

**0903266 [2009] RRTA 850 (18 September 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0903266

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Richard Derewlany

**DATE:** 18 September 2009

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

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

### **RELEVANT LAW**

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

### **Definition of 'refugee'**

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

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

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

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

### **CLAIMS AND EVIDENCE**

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

#### *Protection visa application*

20. In his protection visa application the applicant claimed he was born in City K, China, and that he was married with 3 children. He stated that for a period of ten years he lived at the same address in Village T, Guangdong, China, and that he worked as a farmer and casual labourer.
21. In a written submission from the applicant's representative it was stated that the applicant had 3 children and that they currently resided with the applicant's wife in China. The applicant claimed he had been mistreated by the Chinese government for breaching the country's one-child policy. He was fined RMB 10,000 after his second child was born, and RMB 50,000 after his third child was born. He had to pay the fine of RMB 50,000 to get his child included in the household registration. He had to ask friends and relatives for money and it took him 3 years to pay the fine by instalments and a further 5 years to repay the money to his friends and relatives. This left him in poverty.
22. The applicant claimed his financial situation was further worsened when his land was confiscated by the local government approximately 5 years ago. He thus lost an important source of income. He claims he was persecuted for reason of membership of a particular social group, being people who had breached the one-child policy in China, and for this reason was seeking protection in Australia.

#### *Department interview 19 March 2009*

23. The applicant provided evidence at an interview with the Department that is summarised as follows:

The delegate indicated after introductory comments that a Mandarin interpreter was being used and the applicant indicated he understood the interpreter clearly, and had no objections to the interpreter. The interpreter indicated the applicant had a strong accent.

The applicant indicated the written statement submitted with the application was about his application to stay in Australia but he was not sure of the contents. The agent read the statement back to him once. He had nothing to add to the statement.

The applicant confirmed his claim that he had 3 daughters. He had breached the law and borrowed money from his friend, who told him he could go to Australia. The delegate referred to the law in China regarding the one child policy and that it affected all citizens. He asked why the applicant felt the law amounted to persecution. The applicant said 'it was the government' The delegate referred again to the general

application of the law. The applicant stated that at the time of the birth of the first child there was no such law, but there was when the second child was born. He thought the law came into effect around 1992. The applicant had 6 siblings, including 3 brothers. His siblings also had more than one child, and they also had problems. His wife had 5 siblings. He was married 17 February 1989. His first child was born 25 August 1989 His wife was pregnant before they married but the government did not know about this. He experienced no problems from the authorities relating to the birth of the first child.

When his second child was born they were fined more than RMB 10,000 by the government as it was less than 3 years since the first child. The applicant wrote his address in China. They have always lived at the same address in the village. He was asked whether he knew the law in Guangdong about second children for those living in villages. He stated there was a fine if the second child was born less than 3 years after the first; his child was born after 2 years. He borrowed money from friends to pay the fine. There is no problem if the fine is paid. One could get a birth certificate if the child was born in hospital, however, household registration was not possible if the fine was not paid, and the child would not be able to go to school. He did not have his household registration with him. He had decided before coming to Australia that he would apply for protection. He did not bring the papers because he did not have them, but had them in China. He forgot to bring them to Australia. After paying the fine nothing happened.

The applicant did not know if the authorities talked to his wife after the birth of their second child The delegate indicated the government generally spoke to families after the birth of a second child. He then said they said 'don't have a third child or there would be trouble'. The delegate said he had just stated they did not talk to him, and the applicant stated 'they are like that'. He was fined after the birth of his third child and he lost his job. He was asked who warned him about having a third child, and was asked who came from the government. The applicant stated it was a cadre from the village.

The applicant stated after some hesitation when his third child was born. The delegate asked if the applicant was looking at something written on his hand, and the applicant stated it was his phone number. He lost his job and it was hard to make a living, and his friends were supporting him. He was a rice farmer. The delegate indicated it was implausible that he lost his job because of his child. The applicant said the government confiscated his land 5 years ago. The delegate raised the issue that the third child was born in 1993, and thus how could it be that he lost his job after 1993 when he lost his land 10 years later (2003). The applicant stated that after 1993 it was forbidden to work on the land so he had to find work elsewhere. He did odd jobs. His fine after the third child was RMB 50,000.

The delegate asked whether any written document was given regarding the fine and the applicant stated if the fine is not paid the child cannot go to school and they cannot do anything. The delegate repeated the question and the applicant stated the authorities just said the child would not study and he could not continue to be a farmer. It was a government official, not a policeman, just a person in charge of birth control. He got a receipt for the payment but did not have a copy. The children all study now. He paid the entire fine about 5 years ago. The delegate asked why the government took his land if he paid the fine. He stated the government acquired all the farm land and sold it. The delegate stated this indicated the land was acquired not because he had more than one child. The applicant agreed that the government took the land because it wanted all the land, and agreed this was a different issue to the one-child issue.

After the applicant lost his land he did odd jobs. When asked whether he 'fought' to get his land back, he stated the government sold all the land and there was nothing one could do. He obtained compensation of several tens of thousand, and then stated it was RMB 20,000. The government took all the land in the village. He did not protest about it. When he received his compensation he cleared all his debts. After this he did not have a job or anything and life was hard.

The delegate indicated the applicant travelled to Australia on a tourist visa. The applicant stated his friend applied for the visa. The friend suggested he go to Australia and perhaps stay and find a job. He borrowed money for this and also his children have to study. He did not sign the visa application form. He applied through Guangzhou and it cost him RMB 30,000. He did not attend the Australian immigration office and no-one talked to him about the application. The delegate raised the issue that the Department talked to him over the phone, but he denied this. His friend helped him with everything. He travelled to Australia alone.

The delegate indicated he understood the applicant had some problems because of having more than one child, and that the government took his land, but these problems were finished in 2003. It appeared to the delegate that the applicant's problems after 2003 are that he has no job or money and thus was in a poor economic or financial condition, but the delegate did not consider this constituted persecution.

The applicant stated he paid a lot of fines and borrowed money from his friends. The delegate stated the fines were for violating the general law in China, and this did not establish he was a refugee. The applicant stated he hoped to get more time in Australia because he has no money and borrowed money to come here, so he has a debt and he needs money because his children have to study.

The delegate explained he would make a decision on the information provided and gave some explanation about the applicant's right of review. The applicant reiterated that he wanted more time because his life was hard and he borrowed a lot of money from his friends. The delegate indicated again this did not appear to establish the applicant was a refugee. The applicant stated this was all caused because of birth control policies. The delegate stated this was a general law in China. The applicant could not go back because it was complicated; he could not go back for documents as he would not be able to get back to Australia, and he wanted time so that he could find a job. The applicant continued to ask about applying for an extension of his stay to find a job and make money and return to China to clear his debt. He thought if he applied for a refugee visa he could stay in Australia longer.

