the Tribunal finds that there is no real chance that the wife applicant will face persecution because of this if she was to return to China now or in the reasonably foreseeable future.

44. Although the wife applicant had previously claimed that she would attend underground Christian gatherings in China if she was to return, at the current Tribunal hearing she stated that this was unlikely and that she would just practice her Mormon religion in private. Therefore the Tribunal finds that the wife applicant would not attend underground Christian gatherings if she was to return to China in the foreseeable future and therefore there is no real chance that she will face persecution for doing so.

Claims relating to materials sent to China

45. As set out above, the Tribunal does not accept that the wife applicant sent any religious or political materials from Australia to China as claimed. Consequently the Tribunal does not accept that the wife applicant, her sister or her friend suffered any consequences for this, including being detained, having their computers hacked or having their computers being infected with a virus. Therefore, the Tribunal finds that there is no real chance that the mother applicant will face persecution as a result of this if she was to return to China now or in the reasonably foreseeable future.

Claims relating to family planning provisions

46. On the basis of the birth certificate provided the Tribunal accepts that the child applicant is the [child] of the wife and husband applicants. The marriage certificate provided states that the wife and husband applicants were married [in] 2010 and the birth certificate provided shows that the child applicant was born on [date deleted: s.431(2)]. Therefore the Tribunal accepts that the wife and husband applicants were not married at the time of the child applicant's conception. Furthermore, the Tribunal accepts that the husband applicant would have been [under the marriageable age] in China. Article 6 of the *Marriage Law of the People's Republic of China* states that women can legally marry at the age of 20 and men at the age of 22.[1] Therefore the Tribunal accepts that the birth of the child applicant was in breach of Fujian's family planning laws.

[1] People's Republic of China 2001, 'Marriage Law of the People's Republic of China', Adopted at the Third Session of the Fifth National People's Congress on September 10, 1980, and amended in accordance with "Decision Regarding the Amendment (of Marriage Law of the People's Republic of China)" passed at 21st Session of the Standing Committee of the Ninth National People's Congress on April 28, 2001 http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm – Accessed 15 November 2010

Non-payment of social compensation fee

47. The Tribunal has considered the relevant provisions in Fujian's family planning laws. Fujian family planning regulations set out guidelines for social compensation fees for out of plan children.[2] It is forbidden for a couple to give birth 'before the stipulated time' under Article 14 of the *Population and Planning Regulation* for Fujian Province. Article 14 states:

> Under any of the following circumstances, the child born is regarded as born before the stipulated time by the Regulation:
>
> (1) Those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age).[3]

48. A DFAT cable (Department of Foreign Affairs and Trade 2010, DFAT Report 1210 – RRT Information Request: CHN37505, 12 November) provides advice in relation to household registration:

> Fines are payable for contravening the regulations. Under Article 39, a social compensation fee is required to be paid by anyone who violates the Regulation in the following ways:
>
> (1) A social compensation of zero point six to one time shall be imposed on those who give birth to a child ahead of the schedule
>
> (2) A social compensation of two to three times shall be imposed on those who give birth to the first additional child. A social compensation of four to six times shall be imposed on those who give birth to the second additional child. A much more heavy social compensation fee shall be imposed on those who give birth to the third or more additional child.
>
> (3) A social compensation of four to six times shall be imposed on those who give birth to a child born out of an extramarital affair. A much more heavy social compensation fee shall be imposed on those who give birth to the second child born out of an extramarital affair.

49. Therefore the Tribunal accepts that a social compensation fee will be payable in order for the child applicant to be registered in China. The wife applicant gave evidence at the Tribunal hearing that both she and the husband applicant's hukous are registered in a rural area of Fujian. The average rural Fujian annual net income in 2010 was 7,427RMB[4] which means that the fine will be between 4,456RMB and 7,427RMB which equates to between AUD696 and AUD1160.[5] At the hearing, the Tribunal quoted the information derived from Fujian family planning regulations and statistical information. The wife applicant claimed that the fine would be at least 40,000-50,000RMB and that she knew this because she had a friend who returned and had to pay this much for registration of her child (a claim also made by the

