

1008417 [2011] RRTA 160 (23 February 2011)

DECISION RECORD

RRT CASE NUMBER: 1008417

DIAC REFERENCE(S): CLF2010/78921

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Jennifer Ciantar

DATE: 23 February 2011

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 on [date deleted under s.431(2) of the *Migration Act 1958* as this information would identify the applicant] May 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] June 2010. The delegate decided to refuse to grant the visa [in] September 2010 and notified the applicant of the decision and her review rights by letter [on the same date].
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 [in] September 2010 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.
20. The applicant arrived in Australia [in] May 2008 as the holder of a Subclass 456 visa which was in effect until [date deleted: s.431(2)] June 2008.
21. On her visa application, the applicant stated that after her graduation in 1989 she stayed home and was unemployed. She married in 1999 and her son was born in [year deleted: s.431(2)]. From 2003 he fell ill quite often and was weak compared to children of a similar age, and vulnerable to various diseases. The applicant's mother in law advised the applicant to have another child while her first child was still young. However, the applicant had been fitted with an IUD when she was in hospital, against her will, and the doctor refused to remove it. Eventually they found [doctor's name deleted: s.431(2)] at [hospital deleted: s.431(2)] who was prepared to remove the IUD in April 2004. The applicant was still not pregnant by the end of 2004 but they increasingly wanted to have another child.
22. [In] May 2005 the applicant was notified of a visiting district clinic for a family planning check. [In] May 2005 the Family Planning Office notified the applicant that she had to undergo an abortion but the applicant had not been aware that she was pregnant. The applicant and her mother in law were very distressed and tried to plead with the district family planning office but they were told the policy would be enforced. The applicant's husband looked for help and found a person called [Mr A] who was a friend of a classmate. The father of [Mr A] is the chief of the administration office of the District Government and he is influential. The applicant paid [Mr A] or his father 20,000 RMB so he would talk to the chief of the administration office to exempt the applicant from the list of persons who must undergo a forced abortion [in] June. However, [in] June, officials from the Family Planning Office came to pick up the applicant from her home. The applicant's husband told the officials that the applicant was exempted but they showed her the list, which included the applicant's name. The officials rang their chief and he said that no one ever mentioned exempting the applicant. The applicant was forced into a van and told she must have the abortion. There were 6 distressed women in the van. The applicant was number 6 and when number 4 entered the theatre, the applicant tried to escape but she was caught and the officials slapped her and then she was forced to undergo an abortion. Afterwards, the applicant was in pain and her husband sent her to a city hospital where she was diagnosed with [condition deleted: s.431(2)]. A few days later, the applicant's son was diagnosed with [condition deleted: s.431(2)] and admitted to hospital, and this made the applicant even more determined to have another child.

23. [In] August 2006, the applicant's friend told the applicant that her cousin worked in a travel agency and could arrange visas to visit the USA or Australia. The applicant decided Australia was a safer environment and she borrowed 150,000 RMB from the bank in order to organise a visa for Australia. The applicant came to Australia [in] May 2008 because she would like to have another child.

Interview with the Department

24. [In] September 2010, the Department interviewed the applicant and a summary of the interview is as follows. Her last address in China was [address deleted: s.431(2)] Yanpai city, Shandong province, and this is where her registration is. She lived with her husband and her child who are in China. She has been to Europe – to Italy, France Germany and Switzerland and a fifth small country. She was told it would be easier to apply for an Australian visa if she had a record of having been to other countries. The applicant confirmed that this was her reason for travelling to these countries and she went there to travel, in 2007. When asked how she has spent her time in Australia, the applicant stated that due to the visa she held she was not allowed to work so she worked a few days a week but she is not currently working. She does not follow a religion. She arrived in Australia [in] May 2008, not 2010 as indicated on her application.
25. When asked to say in her own words what difficulties she has experienced, the applicant said that because her son was getting diseases frequently she wanted to have a second child but she was forced by the local authorities to have an abortion. When asked if she applied for permission to have a second child, the applicant said that she did not understand the question as in China, people are not allowed to have more than one child. The delegate put to the applicant that some people are allowed to have a second child. The applicant said that some people in rural areas might be allowed to have a second child but the applicant lived in an urban area. She decided she wanted to have a second child in 2003 when her son was sick. When asked when she found out she was pregnant, the applicant said it was [in] May 2005 when she was away. There is a local department that monitors the one child policy and she was notified that she had to go to the hospital for an abortion. In China, a woman has to take the annual test. She was notified that she was to take the annual test and then they called her up. They told her she was pregnant and she had to go to the hospital [in] June to get rid of the baby. When asked if she was given an option of paying a fine and having the baby, the applicant said she was not given this option as she was only told to report to the hospital; it is compulsory. When asked if she had any difficulty having a second child, the applicant said that she stopped using contraception when her son became ill because she wanted to have a second child. The applicant said that if a person has some association with the Government they might be able to have a second child but she had no such association. When asked what she did when she was told she had to go to the hospital, the applicant said she and her husband went looking for help as they wanted to keep the baby. Then they went to some friends of the applicant's husband and they said that someone called [Mr A] could help them. He was the classmate of a classmate of the applicant's husband. They asked him if he could get the applicant's name off the list of women who had to have an abortion. They gave [Mr A] 20,000RMB and he said he would take care of it.
26. However, it turned out that her name was still on the list so the applicant went to the hospital [in] June and had the abortion. [Mr A] took the money and did not take care of the matter. The hospital was [hospital deleted: s.431(2)]. They arrived about 8 am and the applicant was escorted there by some officials. The applicant was about [duration deleted: s.431(2)] pregnant. There was another pregnant woman in the car. There were 6 altogether including

the applicant. There were 2 escorts and the applicant is not quite sure but she thinks they were from the hospital and they were not wearing a uniform. When they arrived at the hospital, they were placed in a queue, outside the hospital, to wait for the abortion. When asked to describe the queue, the applicant said that they were in the queue in the hall of the hospital and there were 6 people in the queue. The applicant was number 4 in the queue and when it was about to be her turn she tried to slip away but they caught her and took her back to the hospital. She only got to the front door and because she tried to resist them, they dragged her to a room and slapped her face. No one else tried to resist. Her husband was at work at that time, as the applicant was at home when they came to take her to hospital. They had thought that because they gave money nothing would happen to her so she was home alone. The applicant said that she was not awake during the abortion and she went home straight afterwards. She was escorted by the same people. After the abortion it was painful around her belly and she went to hospital and found that she had a uterus infection. She went to a different hospital, the municipal hospital. She was given the test results. She was not given any documentation when she had the abortion; they will not give them any documentation.