The delegate asked why the applicant applied for a protection visa some 1 ½ months after arrival. He stated he applied for the visa within a week of arrival; his agent organised the application. The delegate referred to the date of the application was signed, and stated he took more than a month to apply and this indicated he had no fear of the Chinese government. The applicant stated he had no choice because he had a huge debt.

### *Review application*

#### *Tribunal hearing*

24. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.

25. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
26. The applicant provided his Chinese passport at the hearing and the Tribunal took copies.
27. The applicant gave his full name and date of birth and address as indicated in the visa application, and stated he lived at his home address from the time of his birth until he left China for Australia. He was married. He stated he had 3 children and gave their names and dates of birth. He stated his eldest child attended senior high school, as did his second child, and his youngest child attended junior high school. The applicant agent prepared the written statement for the application after the applicant told him his story. The agent read the statement back to him.
28. The applicant stated he was fined RMB 10,000 after the birth of his second child. The Tribunal asked whether the family planning laws of China were in force at the time his first child was born and he stated they were. The Tribunal raised the issue that the applicant told the Department the laws were introduced around the time of the birth of his second child, yet the independent information established the laws had been in force since the early 1980s. The applicant stated the interpreter must have made a mistake; he did not know what she was saying. The Tribunal stated the delegate asked him specifically about whether the laws were already in force, and he gave no indication he did not understand the interpreter. The Tribunal indicated it had some concern the applicant would not know when the laws had come into force. The applicant stated he was not asked about this and the Tribunal indicated it had listened to the record of the interview and considered he was asked about this. The applicant stated there was no fine for the first child, just for the second. The fine was imposed by the commune. He stated his village was close to the town, but confirmed it was in a rural area and he worked as a farmer. He got the RMB 10,000 by borrowing from friends and it took him 2-3 years to pay the money back. The commune advised him everything would be in order once the fine was paid. He paid the money in one payment. He experienced no problems relating to the birth of his first child, and he could include the second child in his household registration when he paid the fine. The Tribunal referred to independent information about the very flexible application of family planning laws in Guangdong province, and that in respect of farmers in rural areas in particular, there were generally no problems in relation to a second child if the first child was female. The Tribunal indicated this made it difficult to accept his claim that he was fined RMB 10,000 after the birth of his second child. The applicant stated that he breached the legal requirements at the time because the second child was born within 3 years of the first. The Tribunal stated it was difficult to accept this given the evidence of the very flexible approach of authorities in Guangdong. The Tribunal also referred to information about the average fines, and the increases that took place in the late 1990s; the Tribunal explained that around the birth of the applicant's second child the fines averaged RMB 1-3, 000 and increased to RMB 5-10,000 in the late 1990s. The applicant stated the fines were decided by local authorities.
29. The Tribunal asked if the authorities came to discuss the family planning laws with him and his wife after their second child was born. He stated they did not. The Tribunal indicated it appeared unusual that no-one came to discuss the issue, and the applicant stated the issue for officials was whether the money was paid. The Tribunal stated that at the Departmental interview he had eventually stated that someone did warn him about having a third child. The Tribunal also stated his evidence at the interview on this issue was problematic because he had initially stated no-one talked to him about it, then stated he did not know if anyone talked to his wife, and eventually stated some-one warned him not to have a third child. He stated it

seemed someone did talk to his wife, but he did not know. The Tribunal stated it was difficult to believe the applicant was not aware whether officials had come to discuss the family planning laws. He stated it seems there was someone who said there would be a heavy fine if they had a third child. The Tribunal indicated it had concerns about the inconsistent evidence and thus about whether the applicant was giving an accurate account of his family circumstances. The applicant stated that after the birth of third child a heavy fine of RMB 50,000 was imposed by the local authorities, and this is why he was seeking help from the Australian government. The Tribunal indicated he had not responded to the issue raised about the inconsistent evidence he had given regarding approaches by officials. He then stated that a village comrade had mentioned something about the family planning laws.

30. The Tribunal asked if the applicant and his wife saw any officials after the birth of their first child to obtain permission to have more children, and he stated he did not. He stated that there were no such regulations. The Tribunal referred to independent evidence that the policies in Guangdong at the time allowed couples to have 2 children. The official laws stated that permission needed to be sought but Guangdong did not apply the laws strictly at the time. The Tribunal indicated it had concerns on 2 levels: the first was that given Guangdong's approach to the family planning laws it was difficult to accept the applicant was fined RMB 10,000 after the birth of the second child. The applicant stated he fell outside the permitted period of time which was 3 years. The Tribunal explained that as the laws provided an exception in any case if the first child was a girl, it was difficult to accept the applicant's claim. The applicant reiterated one was allowed to have another child only after 3 years. In relation to documents regarding the fines, he did not have them and he was too far away to obtain them. The Tribunal indicated it was not requesting documents. It would need to consider any the applicant provided but given the other problems with the applicant's evidence it might conclude they were not reliable given the evidence of the ease of obtaining false documents The applicant stated he got a receipt for the fine paid.
31. The Tribunal raised the issue that the fine appeared to be very high in 1993 given the information about the average level of fines, and the increases that took place in the late 1990s. The applicant stated again the last fine was also set by the authorities. He also borrowed money from friends for this fine, and paid it in 3 instalments over 3 years. He was told his child would have no access to education if the fine was not paid. He paid the fine fully in 1995. He confirmed that after the fine was paid his child was registered and obtained access to services including education. The Tribunal stated that even if it accepted the applicant paid the fines, it appeared the applicant had paid them by 1995, and his children were able to be registered and have access to services such as education. It was therefore difficult to see how the applicant feared being persecuted by the authorities if he returned to China. The Tribunal also explained that if it accepted the fines were imposed, it appears they were imposed in implementing family planning laws, and there was no indication the authorities had targeted the applicant for one of the Convention reasons when they imposed the fines. It was thus difficult to see this constituted persecution in the past and also that this established the applicant had a well-founded fear of being persecuted if he returned to China. The applicant reiterated that he had to borrow money to pay the fine, otherwise his child would not be registered. The Tribunal reiterated there was no indication the authorities had targeted the applicant after the fine was paid or that his children did not have access to services once the fines were paid.
32. The applicant stated again that he had to ask for help to pay the fines. The Tribunal indicated it was difficult to see the applicant had a well-founded fear of being persecuted if he returned



to China. He stated that before the fine was paid he often had quarrels with officials. The Tribunal stated this might not amount to persecution. The Tribunal indicated the applicant's own evidence was he paid the fines and his children were registered so it was difficult to see how this amounted to persecution. He repeated he had to borrow money to pay the fines, otherwise his children would not have been able to obtain education.