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[2] *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website http://www.unhcr.org/refworld/pdfid/4242b7394.pdf - Accessed 28 June 2011

[3] *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website

[4] Per Capita Annual Income of Urban and Rural Households,1978-2010" 2011, *Fujian Statistical Yearbook 2011*, Sec.7.1, Fujian Provisional Bureau of Statistics website http://www.stats-fj.gov.cn/tongjinianjian/dz2011/index-en.htm
(Sec. 7.1 also at http://www.stats-fj.gov.cn/tongjinianjian/dz2011/en/html/0701.htm)

[5] See http://www.xe.com/currencyconverter/ accessed on 12 March 2013

husband applicant at the hearing). She initially claimed that she had not made any enquiries with the authorities in China in relation to the fees to be paid but when the Tribunal put to her that she had claimed in writing to the previous Tribunal that she had made enquiries and was told that there was no leeway then she changed her evidence and stated that she had made enquiries with the authorities. She provided no evidence to support this claim, nor any explanation of why she had previously claimed that she did not make any enquiries. In light of the credibility concerns that the Tribunal has in relation to the wife applicant, and the lack of evidence about why the fine would be 40-50,000RMB, the Tribunal does not accept that this is accurate. The Tribunal prefers the independent information obtained by the Tribunal from sources which it considers to be reliable. Although not raised directly by the applicants, the Tribunal accepts that the couple would be required to pay an additional fee for the registration of their second child after its [birth].

50. The Tribunal has considered whether the imposition of a fee on the wife applicant constitutes persecution of the wife applicant. The Tribunal is satisfied on the evidence before it that China's family planning policies and laws apply generally to the Chinese population and penalties apply to those who have breached China's family planning laws by having a child out of wedlock, prior to the prescribed age, or having additional or subsequent children without permission. The laws provide that a 'social compensation fee' shall be paid by anyone who breaches the family planning laws. The Tribunal is not satisfied there is any evidence that the *Population and Family Planning Regulation* of Fujian Province and associated provisions will be applied to the applicant in a discriminatory manner for any reason or that it is selectively enforced. The Tribunal is satisfied that such laws are appropriate and adapted to achieve a legitimate national objective in the context of China's need to control its overall population growth. As such, the Tribunal does not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.

51. The Tribunal has also considered whether there is a real chance that the child applicant may be subject to persecution on this basis. The wife applicant claims that she could not afford to pay the social compensation fee because neither her nor the husband applicant's families are willing to support them financially, the couple have no savings to use to pay the fee, she and the husband applicant have no qualifications and therefore would not be able to get a job in China or it would be poorly paid; and the husband applicant's family would force she and the husband applicant to separate so that she would have the child applicant to look after unsupported.

52. However, the Tribunal considers that the fee required to be paid is a relatively modest one. The wife and husband applicants have been able to support themselves in Australia since 2009, and the [baby], including with accommodation, two mobile phones on monthly plans, food and daily essentials. They have been able to find work in Australia despite their visa issues, although the wife applicant is not currently working. This suggests to the Tribunal a resourcefulness which would assist them if they were to return to China. The wife applicant claimed that the husband applicant is only working 2-3 days per week and only earns $120 per day. She gave evidence at the hearing that he sometimes works more days per week than this but, despite repeated questioning, claimed that the maximum amount he ever earns is $300-$360 per week. The Tribunal does not find this credible as if he is working more than 3 days and earns $120 per day then he would receive more than $360 per week for those weeks. Furthermore (as put to the applicants under s.424A) at the previous Tribunal hearing in February 2012 she claimed that the husband applicant earns $100-$200 per day. The

Tribunal believes that the wife applicant was attempting to minimise her evidence in relation to their income and was not being honest about how much the husband applicant earns here in Australia.