27. At the end of 2006 the applicant decided that she wanted to come to Australia because she was told by friends that she could have babies in Australia. When asked if she wanted to come to Australia with her husband and child, the applicant said that she did but they did not apply for a visa because it would cost a lot of money. They decided that the applicant would come first and the others could follow. She arranged the visa by going to an agent and paying some fees. She paid 140,000 RMB to the agent and she knew the type of visa for which she applied. She took out a loan from the Bank of China to pay the agent.
28. The delegate put to the applicant that on the visa application she said she was coming to Australia to attend a manufacturing course or conference. The applicant said that she was not coming to Australia to attend a manufacturing course. The delegate again put to the applicant that on the application the applicant says she was coming to Australia to attend a manufacturing course and that she works in manufacturing. The applicant said she was coming to Australia to attend a manufacturing course but she does not work in manufacturing. The information given on the visa application was false. The applicant said that before she came to Australia she had her own business selling food. It was like a grocery shop selling items such as milk, wine and cigarettes, and she had this business for about 3 years and she received some help from family members.
29. The applicant said that she had no problems with the authorities after she had the abortion. She did not have any difficulties with the authorities when she went to Europe but when she came to Australia the major difficulty was that she could not have a second child. She had no difficulty leaving China. When asked why she had not applied for protection when she went to Europe, the applicant said that it did not occur to her to apply for protection in Europe and because she was told that Australia was a country that upheld human rights she had decided to come to Australia. When she was in China she did not know that she could apply for protection in Australia. She found this out about a few months after her arrival. When asked why she did not apply when she found out she could do so, the applicant said that she was told that if she applied and her application was not approved it might be difficult or impossible for her to return to China and then she would not be reunited with her husband and child. If she could not get a protection visa then she would not be able to stay or go back. The delegate put to the applicant that normally if a person is granted a protection visa they cannot return to China. The applicant said that she would like to stay here so she can have a second child, as long as her husband and son can come to Australia. The delegate put to the

applicant that she had said that she had not applied for protection because she was concerned that if she was refused she could not stay. The delegate asked the applicant what has changed. The applicant said she was told recently that if she was granted a visa then after 4 years she could apply for her son and husband to join her in Australia. The applicant said that the most important thing is for her son to join her in Australia.

30. When asked what she thinks would happen to her in China, the applicant said that if she goes back to China she will not be allowed to have a second child and if she falls pregnant she will be forced to have an abortion. When asked if she would move to a rural area so she could have a second child the applicant said that she cannot change her registration, which is in an urban area.

First Tribunal Hearing

31. The applicant appeared before the Tribunal [in] November 2010 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
32. The applicant's oral evidence can be summarised as follows. When asked whether she received assistance in completing the visa application form, the applicant stated that she wrote down her claims and then she asked a student at [Location A] library to give her some assistance. There are many overseas students at [Location A] library. The person she asked was not someone that she personally knew. The Tribunal put to the applicant that the visa application form indicates that the statement was translated by an accredited interpreter. The applicant said she does not know anything about an accredited translator being used as she just asked an overseas student to give her some help. She did not pay the student as the student did not ask for payment, just for dinner. The Tribunal put to the applicant that it was difficult to understand how an accredited translator would not have been paid for their services. The applicant stated that she just spoke to the student in [Location A] library who offered to assist her.
33. When asked why she had not applied for protection as soon as she arrived in Australia, the applicant stated that after she came to Australia she was told that if her application was declined she could never return to China and if she returned to China she would be targeted by the authorities. The Tribunal asked the applicant why she had come to Australia if she did not intend to claim protection. The applicant stated that it was because in China, she was forced to have an abortion and she had lost the chance to have a second child so her only choice was to come to a free country. The Tribunal again asked the applicant her purpose in coming to Australia. The applicant stated that it was because she wanted to have another child and she was not allowed to do so in China. The Tribunal asked the applicant how she could have another child in Australia when she had come to Australia without her husband. The applicant stated that she wants to stay in Australia and contribute to Australia because she is a young woman. She wants to have one more child. The Tribunal again asked the applicant how she intends to have another child in the absence of her husband. The applicant stated that they had planned that her husband would follow her to Australia, after about six months when he had saved up more money. They had intended to use the same travel agent to arrange her husband's passport and visa. However, her husband did not make much money from his job and their son was sick for a long period so he did not have enough money. Her husband is employed as a worker in a ship manufacturing factory.

34. The Tribunal put to the applicant that she stayed in Australia unlawfully from June 2008. The applicant confirmed that this is correct and said that she did not have permission to work. The Tribunal put to the applicant that she claims to have come to Australia in order to have a second child but instead she did not claim protection and she stayed unlawfully for more than two years. The applicant stated that this is not the case because she wanted to apply for protection but she hesitated when she was told she could not return to China, as she missed her son. She was told by other people, particularly a person from her own hometown that she would not be able to return and that the Communist party does bad things to people who go back so the applicant was fearful. The applicant stated that she had not approached a migration agent or lawyer for advice. She was frightened that she would not be able to return to China and she missed her husband and son. The Tribunal put to the applicant that it is difficult to understand why she came to Australia to seek protection but then she did not apply for protection for more than two years. The applicant stated that she wanted to apply but her husband said that their son was very sick and she should return to China. However, she did not want to return and so she kept delaying.
35. When asked why she has now lodged a protection visa application, the applicant stated that her husband has been able to borrow enough money in order to come to Australia and she wants to stay here. Her husband is still in China at the moment and the applicant wants to have legal status before he arrives so that they can then have another child. Her husband's aunt has agreed to lend her husband the money to come to Australia. The Tribunal put to the applicant that if she had been granted a protection visa then she could have applied to sponsor her husband and son to come to Australia. The applicant said that she was not aware of this. The Tribunal asked the applicant if she had not made enquiries about bringing her husband and son to Australia. The applicant stated that she did ask people but they said it was not so easy. The Tribunal put to the applicant that she had not asked anybody who could give her correct advice. The applicant said she received conflicting advice and that in the first six months she really missed her son and her home.
36. When asked what happened when she decided to have a second child, the applicant stated that after her son turned three he suffered from different diseases, he was weak and he was shorter than children of a similar age. People suggested to her that she should have another child while she was still young. She and her husband wanted to have another healthy child but the applicant had already been given a contraceptive device by the birth control office and she could not have it removed. They had gone to look for help and finally her husband's uncle had helped them. They paid [name deleted: s.431(2)], based in [hospital deleted: s.431(2)], 10,000 Yuan and in April 2004 he secretly removed the contraceptive device. By the end of 2004 the applicant was still not pregnant but she and her husband still wanted to have another healthy child so that their son would not be lonely.
37. [In] May 2005 the applicant received a notice from the family planning office saying that she was to have an annual check-up [in] May 2005. [In] May 2005 she was told that she would have to have an abortion. When asked about the annual check-up, the applicant stated that every year there was a free maternal examination for all women of childbearing age and the examination was compulsory. The examination could detect other diseases, for example, it included an ultrasound to detect cervical cancer. When asked how her pregnancy was detected, the applicant stated that she had a urine test. She had not realised she was pregnant because her periods are irregular. The applicant had wanted another child for a long time and when she discovered that she was pregnant but that she had to have an abortion, she and her

mother-in-law cried every day and her mother in law unsuccessfully pleaded with the district Governor.