33. The Tribunal asked how the applicant thought his circumstances established he would be persecuted if he returned to China. He stated that because he had quarrels with officials before the RMB 50,000 was paid, and they would take revenge on his return. He stated he often had quarrels with officials because he felt the fines were too high; this was why his friends helped him to leave China. The Tribunal indicated the applicant had lived in China for approximately 13 years after paying the last fine. He repeated he often had quarrels because other people had not been fined so much when they had 3 children. The Tribunal expressed its concern that the applicant was embellishing aspects of his dealings with the authorities, as he had not made these claims at the Departmental interview. He had specifically stated at the interview that he experienced no problems once the fines were paid.
34. The Tribunal explained that the applicant had raised the issue of acquisition of land at the interview but had clarified that it was a separate issue to that of the family planning laws. The Tribunal indicated that it was difficult to accept the applicant had ongoing quarrels with officials over 13 years at a level that would constitute persecution. The applicant repeated there were many quarrels, and also many 'opinions' were given about the acquisition of land. The Tribunal stated it would come to the land issue shortly, but considered it was implausible from the applicant's evidence that he had continued to have problems with the authorities though he paid the fines, and that there was a real chance they would target him on his return.
35. The Tribunal stated the applicant said at the Departmental interview that he had no further problems with officials once he paid the fines, though he raised more general economic issues because of the money he had to borrow to pay the fines. He had indicated to the Tribunal that the issue for officials was the money, and the Tribunal explained this was consistent with the independent information, that is, that the main issue for officials was the collection of the fines. The Tribunal reiterated it was therefore difficult to see how the applicant had experienced persecution in China for a Convention reason in the past or that there was a real chance he would be persecuted for a Convention reason if he returned to China, in relation to the family planning laws. The applicant stated he was treated unfairly because others were fined a lesser amount.
36. The Tribunal asked about the acquisition of the applicant's farm land. He stated the year the government acquired the land but that he could not remember the month. He did not really agree but the land was acquired compulsorily. He received compensation of RMB 20-30,000. The government acquired a lot of land in the area for factory developments. The Tribunal asked if the applicant took any action regarding the acquisition. He stated he tried to avoid having the land taken because it meant he would have no income or future. The Tribunal asked if the applicant took any protest action or made petitions. He stated he did but to no avail. He tried to stop the acquisition of the land but he had no choice and one could not do anything. He raised disputes and lodged complaints to a higher authority but it was no use. The Tribunal indicated the applicant had not made these claims at the Departmental interview. He reiterated it was useless to do anything. The Tribunal explained again its concern was that the applicant had previously stated he had not taken action to complain or protest about the acquisition. The applicant stated he did protest but was not asked about it. The Tribunal referred to independent evidence about the widespread acquisition of farming

land in China , and the fact that many citizens were unhappy about the policy, but the applicant's evidence was that the authorities acquired his land as part of a broader program. The Tribunal stated that even if the applicant had made a complaint, this did not establish he was targeted as a result or otherwise adversely affected such that it constituted persecution. The applicant stated there was no job and it was difficult to live. He thought this was a claim of persecution because he could not live, and had relied on the land to maintain his family. The Tribunal stated that it might be that the applicant's economic circumstances became more difficult as a result of the acquisition but it was difficult to see that this constituted persecution for a convention reason. He stated he did not want to sell the land and the acquisition was 'forced' upon him.

37. The Tribunal asked in what way the applicant felt the authorities would target or persecute him after the acquisition of his land, for which they paid compensation. He stated there were arguments with officials about the amount of compensation. The Tribunal raised again its concerns that the applicant had not claimed at the Departmental interview that there were arguments or complaints with officials about the amount of compensation, and the Tribunal was concerned that the applicant was attempting to create a profile of having experienced problems with the authorities. The applicant stated he had given a true account to the Tribunal. The Tribunal indicated it did not seem plausible he would omit out such important details in the Departmental interview. He stated he was not sure the interpreter at the Departmental interview understood what he was saying during the interview. The Tribunal stated that the applicant gave no indication during the interview that he did not understand the interpreter. It was thus difficult for the Tribunal to accept that the interpreter had not understood what he said, even though the Tribunal accepted the interpreter mentioned he had an accent.
38. After the applicant's land was acquired he worked as a mason in the construction industry. It was not a fixed position but he worked for different employers. He usually had work for about 6 months and then changed employer. He went to another town to work; it was about 15 km away from his village and took about a hour to get to by bicycle. The Tribunal stated that the applicant had worked as a mason after his land was acquired. The Tribunal considered that the applicant's difficulties in China might be a result of the economic conditions in his area, not because the authorities had targeted him for a Convention reason.
39. The Tribunal asked when the applicant paid off the money he borrowed from friends for the family planning fines. He stated he still owes money to his friends. The Tribunal indicated the applicant told the Department he cleared his debts relating to the fines when he received compensation in 2004, so it was concerned he was now claiming he still owed money in relation to the borrowings for the fines. The Tribunal indicated that although it might conclude the applicant still had a debt in relation to money he borrowed to obtain an Australian visa so that he could try to work in Australia, this was a different matter to any debt relating to the family planning fines. The applicant stated he did not clear his debt relating to his fines when he received compensation from the authorities. He indicated he was able to give more details at the Tribunal hearing because of the different interpreter. The Tribunal indicated it was difficult to accept this as the Departmental officer specifically asked him about when he cleared the debt and he had specifically stated he had cleared it after receiving compensation. He repeated that although he paid some of his debt when he got compensation, he still owed some money.
40. The Tribunal raised the issue of the applicant providing false information and comments to obtain his Australian visa, and this raised a concern about the applicant's credibility

generally. He stated his friend organised the visa. The Tribunal indicated it appeared the applicant was prepared to provide false information to get a visa, or at least was aware that false information would be provided to get a visa. He stated his friend organised the visa and he had to pay RMB 30,000 for it. The Tribunal indicated it might conclude that the information provided with the visa application was false but that this was in order to obtain a visa that he otherwise might not have obtained, rather than for any reason connected with his claims for protection.

41. The applicant stated he was seeking protection in Australia. The Tribunal explained it had outlined its concerns about the applicants; evidence, but would consider all the evidence given in making its decision. The Tribunal asked whether the applicant had anything else to raise in relation to his claims. He stated he thought he was persecuted because he breached the family planning laws and because of the land acquisition. The land was acquired in 2003 or 2004 and the process took a long time over this period. It happened a long time ago and it was hard to remember when it finished. The Tribunal indicated it seemed unusual he did not remember when the process was completed. He stated there were quarrels with officials during the process, and he was busy trying to make money to support his family.

*Section 424A letter*

42. The Tribunal sent a letter to the applicant inviting him to comment on or respond to information the Tribunal considered would be the reason or part of the reason for affirming the decision under review.
43. The Tribunal received the applicant's response in which he stated:
- He could not remember clearly things that happened many years ago and thus might have been wrong in some of the evidence given to the Department and/or the Tribunal, but he did not mean to mislead the Department or the Tribunal.
  - His visitor visa was arranged by an agent in China who provided incorrect information.
  - He speaks Cantonese better than Mandarin and there may have been some misunderstandings between the Mandarin interpreter and him.
  - He does not wish to return to China as he hates the government and has been mistreated by it because of his breach of the one-child policy and the land confiscation dispute.