53. In addition, the applicants provided evidence at the hearing that the wife applicant came to Australia on a student visa which cost her family 200,000RMB and the husband applicant came on a student visa which cost his family 150,000RMB. While the wife applicant claims that her family no longer supports her financially her evidence in relation to when and why this occurred was inconsistent and unpersuasive (as discussed above). She gave evidence at the hearing that she speaks with her family fortnightly which suggests that her family have not disowned her (the husband applicant gave evidence consistent with this). They also both gave evidence that the husband applicant speaks with his family fortnightly which again suggests to the Tribunal that the family are not as opposed to the relationship as the wife and husband applicants are claiming. They claim that the husband's family would not support the [child applicant] but have not provided any evidence in support of this. The wife applicant's evidence in relation to her parents' employment history was inconsistent and unpersuasive, as discussed above. The Tribunal does not accept that the wife applicant has been honest about her family's financial situation. In light of the credibility concerns discussed above, the evidence that their families have been willing and able to provide significant financial assistance in the past (whether through savings or borrowings) and their own evidence that they have regular ongoing contact with their family, the Tribunal is not satisfied that both the wife and husband applicant's families in China would be unwilling or unable to assist in the payment of the fee for registration of the child applicant.

54. Furthermore, the Tribunal accepts that in Fujian there also exists the possibility of paying the fee by instalments. Although this was disputed by the wife applicant it has been confirmed by DFAT[6]:

> According to Article 10 of Management Measures for the Collection of the Fujian Province Social Compensation Fee:
> - the person concerned shall make a lump sum payment, in person, within 30 days from the time of receiving a payment notice;
> - if the person concerned has difficulty in paying the social compensation fee, they should submit a written request within 30 days of receiving notice. Their request should be addressed to the authority who issued the payment notice (such as the county or town-level family planning administrative office), requesting to pay via instalments;
> - the written request will require supporting documentation (unspecified) from employers, residence or village committees, or other relevant authorities;
> - the authority responsible for collecting payment shall make a decision on approving or refusing the instalments within 30 days from the application date, and advise the person concerned of the authority's decision in writing; and
> - the period permitted for payment instalments shall not exceed three years.

55. Therefore, while the Tribunal accepts that it will be difficult financially for the applicants if they return to China (particularly if they are required to pay for the registration of two children), it is not satisfied that the wife and husband applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to state provided education

[6] Department of Foreign Affairs and Trade 2010, DFAT Report 1210 – RRT Information Request: CHN37505, 12 November

and healthcare available to all other registered Chinese citizen. Article 25 of the Marriage Law of the People's Republic of China stipulates:

> Children born out of wedlock shall enjoy the same rights as children born in wedlock. No one may harm or discriminate against them.

56. In light of the above, the Tribunal is not satisfied that there is a real chance that the child applicant will suffer persecution.

57. The Tribunal has also considered whether the child applicant would face harm in the form of persecution until such time as [the child] is registered (if the first named applicant pays by instalment) for reason of her status as an unregistered child.

58. The *Hukou* (household registration system) records a child's birth, testifies to its citizenship, and registers its permanent residence. The *Hukou* registration is one of the most important components of the household management system in China. A child cannot acquire most of his or her rights without their *Hukou* registration. Without a *Hukou* registration, an unregistered child would not be entitled to either government funded public education or subsidised health care.[7] The parents of an unregistered child would have to arrange and pay for private education and medical services. According to DFAT advice, if a non-government school exists in the area an unregistered child would be able to attend but may be charged higher fees than a registered child.[8] DFAT has advised that there are many private schools in Fujian that will enroll unregistered children and that their fees are not excessive by Chinese standards.[9] It should however be noted that DFAT advice of August 2007 states that China does not have a national health insurance system for children so a child's registration status is not relevant to accessing medical services.[10] A 2009 research paper titled 'The Emerging Role of Private Health Care Provision in China: A Critical Analysis of the Current Health System' published by Stanford University notes the burgeoning role of private health providers in the form of clinics and hospitals and this may be a response to the negligible difference in cost to a patient between using a private health provider or a public one.[11] The cost can be broken down to show that the government covers only 20.4% of total health expenditure (with local governments currently accounting for 90 % of total government spending), while citizens paid 45.2% directly out of their pockets and the health insurance share (in 2003 only 46% of the population had insurance) was 34.5%.[12] Apart from health and education an unregistered child would only be denied welfare payments to the unemployed and elderly, many of the other services that the local government would have

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[7] Wang, F.L. 2005, 'Brewing Tensions While Maintaining Stabilities: The Dual Role Of The *Hukou* System In Contemporary China', *Asian Perspective*, Vol. 29, No. 4, pp. 85-124, – Accessed 20 April 2011.