38. The applicant was sent a notice that she was to have an abortion [in] June 2005. Before this date, her husband located a friend of a former classmate and paid him 20,000 Yuan to have the applicant's name crossed off the list of people scheduled to have an abortion [in] June 2005. The person they paid said the money they gave him would be used for his social connections. They believed that the applicant would not have to have the abortion and she would be able to have a child. However, [in] June 2005 two people came to the home in order to take her for the abortion. Her husband had to work and he could not do anything. Her husband was at home at the time that the two people came and he told these two people that the applicant's name was not on the list and had been deleted. However, they said that the applicant's name was on the list and they showed her that her name was on the list. The applicant's husband asked these two people to ring their supervisor but the supervisor confirmed that the applicant's name was still on the list. The two people then escorted the applicant into the waiting vehicle. Her husband was in a hurry and left for work. The applicant's son stayed at home with her mother-in-law and father-in-law who were visiting at the time. They have been very happy to hear about the pregnancy.
39. The applicant stated that she was perhaps between one month and two months pregnant but it was hard to tell because her periods were irregular. She was sent home after the abortion and she did not have any further contact with the family planning clinic. After the abortion, when the applicant came home she had pain in her abdomen. She went for a check-up at the municipal Hospital and found she had an inflammation in her womb from which she recovered after a few days.
40. When asked about her work, the applicant stated that after she married she sold food at home. The place from where she sold the food was very small and was not part of the applicant's house. She just worked in the morning during the time that workers were on their way to work. She rented the space for 10 Yuan per day from a person who also sold breakfast items.
41. The applicant stated that a few days after her abortion, her son developed pneumonia which lasted for a long time. She and her husband again decided to have a second healthy child at any price. A friend told the applicant that she had a cousin who is a travel agent, who could organise visas for the applicant to go to either the United States or Australia. The applicant had gone to see the travel agent around October 2006. The applicant confirmed that she approached the travel agent more than a year after the abortion. The applicant and her husband decided that it would be better to come to Australia, as America was expensive and there was too much crime. They paid 140,000RMB to the travel agent and they obtained the money by borrowing money after they mortgaged their house.
42. The applicant confirmed she had travelled to Europe in September and October 2007, at a cost of more than 20,000 Yuan, which was additional to the 140,000 Yuan she paid the agent. She used the same agent to arrange the trip to Europe. She went to Europe with a group but not with her husband. When asked why it had taken from 2006 until 2008 for the applicant to be able to obtain a visa to come to Australia, the applicant stated that it was not easy to obtain a visa and there were a number of steps. When asked why she had not applied for protection in Europe, the applicant said that it was because she had decided to come to Australia. The Tribunal put to the applicant that people fleeing persecution usually seek protection in the first country that offers protection but the applicant went to five different countries and did not apply for protection. The applicant stated that she was determined to come to Australia.

43. When asked if she had used any birth control after the abortion, the applicant stated that she used condoms after the abortion so that her body could recover. The authorities had not forced her to use contraception. The Tribunal put to the applicant that she had been forcibly given contraception after she had her first child and it seemed strange that she was not made to use contraception after the abortion. The applicant stated that the authorities had asked her to use contraception but she did not want to take the contraception that they offered because it would give her back pain. They had accepted this but told her that she was not to become pregnant. The applicant stated that she had used contraception after the abortion for quite a long time, as she feared having another forced abortion. She had continued to use contraception throughout the time she was in China because she still wanted to have one more child, and if she had another abortion it might be difficult to conceive a further child.
44. The Tribunal put to the applicant that the one child policy and regulations in China are laws of general application, and in general, such laws do not amount to persecution. The applicant stated that she believes that the one child policy does make her a refugee as she is not permitted to be pregnant even though her son is weak and when she and her husband are old, they will have no one to care for them. The Tribunal again explained that the one child policy is generally a law of general application.
45. The applicant stated that she cannot have a normal life in China. She and her husband now owe quite a lot of money and their health is poor, and they will always dream of having a second child. The applicant finds it difficult to face her mother-in-law because she has not given them a healthy grandson. Her parents-in-law want another child. The applicant's husband is an only child and the applicant has a younger brother.
46. When asked about her son's health, the applicant stated that he is very short and he cannot grow taller. The Tribunal asked the applicant if her son has a disability. The applicant stated that her son's condition is a kind of disability as he cannot grow taller and he is also very vulnerable to changes in the weather. The applicant said that her son is [appearance deleted: s.431(2)] and the doctor has said that her son has [condition deleted: s.431(2)]. The Tribunal put to the applicant that in some areas in China, if the first child has a disability then the parents can ask for permission to have a second child. The applicant stated that the government would not admit that her son has a disability and she was refused permission to have a second child. She had applied in 2003 when she realised that her son was not healthy. They had applied to the PSB in their area and the government. However, she has been deprived of the right to have more children and she wants a protection visa to give her relief from the abuse she has suffered.
47. The applicant stated that she was one of a number of women who were forced to have an abortion. The Tribunal asked the applicant if the one child policy had been applied differently in her case or was it applied to her in the same way that it was applied to every one. The applicant stated that it was not the same for her because her son is not healthy and she believes she is entitled to have a second child. However, the government told her that her son has arms and legs and he would be capable of living alone. When asked if her son has any other problems apart from his size and suffering many colds, the applicant stated that he is short and he has had to have many hospital admissions. When asked about the reason she had given when she applied for permission to have a second child, the applicant stated that it was because her son cannot grow taller and he is always sick but they had refused permission. She had not provided any medical reports when she asked for permission to have a second child. The applicant stated that her son has not grown any taller for a number of years. The Tribunal

put to the applicant that her son is now only aged 10 and he could still grow. The applicant stated that she is getting older and her age does not allow her to wait to have another child.

48. The Tribunal asked the applicant if there is any other reason why she thinks that the law in China was applied differently in her case. The applicant stated that she believes there is no reason why she should not be allowed to have a second child. The Tribunal asked the applicant if she had considered moving to a different province where the regulations were not so strictly enforced, for example Fujian, so that she could have another child and then pay a fine. The applicant stated that a second child would not be allowed registration and could not have an education. The Tribunal put to the applicant that a second child could be registered if a fine was paid. The applicant stated that she does not agree with this and she does not have any money to pay a fine. The Tribunal put to the applicant that she paid a considerable amount of money to come to Australia. The applicant stated that the child would need to be registered, she and husband need to work and they would not be able to do so elsewhere, and they are already short of money. The Tribunal again explained that the family planning laws in China are laws of general application unless they are applied in a discriminatory fashion. The applicant stated that she does not even have the right to have a second child and she cannot face her mother-in-law. She cannot afford to pay a fine.
49. The applicant stated that she had nothing further to say.