*Independent evidence*

Family planning regulations

44. The Family Planning Regulations of Guangdong province effective from 1 June 1986 provide:

Article 5

...Each couple in the city or town population category (state cadres, staff and city or town residents) can only have one child. Those who meet one of the following conditions should first lodge their applications, and can be arranged to have a second child depending on the quota and the time limit between two births after their applications are approved by the family planning authorities at the levels of county (city) or district under the jurisdiction of the city government:

1. The first child who is disabled and cannot join the normal work force after growing up. His/her disability must be determined as non-genetic one by the "Family Planning Technical Assessment Group" at county or above levels;
2. As for the second marriage, one side of the couple has a child and the other side has no child; or both sides have a child before the second marriage, but have no child in their new family after divorce as the custody of their children is given to their previous spouses according to divorce decree;
3. Those who have been determined as infertile are pregnant after adopting one child according to law;
4. Husband and wife who are both the only child in their respective families;
5. Those who have worked in mines or under the sea for 5 consecutive years and are continue to work there.

Couples in the agricultural population category are encouraged to have one child. Those who request for the second birth must be subject to the overall control and arranged in a reasonable way by the people's governments at village or town levels depending on the population quota and time limit between two births. Those who can meet one of the conditions from 1 to 4 listed above or whose first child is female will be given a priority consideration.

Those who intend to give second birth must wait for a period of over four years after the first birth. The exact period should be determined by the people's governments at the levels of county (city) and district under the jurisdiction of a city government.

Third birth and second birth without permission are prohibited. ...

#### **Chapter 4 Restrictions and Penalty**

Article 16 Those who violate the family planning regulations are penalised according to the following rules:

1. State cadres or staff who have their second children without permission will be fined apart from necessary administrative punishment by their workplaces. The fine will be deducted as "violation fee" by the workplaces of both husband and wife based on no less than 20% of their wages from the birth of their children till their 7th birthday. Those who do not obey the time limit for their second birth are fined until the end of the time limit applicable. Those who give more than two births are penalised severely.
2. Self-employed or unemployed people who have their second children without permission are penalised by their local town people's governments or neighbourhoods in consideration of Rule 1. Industrial and commercial administration authorities or labour service authorities should give assistance in collecting the fine.
3. As for the peasants who have their second children without permission, both husband and wife will be penalised and the amount will not be less than the average total annual income of the local labour force. Duration of the penalty is determined by the people's governments of county (city) or district under the jurisdiction of a city government. Those who give more than two births are penalised severely.

(Family Planning Regulations of Guangdong Province (Promulgated & Effective 1 June 1986) (English translation by DIEA Translation Service Centre, Canberra)

45. Revised regulations were issued in Guangdong in November 1992 and remained in force until further revisions were made at the end of 1997:

...

Article 8. The couple including the state cadres, workers and residents in the cities and towns may only give birth one child. Those who tally with one of the following situations and make their own application and are approved by the family planning departments in the counties, cities and districts under the jurisdiction of the municipal government may be arranged to have another child according to the planned population quota and birth space.

- a. Those who have the first child suffering from the nongenetic diseases and disabling for the normal labourer, who is identified by the family planning technical group at the county level or above;
- b. One side of the remarried couple has only given birth to one child and the other side has not or both sides of the remarried couple who have given birth to one child before remarriage and the child have [sic] been judged to the ex-spouse at divorce according to the law and no child in the remarried family;
- c. Those who have been identified sterility [sic] and are pregnant after adopting a child according to the law;
- d. The only sons marry with only daughters;
- e. Those who have worked in the mine [sic], under the well [sic] or sea for 5 years or above and now still working in these fields.

Article 9. The couples in the rural areas are encouraged [sic] to have one child. Those who apply for having two children must be arranged as a whole by the people's government in the village and towns according to the planned population quota and birth space. Those who conform to one of the items a. to d. or those who have given birth to a daughter first may be given priority to have the second child.

Article 10. Those who will have the second child must be spaced for 4 years or above after giving birth to the first child. ...

Article 32. Those who violate the family planning regulations will be punished as follows:

- a. Those who in the town have second child unplanned will be give [sic] the necessary punishment, each side of the couples [sic] will economically be fined no less than 30% to 50% of their wages. One time collective [sic] 7 year unplanned charge. Both sides of the couple who are cadres or workres [sic] will be no permit to rise up high [sic] position and given bouns [sic] in 5 years. (except the award for achievement in scientific research and creation).
- b. Those couples who are in rural area [sic] will not be arrange [sic] to work in the village and town enterpries [sic] and will not to change from the agricultural population to non-agricultural population with in 5 years. They cannot enjoy the collective welfare treatments.

c. Violate article 10 of the regulation those who will have second child not in spaced time, must be collective one to three years unplanned birth charge.

d. The couples who have married but not attain late birth age, and no [sic] have fertility certificates birth first child, will collective one year unplanned birth charge.

The couples who are [sic] not attain [sic] married age, and the unmarried people who have children will be punished from the day of child's birth to five years.

The charges for unplanned birth will be collected and managed by the town governments and street offices and only used as the specific family planning program.

(29th Session of the Standing Committee of the Seventh Guangdong People's Congress 1992, The Guangdong Family Planning Regulation (An unofficial translation provided to the Refugee Review Tribunal by Ms Penny Kane), 28 November (CISNET China CX4354))

46. In an RRT record of conversation, dated 15 August 1994, Penny Kane, senior author of 'The Second Billion: Population and Family Planning in China', provided advice on the generally lax enforcement of the one child policy in Guangdong:

I asked Ms Kane whether she would be able to comment on family planning in Guangzhou, particularly in relation to forcible sterilisation and penalties for breaching the one child policy. Ms Kane replied that forcible sterilisation was not policy and should not be being practiced [sic] in Guangdong. She added that Guangdong was one of the pieces in China where the family planning regulations had been least enforced. She said she had been in China a few months ago and average family size in Guangdong is still well above the national average, with many families of three rather than two children being evident.

She added that the new Guangdong Provincial Regulations relating to Family Planning 1993 [issued in November 1992] don't any longer insist on the idea of a single child family, they say it is a matter for local negotiation. She said that the old Guangdong regulations, of which no one took that much notice, said that the 3rd birth and 2nd unplanned child were strictly forbidden for the rural population and that the 4th birth and 3rd unplanned child for minorities were strictly forbidden. These clauses have been deleted from the 1993 regulations. The 1993 regulations state that unplanned births are strictly forbidden. According to Ms Kane, this is a return to the policy prior to the introduction of the one-child policy in the early 1980s. It is a return to the policy whereby people negotiated with their local work unit or township if they wanted to have a 2nd or 3rd child. Ms Kane felt this change in wording was extremely significant. However, Ms Kane added that in the new regulations the penalties for unplanned children (rather than the 2nd unplanned child or 3rd birth) had increased and been extended for those who lived in towns

Ms Kane added that based on 1987 figures, 90% of women in Guangdong who had given birth to one child subsequently gave birth to a second child. Of these women, just over 54% of them went on to give birth to a 3rd child.