[8] Department of Foreign Affairs and Trade 2007, *DFAT Report 691 – RRT Information Request CHN32173*, 31 August Department of Foreign Affairs and Trade 2004, *DFAT Report No. 327 – China: RRT Information Request: CHN17017*, 7 October

[9] Department of Foreign Affairs and Trade 2004, *DFAT Report 287 – RRT Information Request: CHN16609*, 22 April

[10] Department of Foreign Affairs and Trade 2007, *DFAT Report No. 691 – China: RRT INFORMATION REQUEST: CHN32173*, 31 August.

[11] Huang, Liang.L, Chu,C., Rutherford.S, Geng.Q, 2009, The Emerging Role of Private Health Care Provision in China: A Critical Analysis of the Current Health System, *Stanford University Asia Health Policy Program Working paper series on health and demographic change in the Asia-Pacific* October, http://iis-db.stanford.edu/pubs/22681/AHPPwp10.pdf - Accessed 26 May 2011

[12] Huang, Liang.L, Chu,C., Rutherford.S, GengQ, 2009, The Emerging Role of Private Health Care Provision in China: A Critical Analysis of the Current Health System, *Stanford University Asia Health Policy Program Working paper series on health and demographic change in the Asia-Pacific* October, http://iis-db.stanford.edu/pubs/22681/AHPPwp10.pdf - Accessed 26 May 2011

normally provided in the past to a registered individual, have now been outsourced to privately run entities.[13]

59. Given the child applicant's young age it is likely that [the child] would be registered by school age even if [the] parents paid by instalments. However, even if [the child] was not, the Tribunal notes the independent information referred to above in respect of education indicates that higher school fees would be applicable for an unregistered child but there are a number of reasonably priced private schools which can be accessed. While the wife applicant claimed that such schools were prohibitively expensive she has not provided any evidence of this. The country information on health care is somewhat contradictory but the latest DFAT information indicates that there is no public health system in China and all residents must fund their own medical costs, whether they are registered or unregistered. The Tribunal is not satisfied that the implications of not being eligible in the interim period for state funded education and/or health benefits as an unregistered child constitutes harm of such a nature or extent as to amount to persecution (having regard to the example of 'serious harm' referred to in s.91(R)(2)).

Discrimination for having a child out of wedlock

60. The wife applicant claims that if the family were to return to China she and the husband applicant would be forced to separate. At the hearing she initially claimed that her family would force them to separate. However when the Tribunal queried why her family would force them to separate unless they were willing to support her and the child, the wife applicant then changed her evidence and stated that the husband applicant's family would force them to separate as their birthdates do not match and therefore they would bring bad luck on the whole family. The wife and husband applicants would be returning to China as adults who have lived independently from their families since they were each in high school. The Tribunal does not accept as credible that they would be forced against their wills to separate. They claim that the families would withhold their hukous from them to force them to separate. However, in light of the credibility concerns outlined above and the wife applicant's inconsistent evidence about who would force them to separate the Tribunal does not accept that the families would do this or that the couple would be forced to separate if they were to return to China. Furthermore, as the husband applicant acknowledged at the Tribunal hearing, even if the families did withhold the hukous, the Tribunal does not accept that it would not be possible to get copies of the hukous from the relevant authorities. Although the Tribunal accepts that this may require payment of a fee it appeared to be purely speculation on the part of the husband applicant that they could not afford this as he gave evidence that he did not know how much it would cost to get a copy.