Second Tribunal Hearing

50. The applicant appeared before the Tribunal [in] February 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
51. The Tribunal indicated that it had invited the applicant to a second hearing as there were some further matters that the Tribunal wanted to discuss with the applicant. When asked about the plans she had for reuniting with her husband and child after coming to Australia, the applicant stated that at that time, she was planning to wait for her husband make more money in China and then he would come to Australia and they would have a second child. When asked how her husband would make more money, the applicant stated that she brought a lot of money with her to Australia, which they had borrowed, and so they could not afford for her husband to come to Australia as well, at that time. They planned that they would both work for a few years and then her husband would be able to borrow more money and he could come to Australia. The applicant stated that she bought \$2000 to Australia with her, which she borrowed from relatives and she had also taken out a loan against her home. They planned that her husband would use the same travel agent that the applicant had used in order to obtain a visa to come to Australia.
52. When asked if she had worked when she first came to Australia, the applicant stated that she had not done so because it was her first time in the country. She had intended to work because she needed to do so to make some money but she had missed her child and she had gone to many restaurants but had been unable to find work.
53. When asked if she had travelled to Australia alone, the applicant said that she had but the travel agency had put her in contact with an overseas student who had shown the applicant what to do. The student had given the applicant a phone number so that the applicant could arrange accommodation to rent. When she first came to Australia, she had rented in [location deleted: s431(2)] but she cannot recall the address as she does not understand English. The

Tribunal put to the applicant that the Department's records indicate that she was granted a visa with [Person 1], who had claimed to work with the applicant. The applicant stated that she knows nothing about this and it was probably arranged by the agent. Many people from her area have the surname of [name deleted: s.431(2)]. The Tribunal put to the applicant that [Person 1] also claimed to have travelled to Europe previously and he had also gone to live in [location deleted: s.431(2)] after arriving in Australia, which seems very coincidental. The applicant asked the Tribunal if this person had arrived on the same day as her. The applicant said that the agency that she used processed many applications for Australia.

54. The Tribunal put to the applicant that her evidence indicates that she was intending to stay in Australia unlawfully and work until her husband could come here. The applicant stated that it was not like this. She just wanted to have a second child and not be unlawful. The Tribunal put to the applicant that she had been unlawful for more than two years. The applicant stated that this was true but at that time she was in a dilemma because her child was still in China and she was told that once she lodged a visa application, she might be in trouble and her family might have problems.
55. When asked why she had now decided to apply for a protection visa, the applicant stated that eventually she decided that she should give her mother-in-law a healthy grandchild. When asked why she had decided not to follow the original plan for her husband to come to Australia in the same way that she had done, the applicant stated that it was because her son had been sick, her husband had to care for their son and also for his mother, so he could not earn much money and the applicant decided that she could not wait any longer. Also, the applicant's mother-in-law is getting older and the applicant decided that they could not wait any longer to give her a second grandson.
56. The Tribunal asked the applicant why, if she had decided that applying for a protection visa was a way of bringing her husband to Australia, she not done so as soon as she arrived. The applicant stated that when she first came to Australia she did not understand anything, she was homesick and she hesitated. She was told that even if she applied for protection, it was not easy because the Department does not believe people and she might face problems on her return. The Tribunal put to the applicant that she had not sought proper advice and she had just relied on advice from people in her community. The applicant stated that she had just spoken to friends and neighbours and they all said it was not possible to bring her husband here and have a second child.
57. The applicant stated that she has lived at her current address for more than one year and she lives alone in one bedroom, in a two-bedroom apartment where other people from her country also live. The Tribunal put to the applicant that other people with whom she lives have also applied for protection visas. The applicant confirmed that it was these people to whom she spoke. When asked why she had not sought proper advice from an agent, given that she had used an agent to come to Australia, the applicant stated that she did not know how to do this. When asked why she had not sought assistance from the people with whom she lived or from other people, the applicant stated that she and the people with whom she lives seldom speak to each other because they are all busy working. Also, different people said different things. The applicant stated that she has been working as a kitchen hand in a restaurant for about six months and previously she did cleaning work.
58. The Tribunal put to the applicant that at the first hearing she had told the Tribunal that her husband now has enough money to come to Australia. The applicant said that she does not know what she said last time because she was too nervous. The Tribunal put to the applicant

that last time she had said that her husband had borrowed money from his aunt so that he could now come to Australia. The applicant stated that she does not think that her husband has enough money to come to Australia at the moment.

59. The Tribunal asked the applicant if women in her province had been required to take an annual test. The applicant stated that women were required to take an annual gynaecological test to ensure they were disease free. The Tribunal put to the applicant that at the first hearing she had said that she had not had any contact with the authorities after the forced abortion, which indicates to the Tribunal that she had not been subjected to any annual tests after the forced abortion. The applicant stated that she did not say this and she had not said that there were no annual tests. She had received a notice. The Tribunal put to the applicant that an annual test would have involved contact with persons in authority and so her previous evidence that she had not had contact with the authorities after the forced abortion did not seem to be correct. The applicant stated that she does not know what she said last time because she was too nervous and she came to Australia in order to have a second child. The applicant stated that the annual tests were always conducted at the women's clinic in [location deleted: s.431(2)].
60. When asked about where her husband was on the day that she had an abortion, the applicant stated that he was at home but he had not accompanied her to the hospital, as there was no use and the clinic had come just to collect her. The Tribunal put to the applicant that she had told the Department that her husband was at work on the day that she had an abortion. The applicant stated that she does not know what she said but maybe she was too nervous and she cannot recall her answers. However, she recalls that husband was at home, as he had not gone to work yet and the clinic had come early. The Tribunal put to the applicant that she had told the Department that her husband had gone to work because they were not expecting the clinic to come. The applicant stated that it was true that they were not expecting the clinic and so her husband was planning to go to work. The Tribunal put to the applicant that the Tribunal is of the view that there is a significant difference between her husband being at work on the day that the clinic came and him being at home on the day the clinic came. The applicant stated that it was early in the morning when they came and he was home at this time. Perhaps she had not heard the question clearly. Her husband went to work later as he was unable to be with her at the clinic anyway. The Tribunal put to the applicant that she has previously given quite detailed evidence about what happened on the day that she was taken to the clinic and so it is hard to understand why she would have said to the Department that her husband was at work and told the Tribunal that her husband was at home. The applicant stated that the van came about 8 am and tried to take the applicant but her husband had said that the applicant's name was not on the list. However, a staff member had shown them the list, which did have the applicant's name and then had made a phone call to confirm that the applicant was to be taken to the clinic, and she was forced to have an abortion.
61. When asked if forced abortions are permitted under the family planning regulations in her province, the applicant stated that they are allowed by the government and the government can force people to have abortions. The Tribunal put to the applicant that the regulations in her Province do not allow for forced abortions. In some provinces, the penalty for a second child is a fine. The applicant stated that in her province she was forced to have an abortion. The Tribunal told the applicant that country information indicates that there are 18 provinces which allow for terminations but Shandong is not one of these provinces and the penalty in her area is payment of a fine. The applicant stated that the fine would be enormous and ordinary workers cannot afford the fine. The applicant stated that on the day she was forced