Ms Kane said that there was no doubt that within the towns the family planning system had been more effective, although in Guangdong generally it had not been very effective. However, she added that it may happen that in a particular town or local area, family planning workers may go over the top, as they are in a difficult position, and this could lead to an abuse like forced abortion or sterilization.

(RRT Country Research 1994, Record of Conversation with Ms Penny Kane, 15 August)

47. The Canadian Immigration and Refugee Board (IRB) have reported that family planning fines were increased to between 5-10,000 yuan in 1998:

In Guangdong, which has a growth rate of 15.52 per 1,000 people, restrictions have been tightened in 1998-99, due to fears that excessive population growth could hurt economic development (AFP 20 Oct. 1998; South China Morning Post 3 Nov. 1998).

...Sanctions for breaking regulations have risen from 1-3,000 yuan (CDN\$183-549) to 5-10,000 yuan (CDN\$915-1,830) (HRIC Dec. 1998). In one district, individuals who give birth out-of-plan may not receive business permits or driver's licenses (Population et Sociétés July-Aug. 1998) (Immigration and Refugee Board of Canada 1999, China: One Child Policy Update, Issue Paper, June [http://www.cisr-irb.gc.ca/en/research/publications/index\\_ehtm?docid=126&cid=50&sec=CH04](http://www.cisr-irb.gc.ca/en/research/publications/index_ehtm?docid=126&cid=50&sec=CH04)).

48. In June 1999 DFAT reported that in Guangdong "the amount of a fine depended on the circumstances of the family, and could vary from RMB100 to RMB7000 or more":

Our post noted that in Guangdong violations of family planning regulations were regarded as civil, not criminal, matters. People who breached the regulations were fined and, if employed by state-owned enterprises, might lose subsidised housing and employment. The amount of a fine depended on the circumstances of the family, and could vary from RMB100 to RMB7000 or more (Department of Foreign Affairs and Trade 1999, Family Planning in China, Senate Foreign Affairs, Defence and Trade Legislation Committee, DFAT answer to questions on notice, Budget estimates hearing, 9 June, Hansard Page 310, 313, 314).

#### Land acquisition

49. The Academic Thomas Lum, in a 2006 paper for the US Congressional Research Service, presents this summary of the government's position in relation to growing unrest relating to compulsory land acquisition and perceived inadequate compensation:

The PRC government's efforts to address social unrest have been hampered by tensions between the central and local governments, institutional weaknesses, inconsistent policies, and the inability or unwillingness to undertake fundamental political reforms. The central government has acknowledged that the grievances of many citizens have been legitimate, and occasionally has corrected local policies that have violated the law or punished local officials for employing excessively violent tactics against protesters. However, the state has reserved the authority to arbitrarily determine which protest activities are acceptable. It has not developed adequate institutions that protect human rights, cede political power to social groups, ensure judicial independence, and resolve social conflict. Many small demonstrations have been tolerated, but marching, organizing, and talking to reporters have brought harassment and repression by government authorities. At the end of 2005, the central government pledged a number of additional reforms aimed at rural unrest, including better management of land use, strengthening the legal system, protecting farmers' land, raising rural incomes, increasing social spending on health care and education, and abolishing the national tax on farmers. However, these policies will likely be resisted by local officials whose power remains unchecked and who are desperate to attract investment and prone to corruption.

(Lum, Thomas 2006, Social Unrest in China, US Congressional Research Service, 8 May, p.8 <http://www.fas.org/sgp/crs/row/RL33416.pdf>)

50. In relation to the acquisition of land from farmers Lum reports:

In the past few years, a new kind of protest has appeared, caused by anger over local development projects and resulting land confiscation and environmental degradation. The lack of property rights in China has led to many governmental abuses at the local level. The country's first comprehensive bill on property rights, which purportedly would help both wealthy private entrepreneurs and common citizens protect their rights to property, was shelved at the annual session of the National People's Congress in March 2006 following opposition from conservative leaders. A majority of Chinese peasants have long term (30 year) land-use contracts but not ownership or the right to sell them. When land takings occur, farmers are entitled only to compensation based upon agricultural output and resettlement costs.

Village, township, and county governments generally receive the lion's share of the price of the "sale" or transfer of land-use rights to the developer. Violent clashes between demonstrators and police have erupted in not only poor regions in China's interior, but also rich coastal areas, where development pressures are heavy.

(Lum, Thomas 2006, Social Unrest in China, US Congressional Research Service, 8 May, p.3 <http://www.fas.org/sgp/crs/row/RL33416.pdf> )

51. On 20 January 2006 the BBC News reported that Chinese Premier Wen Jiabo stated that the unlawful acquisition of farm land by local authorities and the lack of reasonable compensation was threatening rural stability:

Chinese Premier Wen Jiabao has said that land seizures by local authorities are a key threat to rural stability.

He said land grabs and a lack of proper compensation for those affected was sparking "mass incidents".

Some places are unlawfully occupying farmers' land and not offering reasonable economic compensation and arrangements for livelihoods, and this is sparking mass incidents in the countryside," he said.

He said farmers were paying the price for China's rapid urbanisation. ('Chinese PM warns on rural unrest' 2006, BBC News, 20 January <http://news.bbc.co.uk/2/hi/asia-pacific/4630820.stm>).

52. Kevin O'Brien and Lianjiang Li, in their 2006 book on resistance in rural China, argue that central government regulations "to protect ordinary people" have been ignored by many local officials. They claim that as a result of this local officials have, among other things, "expropriated land and used coercion against villagers". O'Brien and Li state that:

The problem of misimplementation in rural China has been particularly vexing concerning measures that aim to protect ordinary people. Since the 1980's, the central government has announced a number of policies designed to limit local extraction, increase the transparency of village finance, introduce villager' self-government, and prevent local officials from using undue force. On the ground, however, many local officials have ignored these commitments, often with impunity. They have imposed arbitrary fees, diverted public funds, manipulated village elections, expropriated land, and used coercion against villagers. According to two officials in the Ministry of Civil Affairs, policies that instruct local officials to respect villagers' "lawful rights and interests" are typically "hot in the centre, warm in the provinces, lukewarm in the cities, cool in the counties, cold in the townships and



frozen in the villages” (O’Brien, K.J & Li, L. 2006, Rightful Resistance in Rural China, Cambridge University Press, New York, p. 28)

53. A 2006 report on land rights in rural China by Roy Prosterman, Professor of Law at the University of Washington School of Law, and president of the Rural Development Institute (RDI), and Zhu Keliang, also of the RDI, notes a number of problems in land security for farmers:

Findings from the 2005 survey confirm that the land rights of Chinese farmers are still under threat. Thirty percent of the village collectives that claim to have given 30-year land rights to farmers have illegally readjusted or reallocated farmers’ contracted land. Moreover, over the past decade, the frequency of governmental taking of farmers’ land for nonagricultural use has grown by more than 15 times. In only 22 percent of all land takings were farmers actually consulted about their compensation.