61. However, the Tribunal is willing to accept that it may become known that the child applicant was conceived outside of wedlock. The wife applicant claimed that this would result in discrimination against herself and the child applicant. The Tribunal has considered independent information about the treatment of unwed mothers and their children. DFAT provided advice in 2004 on the treatment of children born out of wedlock (in Guangdong), noting that 'being a child out of wedlock still attracts some degree of social stigma'.[14]

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[13] Saich,T. 2004, 'The Changing Role of Government' Background Note for the World Bank Report on China's 11th Five Year Plan Kennedy School of Government, *Harvard University,* August http://www.hks.harvard.edu/fs/asaich/The_Changing_Role_of_Government.pdf - Accessed 26 May 2011

[14] Department of Foreign Affairs and Trade 2004, *DFAT Report 330 – RRT Information Request: CHN16967*, 15 October

However, the DFAT report also advised that the children 'might be subject to bullying or teasing at school, but are unlikely to suffer serious social disadvantage'[15]

62. In 2010 Dr. Alice de Jonge provided additional advice to the RRT on the treatment of children born out of wedlock in China. Dr. de Jonge advised:

> Such children are still regarded with pity and disdain. They are teased at school. Single mothers are subject to discrimination when it comes to accessing housing, education and medical services.[16]

63. Regarding the treatment of such children in Fujian specifically, Dr. de Jonge advised:

> Fujian is a relatively prosperous province in SE China It is not the worst place to be a child born out of wedlock. Nor the best. The private sector is active in Fujian so that access to employment is at a reasonable level, even for single mothers, depending upon qualifications.[17]

64. The Tribunal accepts that the applicants may be subject to social stigma and ostracism. It accepts that if this occurs it would be distressing for the applicants. However, in light of the country information set out above the Tribunal is not satisfied on the evidence before it that they will face societal discrimination, stigma or ostracism that is sufficiently serious to constitute 'serious harm' (having regard to the examples provided in s.91R(2) of the Act).

Forced abortion and sterilisation

65. The wife applicant stated at the hearing that she is [pregnant]. The Tribunal accepts this evidence. At the hearing the husband applicant raised new claims in relation to the wife applicant being pregnant. While the wife applicant did not initially refer to any claims relating to herself as a result of her pregnancy, after the husband applicant raised these claims she then claimed to fear that she would be forced to undergo an abortion or sterilisation in China should she return there. The Tribunal has carefully considered the country information in relation to the existence and prevalence of forced abortions and sterilisations in Fujian.

66. The law prohibits the use of physical coercion to force abortions but pressure on local birth planning officials to meet family planning targets has resulted, according to the US DOS, in the use of physical coercion and "the abortion of certain pregnancies".[18] A 2008 article by Amnesty International states that "reports persist of local authorities forcing women to undergo abortions", and that "officials responsible for such practices are rarely prosecuted".[19] According to a Freedom House report from 2009 "compulsory abortion or sterilization by

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[15] Department of Foreign Affairs and Trade 2004, *DFAT Report 330 – RRT Information Request: CHN16967*, 15 October

[16] de Jonge, A. 2010, Email to RRT Country Advice 'RE: Request for assistance from Refugee Review Tribunal, Sydney (RRT ref: CHN36060)', 15 January

[17] de Jonge, A. 2010, Email to RRT Country Advice 'RE: Request for assistance from Refugee Review Tribunal, Sydney (RRT ref: CHN36060)', 15 January

[18] US Department of State 2009, *Country Reports on Human Rights Practices 2008 – China*, 25 February, Section 5

[19] Amnesty International 2008, *People's Republic of China: Briefing for the Committee against Torture in advance of their consideration of China's fourth periodic report, 3-21 November 2008*, ASA 17/094/2008, Article 4 http://www.amnesty.org/en/library/asset/ASA17/094/2008/en/bae00ac3-8f0b-11dd-8d03-3f760a3cc4a3/asa170942008en.html – Accessed 15 November 2010

local officials citing family-planning rules still occurs but is illegal and far less common than in the past".[20]

67. Forced abortions and sterilisations were also said to occur in Fujian Province. One reported case of forced abortion occurring in Fujian in 2012 was located.[21] The Fujian family planning regulations do not overtly stipulate a requirement for compulsory abortion or sterilisation for couples who have out of plan children. However, *Article 18* of the Regulations does state that those who have out of plan pregnancies "should take remedial action in time" and that the relevant committees and units "should urge them to take remedial measures in time".[22] The US Congressional-Executive Commission on China's *Annual Report 2009*, alleges that "the term remedial measures is used synonymously with compulsory abortion".[23] There have been reports of forced abortions within Fujian province.[24] The Tribunal accepts that some of these relate to pregnancies occurring outside of marriage.