to have an abortion other people had also been forced to have an abortion. The Tribunal indicated that it accepts that sometimes officials force people to have abortions even if the family planning regulations do not allow for this. However, the abortion is not necessarily carried out for a Convention reason, but rather because officials have to reach certain targets and enforce the one child policy. The applicant stated that she believes that not being allowed to have a second child is persecution. The Tribunal indicated that although it is a harsh law, the one child policy in China is, in general, a law of general application.

62. The Tribunal put to the applicant that it was difficult to understand why she had delayed applying for a protection visa if she was so keen to have a second child. The applicant said that she had concerns when she first came to Australia and her child missed her. The applicant had nightmares and she dreamt about having another child but she did not know where to start. She was concerned that if she made the application her family would have trouble so she kept delaying. However, then she decided that she could not delay any more, as her mother-in-law is desperate for another healthy grandson. The Tribunal asked the applicant if she had considered moving to a different province or to the countryside, where she may be permitted to have a second child. The applicant stated that a second child would need household registration or else they would not be permitted to go to school. The Tribunal put to the applicant that if a fine is paid then a second child can be given household registration. The applicant stated that they could not afford the fine. The Tribunal put to the applicant that she paid a considerable amount of money to come to Australia, including the money she paid an agent, the money she spent travelling to Europe and the \$2000 she brought to Australia with her. The applicant confirmed that she has spent a lot of money. The Tribunal put to the applicant that she could have afforded the fine. The applicant stated that the fine is much more than a salary. Her husband's salary is barely enough to cover their expenses. She has not been able to afford to send much money back to China.
63. The applicant confirmed that she had been forced to have an IUD fitted after the birth of her first child and she said that all women were forced to have IUDs fitted after the birth of their first child. When asked if she had been forced to have an IUD fitted after her forced abortion, the applicant stated that she was sent a notice about this but she did not attend, as she was not at home, because she had gone into hiding and she stayed with friends and relatives. She did not want an IUD after the forced abortion. When asked when exactly she had gone into hiding, the applicant stated that it was probably around the end of 2005. Officials would have expected her to be at home at the time of Chinese New Year but she had not been at home very often. She only went home occasionally and she stayed either with her mother, or her mother-in-law and her husband and child went with her. The applicant confirmed that she had not responded to the notice she had received about an IUD. She does not know if officials came to visit her because she was in hiding and they would not have been able to find her. The Tribunal put to the applicant that officials could have spoken to her when she had her annual gynaecological check-up. The applicant stated that the people who conducted the tests only conducted tests and she did not always attend, as her periods were irregular and she was scared. The Tribunal put to the applicant that the clinic that conducted the annual test would have had the capacity to also fit an IUD. The applicant stated that they did not do so, as this was done at the hospital and they only conducted the annual test.
64. The Tribunal put the applicant that at the first hearing she had said that after the forced abortion she was offered contraception but she declined and said that she had back pain and the authorities had accepted this. The applicant said that she did not say this at the first

hearing but if she did say this, it was wrong and after the forced abortion she had not gone to have an IUD inserted.

65. The Tribunal put to the applicant that she had not previously said anything about being in hiding. The applicant said that she has not previously been asked or perhaps she was too nervous. The Tribunal put to the applicant that she had not previously said that she had to stay with relatives, even though she gave quite detailed evidence about what she did in the years after the forced abortion. The applicant stated that after the forced abortion she was scared and she did not go home. When asked why she was scared, the applicant stated that she was scared she would be forced to have an IUD or that she would be harassed about something else. The Tribunal put to the applicant that she is changing her evidence and that the Tribunal has to consider whether it finds the applicant to be a credible witness. The applicant is now giving different evidence to the Tribunal about having been in hiding and about whether or not she had to have an IUD after the forced abortion. The applicant stated that perhaps she was too nervous last time.
66. When asked if she had used contraception after the forced abortion, the applicant said that she did not. The Tribunal put to the applicant that at the first hearing. She said that she had used condom is after the forced abortion. The applicant stated that she had been too nervous last time but she had not used contraception as she wanted to get pregnant again. The applicant then said that perhaps she had used condoms for a short time but then she had stopped using anything because she wanted to have a second child. The Tribunal asked the applicant what she had intended to do if she fell pregnant. The applicant stated that she would have tried to use her connections and perhaps she would have travelled overseas. The Tribunal put to the applicant that at the first hearing she had said that she had used condoms because she did not want to risk having a second forced abortion. The applicant said that she had used condoms just after the forced abortion but then she used no contraception. The Tribunal put to the applicant that she has said three different things. At the previous hearing, she said she used condoms after the forced abortion and at this hearing, she initially said she used no contraception and then she said that she used condoms for a short period and then she used no contraception. The applicant said that maybe her answers are not very accurate but when she decided to have a second child, she did not use any contraception.
67. When asked about her work in China, the applicant said that she sold food from downstairs in the building where she lived. When asked how she could have carried out this work if she was in hiding, the applicant stated that she stopped working and she did not work when she was in hiding.
68. The Tribunal indicated to the applicant that the Tribunal was going to give her some information which could be part of the reason for affirming the decision under review. The Tribunal said that it would explain the relevance of the information to the applicant and give her an opportunity to comment on or respond to the information. She could also ask for extra time to comment on or respond to the information and the Tribunal would consider whether to allow her additional time to provide a written or oral response.
69. The Tribunal put to the applicant that she had told the Department that her husband was at work on the day she was taken for the forced abortion but she told the Tribunal that her husband was at home. The Tribunal indicated that the Tribunal is of the view that this is a significant difference in her evidence, as it is difficult to understand why the applicant would not be able to accurately recall whether her husband was at home on the day that she was

taken for a forced abortion or not. The applicant said that he was home when they came to collect her but after she went for the forced abortion, he went to work.