(Zhu, Keliang and Prosterman, Roy 2006, ‘From Land Rights to Economic Boom’, China Business Review, July-August, Rural Development Institute website [http://www.rdiland.org/PDF/PDF\\_Publications/CBR.From%20Land%20Reform%20to%20Economic%20Boom.07.06.pdf](http://www.rdiland.org/PDF/PDF_Publications/CBR.From%20Land%20Reform%20to%20Economic%20Boom.07.06.pdf))

## **FINDINGS AND REASONS**

54. The Tribunal finds on the basis of the applicant’s passport which he provided at the hearing that the applicant is a citizen of China (PRC).

### *Use of Mandarin interpreter at Department interview*

55. The applicant has stated at the Tribunal hearing, and also in response to the Tribunal’s letter under s.424A, that there may have been misunderstandings between him and the Mandarin interpreter at the Department interview, and that this would explain aspects of his evidence that appeared to be inconsistent, or which the Tribunal considered were problematic. He claimed at the Tribunal hearing that he felt he could give more details to the Tribunal because a Cantonese interpreter was being used. In his response to the s.424A letter he also stated he spoke Cantonese better than Mandarin.
56. The applicant stated in his visa application that he speaks, reads and writes ‘Mandarin/Cantonese’. The Tribunal has listened to the record of the Department (DIAC) interview on 19 March 2009. After some introductory comments the delegate confirmed that the interview was being conducted with the assistance of a Mandarin interpreter. The delegate asked whether the applicant understood the interpreter clearly, and he confirmed that he did. The delegate also asked if the applicant had any objections to the interpreter and he stated he did not. The Tribunal considers the applicant was reasonably put on notice that if he did experience difficulties understanding the interpreter he should let the delegate know. The Tribunal considers the applicant had ample opportunity to raise any problem he had understanding the interpreter during the interview, but he gave no indication at any stage that he was having problems understanding the interpreter in a way that adversely affected his ability to provide information. Nor did he indicate that he had problems providing information because he was speaking Mandarin. The Tribunal accepts that the Mandarin interpreter indicated at one stage in the interview that the applicant had a strong accent, and may have had to clarify some points on occasions. The Tribunal has taken into account therefore that there may have been some difficulties with interpretation. The Tribunal has also taken into account the applicant’s submission that he speaks Cantonese better than Mandarin. However the Tribunal does not accept that there were problems with or errors in

the interpretation such that they adversely affected the applicant's evidence. The Tribunal also does not accept that the applicant, in speaking Mandarin, was not reasonably able to express himself and thus did not have a reasonable opportunity to provide information at the Department interview. The Tribunal concludes that it can reasonably take into account the information the applicant gave at the DIAC interview when deciding the review.

*Breach of family planning regulations*

57. The Tribunal accepts that the applicant resided in the rural village of Village T, approximately 15km from the town of Town S in Guangdong province from his birth until the time he departed China for Australia in late 2008. The Tribunal accepts the applicant worked as a farmer on a plot of land in the village. The applicant has given some contradictory evidence regarding the period in which he worked as a farmer, and this evidence is discussed in greater detail below. The Tribunal finds for the reasons set out below that the applicant worked on his farm land until approximately 2004, when it was acquired by the Chinese authorities, and that after this time he worked in various jobs in China mainly in the construction industry, including as a mason.
58. The Tribunal accepts that the applicant has 3 children who reside with his wife in China. He has claimed that he experienced problems with the authorities because he breached China's family planning laws: this resulted in him being fined RMB 10,000 after the birth of his second child and RMB 50,000 after the birth of his third child. He claims he had to borrow money to pay the fines, which has caused severe hardship, and he was involved in ongoing disputes with officials even after the fines were paid.
59. The applicant claimed that he was fined RMB 10,000 after the birth of his second child because she was born within 3 years of the birth of his first child. The independent evidence about the implementation of family planning laws in Guangdong province in the early 1990s indicates that although family planning regulations were in place, they were administered very flexibly and indeed the authorities took a very lax approach to their enforcement. The evidence indicates that in practice the Guangdong authorities had not been insisting on the idea of a single child family, and also that families living in rural areas were given priority for applications for a second child if the first child was a girl.
60. The independent evidence indicates that the regulations at the time still required couples to seek permission to have a second child, and that there should be an interval of 4 years between the first and second child. The independent evidence also indicates that as the regulations were enforced at the local authority level, there was significant variation in the manner and degree to which they were enforced. Given this evidence the Tribunal considers it is plausible, notwithstanding the generally lax approach to the implementation of the regulations in Guangdong in the early 1990s, that the applicant was fined after the birth of his second child for failing to wait the specified interval, and/or failing to seek permission to have a second child. In reaching this conclusion the Tribunal makes no adverse finding in respect of the applicant's evidence at the DIAC interview that he thought the family planning laws came into effect in 1992. The independent evidence indicates they had been introduced in China in the mid 1980s, however it also indicates that revisions to the regulations were introduced in Guangdong in 1992. Given this and the passage of time since the birth of the applicant's second child, the Tribunal accepts the applicant may have been thinking about when there were changes to the regulations, or generally when the laws affected him in his circumstances.