68. Despite these incidents, according to a 2004 DFAT report, compulsory abortions and sterilisation in Fujian are much rarer than in the 1980s.[25] The official view of the Fujian Province Birth Planning Committee (FPBPC), is that there have been no cases of forced abortion or sterilisation in Fujian in the last 10 years. Since the early 1990s, it was claimed that all women and men who undergo surgical procedures for family planning reasons provide informed, written consent before surgery.[26]

69. The Tribunal accepts that there are examples of forced abortions and sterilisations occurring in Fujian. However, given Fujian's large population[27] the Tribunal does not accept that these reports show that the practise is widespread or that there is a real chance of the applicant being forced to undergo a forced abortion or sterilisation upon return from Australia. Furthermore, as referred to above, the country information states that compulsory abortions

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[20] Freedom House 2009, *Freedom in the World – China (2009)* http://www.freedomhouse.org/template.cfm?page=363&year=2009&country=7586 – Accessed 15 November 2010

[21] 'New 'late-term abortion' row in China's Fujian province' 2012, *BBC*, 10 July <http://www.bbc.co.uk/news/world-asia-china-18778597> Accessed 8 February 2013; 'Another Forced Abortion Tragedy—'My poor wife, my poor child' 2012, *China Aid*, 9 July <http://www.chinaaid.org/2012/07/another-forced-abortion-tragedymy-poor.html> Accessed 8 February 2013; Wong, E 2012, 'Reports of Forced Abortions Fuel Push to End Chinese Law', *New York Times*, 22 July <http://www.nytimes.com/2012/07/23/world/asia/pressure-to-repeal-chinas-one-child-law-is-growing.html?pagewanted=all&_r=0> Accessed 8 February 2013

[22] Fujian Provincial Government 2002, *Population and Family Planning Regulation of Fujian Province*, Adopted by the 33rd Meeting of the Standing Committee of the Ninth Provincial People's Congress on 26 July 2002

[23] US Congressional-Executive Commission on China 2009, *Annual Report 2009*, 10 October, p 153

[24] China Aid Association and Women's Rights Without Frontiers 2009, *New Evidence Regarding China's One-Child Policy Forced Abortion, Involuntary Sterilization, Infanticide and Coercive Family Planning*, United States Action website, 10 November http://www.unitedstatesaction.com/documents/china/Littlejohn_and_Fu_Report_1.doc – Accessed 15 November 2010 ; 'China Aid' 2010, China Aid Association website http://www.chinaaid.org/qry/page.taf?id=97 – Accessed 15 November 2010

[25] Department of Foreign Affairs and Trade 2004, *DFAT Report No. 317 – RRT Information Request: CHN16905*, 2 September

[26] US Department of State 2007, *China: Profile of Asylum Claims and Country Conditions*, Political Asylum Research and Documentation Service website, May, http://www.pards.org/paccc/china_may_2007.doc – Accessed 15 November 2010

[27] http://www.geohive.com/cntry/cn-35.aspx accessed on 31 October 2011 states that Fujian had a population of 36,894,216 in the 2010 census

and sterilisations are illegal under Chinese law and as far less common than in the past. The Tribunal does not accept that there is a real chance that the applicant would be subject to a forced abortion or sterilisation should she return to China now or in the reasonably foreseeable future.

Other claims

70. The wife applicant also claimed that her and the husband applicant's families would disown them if they returned to China because they did not completed their studies, got married and had a child together. The Tribunal accepts that it is likely that their families would be disappointed in the wife and husband applicants not having completed their studies in Australia despite their families having invested significant amounts of money in them. It is also willing to accept that their families may not approve of the relationship. However, the Tribunal does not accept that their families have or will disown them as a result of this because they have had regular ongoing contact with the families despite the birth of their [child] and despite having lived together for many years. Furthermore, the Tribunal does not accept that any harm suffered by the husband and wife applicants as a result of being ostracised by their families would constitute serious harm as they are adults who have already been living independently away from their families for many years in Australia.