70. The Tribunal put to the applicant that she told the Department she had her own business selling food for three years and she said nothing about going into hiding after the forced abortion. She had also told the Department that she had no trouble with the authorities after the forced abortion. However, she has told the Tribunal that she received a notice about having an IUD, so she went into hiding and she stopped working. The Tribunal explained that this information is relevant as the applicant's inconsistent about what she did after the abortion may lead the Tribunal to find that the applicant is not a credible witness, and the Tribunal may not accept that the applicant has given a truthful account about what happened to her in China.
71. The applicant stated that she cannot recall the answers that she gave previously. The Tribunal put to the applicant that she was only being asked to recall what happened to her in China, not what answers she previously gave to the Tribunal or to the Department. The applicant stated that what happened was that she had been forced to have an IUD after her first child and she had had the IUD removed. She wanted to have a second child and when she fell pregnant she was made to have an abortion. The applicant said that perhaps she had not heard the questions clearly.
72. The Tribunal asked the applicant why she had told the Department and the Tribunal at the first hearing that she had no problems with the authorities after the forced abortion but now she is saying that she was in hiding from 2005 and that she had been sent a notice about having an IUD. The applicant said that she had said she had no trouble from the authorities as she was not really forced to do anything because she had been scared and gone into hiding and so they were unable to make trouble for her but otherwise she might have been forced to have an IUD. The Tribunal put to the applicant that previously she had said that she had been offered contraception after the abortion but she had declined the contraception because she had back pain and this explanation had been accepted. The applicant said that she cannot recall what she said but she does get back pain.
73. The Tribunal again explained to the applicant that if the inconsistent evidence leads the Tribunal to not accept the applicant's account of what happened to her in China and if the Tribunal finds that the applicant is not credible witness then the Tribunal might decide to refuse the visa. The applicant stated that her evidence might be inconsistent but she was forced to have an abortion and her story is true. Otherwise, she would not have abandoned her ill child and come to Australia alone.
74. The Tribunal asked the applicant if she wanted more time to comment on, or respond to the information that the Tribunal has given to the applicant. The applicant said that perhaps she had not heard the questions clearly and maybe her answers were different but everything she said is true and she hopes that the Tribunal believes her. The Tribunal again asked the applicant if she wanted to request any further time. The applicant stated that she has nothing else to say and perhaps there are some inconsistencies but she really was forced to have an abortion and she had no choice but to come to Australia, as her wish and that of her family is for her to have a second child. The applicant stated that she does not need any more time.

Independent Information

75. According to a Mandarin speaking Tribunal officer the *Shandong Province Population and Family Planning Ordinance* do not contain any reference to abortion as a penalty for out of plan pregnancies.¹ This is consistent with information from the US Congressional-Executive Commission on China's (CECC) *Annual Report 2009* which does not list Shandong as one of the 18 provinces in which termination of pregnancy or unspecified 'remedial measures' for out of plan pregnancies are specified in family planning regulations.²
76. No reports were found regarding forced abortion in Shandong province during 2010. Reports indicate, however that forced abortion have been reported in Shandong province in recent years. The CECC reported that "in June 2009, family planning officials in Guan county, Shandong province, forced 35-year-old Feng Junhua to have an abortion in her ninth month of pregnancy. The injection to induce abortion reportedly caused massive haemorrhaging and killed the mother."³ Furthermore, in September 2010 blind human rights activist, Chen Guangcheng, was released from prison after serving "a four-year prison sentence for charges relating to his involvement in a legal action against forced sterilizations and abortions carried out by the authorities on thousands of women in the Shandong province" Chen Guangcheng continued to be under unofficial house arrest following his release.⁴
77. A September 2005 DFAT report states that according to the Shandong Family Planning Commission, family planning is strictly enforced in Shandong. DFAT provide the following advice on family planning penalties in Shandong province:
- The Shandong Family Planning Commission informed us that it strictly enforces family planning regulations in Shandong and it had no practice of waiving or reducing the compensation fee. But if the families are under a certain income threshold, the compensation fee can be postponed or paid by instalment. We have not been able to find any evidence of authorities waiving these penalties, but this does not rule out the possibility of waiver or reduction (Department of Foreign Affairs and Trade 2005, *DFAT Report 404 – RRT Information Request: CHN17471*, 6 September – [Attachment 1](#)).
78. The following reports were found in the sources consulted regarding the enforcement of family planning in Shandong province. The articles report on abuses by family planning officials in Shandong including detentions, forced abortions and forced sterilisations. The 2008 US Congressional-Executive Commission on China (CECC) report contains some information on abuses by family planning officials in Shandong. The report states that in April 2008 a woman in Shandong was detained and beaten by family planning officials in order to compel the woman's sister to abort an unauthorised pregnancy. The report also contains information on Chen Guangcheng, an advocate who was sentenced to four years imprisonment in 2006, who had protested against widespread abuses by family planning officials in Linyi city, Shandong. The report states that Chen Guangcheng's wife, Yuan

¹ *Shandong Province Population and Family Planning Ordinance* (Promulgated 28 September 2002), Shanghai Municipal Population and Family Planning Commission website

http://www.popinfo.gov.cn/popinfo/pop_doczwd.nsf/v_zcfg/82683102f1dce2d748256d2e002d6c28 – Accessed 5 August 2008 – \\NTSSYD\REFER\research\internet\eastasia\chn32412.we6.doc

² US Congressional-Executive Commission on China 2009, *Annual Report 2009*, 10 October, p. 153 – [information deleted: s.431(2)].

³ US Congressional-Executive Commission on China 2009, *Annual Report 2009*, 10 October, p. 153 – [information deleted: s.431(2)].

⁴ Amnesty International 2010, *Blind Chinese human rights activist remains under surveillance*, 12 September <http://www.amnesty.org/en/news-and-updates/blind-chinese-human-rights-activist-remains-under-surveillance-2010-09-13> - Accessed 8 December 2010 – [information deleted: s.431(2)].

Weijing confirmed that “cases of forced abortion and other abuses have resurfaced in Shandong in 2008”. (United States Congressional-Executive Commission on China 2008, *Annual Report 2008*, CECC website, 31 October, p.98 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf – Accessed 22 May 2009 – Attachment 3).

79. An April 2007 article by *Radio Free Asia* reports that according to Zhang Ming, the head of the Chinese Federation of House Churches, a forced abortion drive had recently taken place in Shandong province. The report provides the following information:

Authorities in China’s southwestern region of Guangxi have forced dozens of pregnant women to a hospital in Baise city to undergo abortions, some as late as nine months, the women and their relatives said.

...The head of the Chinese Federation of House Churches Zhang Ming said that a similar forced abortion drive had also recently taken place in the eastern province of Shandong.