61. The Tribunal considers that the applicant's claim that he was fined RMB 10,000 in respect of the birth of his second child is not consistent with the independent evidence. The Canadian IRB has reported that as a result of increases in the financial sanctions in 1998 (arising from a tightening of family planning restrictions in 1998), fines in Guangdong had risen from an average of RMB 1-3,000 to RMB 5-10,000. DFAT also reported in 1999 that the fines in Guangdong ranged from RMB 100 to RMB 7,000 or more. Given this evidence the Tribunal considers the applicant has inflated the amount he was fined in respect of the birth of his second child. When the independent evidence was discussed at the hearing the applicant indicated only that he felt the fines imposed on him were higher than those imposed on other families. The applicant gave no further explanation or details about why this might have been the case. In view of this and the independent evidence, the Tribunal does not accept the applicant's claim about the level of the fine. The Tribunal concludes that the applicant was fined a significantly lower amount, in the range indicated by the Canadian IRB evidence. The Tribunal concludes the applicant has inflated the level of fine imposed after the birth of his second child in an attempt to create a profile of someone who experienced significant difficulties because of the penalties imposed, or was singled out and more severely penalised than usual.
62. During the Tribunal hearing the Tribunal raised a concern with the applicant that his evidence at the DIAC interview about his dealings with the authorities after the birth of his second child was problematic. He told the Department that he did not know if the authorities spoke with his wife after the birth of his second child, and they did not speak with him. He then said they generally indicated that he and his wife should not have a third child or 'there would be trouble'. Although the Tribunal accepts this matter occurred many years ago, the Tribunal considers it is highly implausible the applicant would not have known at the time whether officials came to talk to his wife about the family planning laws. The Tribunal also considers his initial evidence on this point (that he did not know) was specific, and is satisfied that his problematic evidence has not been caused by inadequate interpreting. In addition, the Tribunal considers the applicant's own evidence to the Tribunal on this issue was problematic. The applicant told the Tribunal that officials did not come to discuss family planning laws with him and his wife after the birth of their second child, but then indicated generally he had a notion that someone did discuss the issue with his wife at least, and had mentioned there would be a heavy fine if a third child was born. The Tribunal considers the applicant's problematic evidence on this issue at the DIAC interview and to the Tribunal is an indication that he and his wife had minimal dealings with officials in relation to their first breach of the family planning regulations, and that they were of no real interest to the authorities beyond the issue of the payment of the financial penalty. The applicant's own evidence to the Tribunal elsewhere in the hearing was that the local officials were largely concerned with whether the relevant fine was paid. The Tribunal also considers the applicant's evidence on this issue does not support his claim that he was penalised at a significantly higher level than the average range indicated in the Canadian IRB evidence.
63. The Tribunal accepts that the applicant was aware generally that financial penalties would apply if he had a third child. The Tribunal accepts that by having a third child the applicant and his wife breached the family planning regulations and that the authorities imposed a fine as a result. However the Tribunal also considers the applicant's claim that the fine was RMB 50,000 is not supported by the independent evidence. As indicated above, the independent evidence indicates that even when financial sanctions were increased in Guangdong in 1998, the increased range of fines averaged RMB 5-10,000. The Tribunal has considered whether family planning officials may have targeted the applicant and imposed a higher level fine.

because of a second breach of the regulations, but given the evidence of the flexible way in which the regulations were administered in Guangdong in the early 1990s, and the findings above that the authorities took no specially adverse interest in the applicant, the Tribunal does not accept that this was the case. As indicated above, the applicant gave no further explanation of why he thought he had been penalised at a higher level than was usual, when this issue was discussed at the hearing. The Tribunal considers the applicant has inflated the amount of the second fine in a further attempt to create a profile of someone who was targeted and who experienced significant difficulties because of the level of fine imposed. The Tribunal concludes that the applicant's second fine was a significantly lower amount also in the range indicated in the Canadian IRB evidence.

64. The Tribunal accepts that the applicant had to borrow money from friends and/or family to pay the fines, and accepts that the fines were not insignificant amounts for him as a farmer. On the applicant's own evidence, he had fully paid the fines to the authorities in 1995, and his children were able to be registered and did not suffer denial of access to government services including education.
65. The Tribunal considers that other aspects of the applicant's evidence regarding his circumstances after the birth of his third child are problematic. He told the Department that he was forbidden to work on his land after the birth of his third child, but his evidence to the Tribunal was that he worked on his land until the authorities acquired the land as part of a wider land acquisition program. The Tribunal concludes that the applicant's claim to the Department was made in an attempt to boost his profile as someone who experienced other adverse consequences as a result of breaching family planning regulations. The Tribunal does not accept that the applicant was forbidden to work on his land or otherwise was unable to continue working on his land after the birth of his third child.
66. The Tribunal also considers the applicant has given inconsistent evidence about his subsequent dealings with the authorities as a result of the fines imposed for breaching family planning regulations. The applicant told the Department and the Tribunal that once he paid the fines his children were registered and had access to government services including education. Apart from the claim made to the Department about his ongoing employment on his land, the applicant gave no indication of any ongoing problems experienced with the authorities as a result of the fines. At the Tribunal hearing the applicant claimed he had ongoing disputes or 'quarrels' with the authorities about this issue. The Tribunal finds it is highly implausible that the applicant would not have mentioned such ongoing disputes about the level of financial penalties imposed at the Department interview, if this had actually occurred. The Tribunal concludes that the applicant's failure to mention protests and 'ongoing quarrels' he claimed to have had with officials in relation to these matters at the Department interview is a strong indication that he did not experience any ongoing disputes with officials in relation to the family planning regulation fines. The Tribunal does not accept the claim that he did not mention all the details about such issues because they occurred many years ago, as they are very significant elements of his claims made to the Tribunal that he continued to experience difficulties with the authorities even after he paid the fines and that as a result the authorities would seek to take revenge against him if he returned. The Tribunal also does not accept, as indicated above, that any such failure to give these details resulted from interpreting problems. The Tribunal concludes that the applicant made these claims at the Tribunal hearing in response to the Tribunal raising the issue that he appeared not to have experienced any problems with the authorities after paying the fines in full in 1995. The Tribunal concludes the applicant has made these claims in an attempt to strengthen his profile

as someone who had ongoing problems with the authorities in respect of his breach of family planning regulations, and who came to the adverse attention of the authorities as a result The Tribunal considers the applicant's evidence on this issue reflects adversely on his credibility.

67. The Tribunal also considers the applicant has given inconsistent evidence about when he paid off the debts he incurred from borrowing money to pay the family planning fines The applicant told the Department he cleared his debts when he received compensation for his land that was acquired by the authorities (in 2004), but he told the Tribunal that even after he received the compensation he still had debts and still owed money The Tribunal considers it is highly implausible the applicant would not have stated at the Department interview that he still had outstanding debts relating to the money he borrowed to pay the family planning fines even after receiving compensation for his land, if this were the case. The Tribunal has considered the applicant's explanation that he had been able to give the Tribunal more details because he had a different interpreter, however the Tribunal considers the delegate's question on this issue were specific and the applicant clearly indicated he had cleared all his debts relating to the family planning fines once he received his compensation. The Tribunal thus does not accept that the inconsistencies on this issue have been caused by language or interpretation problems. The Tribunal concludes that the applicant has made this claim to the Tribunal in a further attempt to strengthen his profile as a person who has continued to suffer unduly from the imposition of the family planning regulation fines by the Chinese authorities.
68. The Tribunal concludes that the applicant paid the fines for breaching the family planning regulations to the authorities in full by 1995 The Tribunal also concludes that the applicant was able to pay off any remaining debts relating to money borrowed to pay the fines, when he received compensation for the land acquired by the authorities in 2004.
69. The Tribunal accepts that the applicant may have incurred other debts which are still outstanding as a result of borrowing money to arrange for a visa for Australia. The Tribunal does not accept however that any current debts the applicant has relate to the fines he had to pay in the early 1990s for breaching family planning regulations.
70. The Tribunal has considered whether the evidence gives rise to claims of persecution for reason of membership of a particular social group.
71. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* (2004) 217 CLR 387 Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
72. Whether a supposed group is a "particular social group" in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular

social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

73. The Tribunal finds on the basis of the independent evidence that China's family planning policies are reflected in laws of general application that aim to limit the number of children that a couple may have. The laws or regulations provide an official sanction of a fine or 'social maintenance fee' for violating the regulations.
74. The Tribunal has found above that the applicant had fines imposed for breaching family planning regulations in respect of his second and third children. The Tribunal has not accepted that the fines were of the amounts of RMB 10,000 and RMB 50,000 respectively, but at significantly lower levels. The Tribunal has found that the applicant paid the fines in full in 1995, and his second and third children were registered and had access to government services once the fines were paid. The Tribunal has also found that the applicant continued working on his land after the birth of his second and third children, and did so until his land was acquired by the authorities in 2004. The Tribunal has also found the applicant paid off his debts relating to the money borrowed to pay the fines when he received compensation for his farm land in 2004.
75. The Tribunal does not accept, given the findings above, that the authorities targeted the applicant and imposed the fines in an unduly harsh or discriminatory manner whether for a Convention reason, including membership of a particular social group, or otherwise. The Tribunal also finds that the applicant did not undertake protests against or lodge complaints with the authorities in relation to the financial penalties imposed such that he came to the adverse attention of the authorities as a result. The Tribunal does not accept the applicant was unable to support himself or his family, or that his capacity to subsist was threatened by having to pay the fines.
76. The Tribunal therefore does not accept that the applicant has suffered serious harm in China amounting to persecution for a Convention reason, as a result of breaching China's family planning regulations in respect of the birth of his second and third children. Nor does the Tribunal accept that there is any real chance the applicant will be persecuted for any Convention reason as a result of these breaches if he returns to China.

#### *Compulsory land acquisition*

77. The Tribunal accepts the applicant's evidence that his plot of farming land in his home village, which he had farmed for a number of years, was acquired by the Chinese authorities as part of a wider acquisition of farming land in the local area for the purposes of industrial development. On the applicant's own evidence the land was acquired for the purposes of industrial development and not for any reason connected with the applicant's breach of family planning regulations.
78. The applicant's evidence is consistent with the independent information about large scale land acquisition by the Chinese authorities or by developers acting with the approval of the authorities, for urban and/or industrial development.
79. The Tribunal accepts the applicant's evidence that he received compensation for the land acquisition, although he was somewhat imprecise about the figure, stating it was in the range of RMB20-30,000.

80. The Tribunal accepts that the applicant was unhappy about the circumstances of the acquisition; it resulted in a significant change in his way of life generally and meant he needed to seek other employment. The Tribunal also accepts that the applicant may have been unhappy with the level of compensation he was paid. The independent evidence indicates increasing levels of discontent and unrest in China because of the extent of land acquisition, the methods used and related issues of corruption, and perceived inadequate compensation.
81. The applicant's evidence at the Department interview was that he took no action to protest against the acquisition because he was of the view that there was nothing that could be achieved by this. However the applicant claimed to the Tribunal that he had protested and had been involved in ongoing disputes with the authorities about the acquisition.
82. The Tribunal finds it is highly implausible the applicant would not have indicated at the Department interview that he protested to the authorities against the acquisition of his land, and was involved in disputes that ran over a significant period, if this had actually occurred. The Tribunal does not accept that the applicant would have forgotten to mention such a significant issue, especially as he subsequently claimed to the Tribunal that it was a reason the authorities would target him on his return. While the Tribunal accepts that the applicant may have expressed his unhappiness about the acquisition itself and even the level of compensation paid, the Tribunal does not accept the applicant was involved in any ongoing disputes with or protests against the authorities on these issues that brought him to the adverse attention of the authorities. The Tribunal concludes that the applicant has made these claims at the Tribunal hearing in an attempt to further strengthen his profile as someone who had protested against the authorities and who experienced ongoing disputes with the authorities in respect of the acquisition of his land, and who would be adversely targeted by the authorities as a result if he returned to China.
83. The Tribunal accepts that the applicant's land was acquired by the authorities as a result of a general land acquisition program that affected a large number of people in his area. The Tribunal does not accept that the applicant was targeted by the authorities for a Convention reason in relation to the acquisition of his land. The Tribunal finds that the applicant did not undertake any protests or lodge complaints or have ongoing disputes with the authorities relating to the land acquisition, and did not come to the adverse attention of the authorities as a result. The Tribunal accepts the applicant may have felt the compensation was inadequate, but the Tribunal does not accept that he was compensated in a discriminatory manner whether for a Convention reason or otherwise. The Tribunal accepts that the land acquisition meant the applicant was required to seek other employment. On his own evidence the applicant obtained employment mainly in the construction industry, although it was not in any permanent position. The Tribunal does not accept that the resultant change in the applicant's circumstances caused the applicant such significant economic hardship that it threatened his capacity to subsist, or denied his capacity to earn a living and this denial threatened his capacity to subsist.
84. The Tribunal therefore does not accept that the applicant has suffered serious harm in China amounting to persecution for a Convention reason, as a result of having his farming land acquired by the authorities around 2004. The Tribunal also does not accept there is any real chance the applicant will be persecuted as a result of the acquisition of land if he returns to China.

85. The Tribunal has also considered the applicant's broader claim that he 'hates' the Chinese government because he had been mistreated by the authorities on account of breaching the family planning regulations and disputes relating to the land acquisition issue. The Tribunal accepts the applicant may hold negative views about the Chinese government generally and the authorities in his area, as a result of his experiences. The Tribunal has also accepted, above, that the applicant may have expressed his unhappiness about the land acquisition and compensation. However the Tribunal has not accepted that the applicant was involved in protest action in the past, and the applicant has not made claims that he would undertake protest action in the future. The Tribunal therefore does not accept that the applicant will be involved in any political activities if he returns to China or be imputed by the authorities as having political opinions that will bring him to the adverse attention of the authorities.
86. The information before the Tribunal indicates that the applicant claimed in his application for a visitor visa for Australia that he was employed by Company Z in the position of Sales Manager, that he was married with one son, and that he was planning to visit Australia on a company incentive tour funded by the company. The application included evidence of substantial bank account deposits in the applicant's name. The applicant claimed that a friend organized the visa for him and he had to pay RMB 30,000 for it. The applicant implicitly acknowledged that false information and/or documents were provided in order to obtain the visa. The Tribunal accepts that the information provided for the visa application did not relate to the applicant. Given the findings above, however, the Tribunal concludes that any false information and documentation submitted to the Australian authorities as part of the visitor visa application were provided in order to facilitate obtaining a visa for Australia to which the applicant may otherwise not have been entitled. The Tribunal does not accept, however, that he did that for any reason connected with the problems he claimed to have experienced from the authorities or his claimed fear of harm if he returned to China.
87. Given these findings, the Tribunal does not accept that the applicant holds a well founded fear of being persecuted for a Convention reason if he returns to China now or in the foreseeable future, whether that arises from membership of a particular social group (such as parent in China who has breached family planning regulations), or actual or imputed political opinion, or any other Convention reason. Having considered the claims individually and cumulatively, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **CONCLUSIONS**

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

## **DECISION**

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

Richard Derewlany  
Member



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