71. The wife applicant also claimed that they would not be able to afford to live in China because they could not earn a sufficient wage to support themselves and the child. While the Tribunal accepts that the couple do not have formal qualifications, it does not accept that they would not be able to earn sufficient money to survive in China The husband applicant has been working in [a trade] in Australia, work which is consistent with the experience and business run by his parents who the wife applicant stated work in [the same industry] in China The husband applicant stated that they had raised the 150,000RMB required to send him to Australia from their own money. Therefore the Tribunal does not accept that the husband applicant is unable to find [work] which would enable him to support his family in China. Therefore it does not accept that any financial difficulties they have would constitute serious harm.

72. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that any of the applicants has a well-founded fear of persecution for a Convention reason if they were to return to China now or in the reasonably foreseeable future.

Complementary protection

73. Having concluded that none of the applicants meets the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative complementary protection criterion in s.36(2)(aa).

74. As discussed above the Tribunal has found that the wife applicant is not a genuine Mormon and would not attend Mormon gatherings or engage in Mormon related activities in China if she was to return now or in the reasonably foreseeable future. Therefore, the Tribunal has no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

75. As discussed above the Tribunal has found that the wife applicant did not post any political or religious materials from Australia to China as claimed. Therefore, the Tribunal has no

substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

76. The Tribunal has accepted that a social compensation fee may be imposed on the first named applicant. The Tribunal accepts also that the imposition of such a fee may cause financial hardship The Tribunal considers, however, that in the circumstances of this case, the imposition of such a fee on the first named applicant and resulting financial hardship, would not constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). While a fine may be considered punishment, the Tribunal does not consider, on the information before it, that the imposition of a fine would be intended to cause extreme humiliation which is unreasonable (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or that the imposition of a fine would cause (or was intended to cause) severe pain or suffering or that the imposition of a fine in these circumstances could be regarded as cruel or inhuman (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

77. As discussed above, the Tribunal is not satisfied that the mother and father applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to the benefits associated with household registration (including education and healthcare) and that in the meantime [the child] would have access to private education and healthcare. Therefore, there are no substantial grounds for believing that, as a necessary and foreseeable consequence of [the child] being removed from Australia to China, there is a real risk that [the child] will suffer significant harm on this basis.

78. The Tribunal has accepted that it is possible that the applicants may face some societal discrimination as a result of the child applicant being born outside of marriage. However, the Tribunal is not satisfied that such bullying, teasing, pity and disdain would constitute ‘significant’ harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). The Tribunal does not consider, on the information before it, that such discrimination would be intended to cause extreme humiliation (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or would cause (or was intended to cause) severe pain or suffering (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

79. In light of the country information discussed above, the Tribunal does not accept that there is a real risk of the mother applicant being forced to undergo an abortion or sterilisation in China as a result of her current pregnancy.

80. As discussed above, the Tribunal does not accept that the wife and husband applicants’ families would disown them in China. The wife and husband applicants have been living in Australia for many years as adults without their parents. Therefore, even if their families did disown them, the Tribunal does not accept that any harm they suffered would be sufficient to constitute ‘significant’ harm as defined in ss.36(2A) and 5(1) of the Act.

81. For the reasons discussed above, the Tribunal does not accept that the husband applicant would be unable to obtain employment in China sufficient to support his family. Therefore, while the Tribunal accepts that they may suffer from some financial difficulties, it does not accept that these would be sufficient to constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act.

82. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of either or both of them being removed from Australia to China, there is a real risk that either or both of them will suffer significant harm.

Conclusions

83. The Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

decision

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

ATTACHMENT 1 - Relevant law

1. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

REFUGEE CRITERION

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

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

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

4. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

5. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

6. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

7. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is

official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

8. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.

9. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be solely attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

10. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

11. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

12. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

COMPLEMENTARY PROTECTION CRITERION

13. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

14. ‘Significant harm’ for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. ‘Cruel or inhuman treatment or punishment’, ‘degrading treatment or punishment’, and ‘torture’, are further defined in s.5(1) of the Act.

15. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

MEMBER OF THE SAME FAMILY UNIT

16. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a ‘member of the same family unit’ as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that ‘member of the family unit’ of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and dependent child.