“We think that it’s unreasonable of the Chinese government to carry out forced abortions like this,” Zhang said. “It has been happening in Laizhou city [Shandong province] as well in recent days” (Mudie, L. 2007, ‘Guangxi Officials Carry Out Mass Forced Abortions’, *Radio Free Asia*, 22 April http://www.rfa.org/english/china/china_abortions-20070422.html?searchterm=None – Accessed 31 March 2009 – Attachment 5).

80. The USDOS *Country Reports on Human Rights Practices 2006 – China* states that international press reports allege that in 2005 in Linyi, Shandong local officials detained approximately 130,000 people and forced them to have abortions and sterilisations. The report notes that Chen Guangcheng for imprisoned after publicising the family planning abuses. The UDSOS states that:

Central government policy formally prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, although reports of physical coercion to meet birth targets continued.

...The most egregious reports occurred in 2005 in Linyi, Shandong Province. International press reports alleged that local official detained some 130,000 persons and forced them to submit to abortions or sterilization procedures. At least 7,000 persons were forcibly sterilized. Local officials profited from this illegal system by charging detention fees. Local rights activists documented several cases of forced late-term abortions.

According to law, citizens may sue officials who exceed their authority in implementing birth-planning policy. However, local officials retaliated with impunity against whistleblower Chen Guangcheng for his work in exposing the Linyi family planning abuses. In August Chen was sentenced to four years’ and three months’ imprisonment on dubious charges of obstructing traffic and damaging public property (US Department of State 2007, *Country Reports on Human Rights Practices 2006 – China*, 6 March, Section 1.f – Attachment 8).

81. An article dated 12 September 2005 in *Time Magazine* provides further information on the campaign of forced abortions and sterilisations in Linyi, Shandong:

At a provincial meeting last year, Linyi officials were castigated for having the highest rate of extra births in all of Shandong, according to lawyers familiar with the situation. The dressing-down galvanized what appears to be one of the most brutal mass sterilization and abortion

campaigns in years. Starting in March, family-planning officials in Linyi's nine counties and three districts trawled villages, looking to force women pregnant with illegal children to abort, and to sterilize those who already had the maximum allotment of children under the local family-planning policy. According to that regulation, which exists in a similar form in most rural areas, women with a son are not allowed to bear more children, whereas mothers whose first child is handicapped or a girl are allowed to have a second baby.

Many women refused to undergo the procedures. Others hid, often in family members' homes. The crackdown intensified. Relatives of women who resisted sterilization or abortion were detained and forced to pay for "study sessions" in which they had to admit their "wrong thinking," says Teng Biao, an instructor at the China University of Political Science and Law in Beijing, who visited Linyi last month to investigate the coercive campaign. In the Linyi county of Yinan alone, at least 7,000 people were forced to undergo sterilization between March and July, according to lawyers who spoke with local family-planning officials. Several villagers, the lawyers allege, were beaten to death while under detention for trying to help family members avoid sterilization.

Officials in Linyi deny that anything improper has happened. "All these things are either exaggerated, distorted or not based on facts," says an official surnamed Yao (he wouldn't give his full name) at the Linyi municipal family-planning commission. But national-level cadres concede that something has gone terribly wrong. "We have heard about the situation in Shandong, and it's totally against national law," a member of the State Family Planning Commission's secretariat in Beijing told TIME. "We are investigating the situation now." A public statement from the commission said that central and provincial authorities have cautioned Linyi officials to follow national regulations, vowing to punish lawbreakers (Beech, H. 2005, 'Enemies of the State?', *Time Magazine*, 12 September <http://www.time.com/time/archive/preview/0,10987,1103579,00.html> – Accessed 31 October 2005 – Attachment 9).

82. The following reports provide general information on forced abortion within China:

- The CECC *Annual Report 2010* provides the following overview of forced abortion:

China's 2002 Population and Family Planning Law (PFPL) states in Article 4 that officials "shall perform their administrative duties strictly in accordance with the law, and enforce the law in a civil manner, and they may not infringe upon the legitimate rights and interests of citizens."

...Despite these provisions, abuses continue. The Commission has reported on a number of cases of violence against women in connection with officials' enforcement of population planning policies.

In 2010, authorities across a wide range of Chinese localities launched population planning enforcement campaigns—often dubbed "spring family planning service activities" (*chunji jisheng fuwu xingdong*)—that employed coercive measures to terminate "out-of-plan" pregnancies.

...In 2010, the Commission analyzed government reports from nine provinces that used the phrase "by all means necessary" (*qian fang bai ji*) to signify intensified enforcement measures and less restraint on officials who oversee coerced abortions. Between January and March 2010, city and county governments in at least four provinces (Henan, Hubei, Guangdong, and Jiangsu) and at least one provincial-level government (Jiangxi) vowed to "by all means necessary, stabilize the low birth level." In March, Panjin municipal authorities in Liaoning province expressed their resolve to crack down on population planning violations "in order to stabilize a low birth rate . . . continuously strengthen measures . . . [and] by all means necessary, drive population and family planning work into the 'fast lane.'" In addition to mandating abortion of pregnancies that exceed fertility limits, all pregnancies

that occur without an official permit, including first pregnancies, are regarded by the government as “out-of-plan” and subject to “remedial measures.”⁵

- According to a Freedom House report for 2010:

China’s policy of allowing only one child per couple remains in place, though many rural families are allowed a second child if the first is female. Although compulsory abortion and sterilization by local officials are less common than in the past, they still occur fairly frequently. According to official websites, authorities in some areas of Yunnan and Fujian mandated the use of abortion in 2009, while in other provinces officials imposed fines on families that resisted the one-child policy.⁶

- The US Department of State (USDOS) reported in March 2010 that:

The government continued its coercive birth limitation policy, in some cases resulting in forced abortion or forced sterilization.

... The law prohibits the use of physical coercion to compel persons to submit to abortion or sterilization. However, intense pressure to meet birth limitation targets set by government regulations resulted in instances of local birth-planning officials using physical coercion to meet government goals. Such practices required the use of birth-control methods (particularly intrauterine devices and female sterilization, which according to government statistics accounted for more than 80 percent of birth-control methods employed) and the abortion of certain pregnancies.

In February, according to international media reports, three women who were acting as surrogate mothers were reportedly forced to undergo abortions in a hospital in Guangzhou.

In the case of families that already had two children, one parent was often pressured to undergo sterilization. The penalties sometimes left women with little practical choice but to undergo abortion or sterilization.⁷

83. DFAT provided the following advice in September 2005 regarding access education and health care for unregistered children in Shandong:

China does not have a national medical health insurance system, thus registration is not relevant to accessing health care. We understand unregistered children can attend school in most cases, but may face restrictions on which schools they can attend and must pay higher tuition fees (Department of Foreign Affairs and Trade 2005, *DFAT Report 404 – RRT Information Request: CHN17471*, 6 September – Attachment 1)

FINDINGS AND REASONS

84. The applicant has provided evidence that she is a national of China and the Tribunal has assessed her claims on this basis.

⁵ US Congressional-Executive Commission on China 2010, *Annual Report 2010*, 10 October, pp.117-118 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:61507.pdf -Accessed 17 December 2010 – [information deleted: s.431(2)]

⁶ Freedom House 2010, *Freedom in the World – China (2010)*, June <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7801> – Accessed 10 September 2010 [information deleted: s.431(2)]

⁷ US Department of State 2010, *Country Reports on Human Rights Practices 2009 – China*, 11 March – [information deleted: s.431(2)]

85. Essentially, the applicant claims that because her son who was born in 2000 was often ill, she and her husband wanted to have another child. The applicant arranged for her IUD, which she was forced to have after her son's birth, to be removed, in secret, in April 2004. [In] May 2005 the applicant attended a family planning clinic and she was informed the next week that she was pregnant. [In] June 2005 she was forced to undergo an abortion, despite having paid a contact 20,000RMB to have her name removed from a list of women who were to undergo forced abortions. When she was taken to the hospital, she tried to escape but the officials caught her, slapped her and forced her to undergo the procedure. [In] August 2006, the applicant's friend told the applicant that her cousin worked in a travel agency and could arrange visas to visit the USA or Australia. The applicant decided Australia was a safer environment and she borrowed 150,000 RMB from the bank in order to organise a visa for Australia. She travelled to Europe in 2007, returned to China and she came to Australia [in] May 2008 because she would like to have another child. The applicant also claims that she had applied for permission to have a second child because her son is very short and frequently unwell but she was refused permission.
86. The Tribunal has serious concerns about many aspects of the applicant's claims, as presented both in writing and orally. The Tribunal considers that there are serious deficiencies and inconsistencies in the evidence presented by the applicant in support of her application. For the reasons discussed below, the Tribunal does not consider that the applicant has presented credible or truthful evidence about crucial elements of her claims to refugee status.
87. In so finding, the Tribunal has taken into account the difficulties which may be faced by asylum seekers generally, and the particular circumstances of this applicant which may have affected her capacity to put forward her claims. While the benefit of the doubt should be given to applicants who are generally credible but unable to substantiate all of their claims, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is the Tribunal 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. 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.
88. The Tribunal accepts that the applicant would be required to comply with the one child policy if she returned to China. Independent information shows that China has implemented a 'one child policy' for a number of decades; and the Chinese government has recently denied considering changing the national family planning policy. The family planning policy is administered at a provincial level and there are provincial, and indeed, regional differences in how the policy is administered. Broadly, the intent of the Shandong Population and Family Planning regulations (family planning regulations) is to limit population growth consistent with the national policy, by limiting the number of children born to each person or couple. The regulations apply to returned Chinese and their families and so would apply to the applicant on her return.
89. The applicant claims that she was forced to have an abortion when she fell pregnant for a second time. The Tribunal notes that independent information indicates that *Shandong Province Population and Family Planning Ordinance* do not contain any reference to abortion as a penalty for out of plan pregnancies and the Tribunal therefore accepts that a forced abortion for a second pregnancy is not a law of general application in Shandong. The independent information cited above indicates that there are a number of reports of abuses by family planning officials in Shandong including detentions, forced abortions and forced sterilisations. The reports indicate that family planning officials force abortions and

sterilisations because they can make a profit from this illegal system by charging detention fees, or because local officials have been castigated for having a high rate of extra births. The US Department of State 2010, *Country Reports on Human Rights Practices 2009* also indicates that the intense pressure to meet birth limitation targets set by government regulations is the primary motivator for local planning officials adopting coercive measures including forced abortions. The Tribunal therefore accepts that in Shandong, it is possible that a woman who was pregnant with a second child may have been forced to have an abortion.

90. Based on the country information, the Tribunal is of the view that if the applicant was forced to have an abortion in 2005, it was because local officials were using coercive measures to implement China's family planning policy because they could make a profit by doing so, or in order to meet birth limitation targets. The Tribunal is not satisfied that the officials forced the applicant to have an abortion for a Convention reason as required by s.91R(1)(a).
91. However, for the following reasons, the Tribunal does not accept that the applicant was forced to undergo an abortion in 2005. The applicant's evidence contains numerous inconsistencies, in relation to significant matters, for which the Tribunal finds there is no satisfactory explanation and which leads the Tribunal to find that the applicant is not a witness of credit.
92. First, the applicant has given inconsistent evidence about whether her husband was at home or at work on the day that the Clinic came to the applicant's home in 2005 to take her to have a forced abortion. In her visa application and in her evidence to the Tribunal, the applicant said that her husband was home at the time that the clinic came to take her for a forced abortion [in] June 2005. However, the applicant told the Department that [in] June 2005 her husband was at work at the time when they came to take her to hospital. The applicant told the Department that she and her husband thought that because they gave money, nothing would happen to the applicant so she was home alone. When this inconsistent evidence was put to the applicant, she said that her husband had been home when the authorities came to take her for the forced abortion because it was early in the morning, before her husband had gone to work. However, after the applicant was taken for the forced abortion, her husband had then gone to work. she also said that she might have misunderstood the question or been too nervous.
93. The Tribunal does not accept this explanation because at her interview with the Department, the applicant elaborated her answer by saying that she was home alone, as they had not expected the clinic to come because they had paid their contact money. The Tribunal is of the view that the applicant would not have given this detail to the Department if she had misunderstood the question. The applicant has claimed that she was persecuted because she was forced to have an abortion and she has given detailed evidence about the events surrounding the abortion, for example, the dates that she had the test prior to the abortion, the date of the abortion and the sequence of events at the hospital where the abortion was performed, including how many other women were forced to have abortions. The Tribunal is of the view that given the significance of the claimed abortion for her, the applicant would know whether her husband was at home at the time that the authorities came. Furthermore, if her husband was not home, then the applicant's evidence that her husband had queried the officials about whether the applicant's name really was on their list is also not credible. The Tribunal finds that the applicant gave different evidence to the Department and the Tribunal about whether her husband was at home on the day the authorities took her for a forced abortion and this casts strong doubt on the applicant's claim that she was forced to have an abortion. The applicant's inconsistent evidence about whether her husband was at home at the

time that the authorities came to take her for a forced abortion, when combined with the Tribunal's other findings, leads the Tribunal to not accept that the applicant was forced to have an abortion [in] June 2005.

94. The applicant also gave inconsistent evidence about her contact with the authorities after the forced abortion and about whether she had used contraception or not after the forced abortion. In regard to whether she had contact with the family planning authorities after the forced abortion, the applicant gave inconsistent evidence about whether she had, or had not, attended annual compulsory gynaecology examinations. At the first hearing, the applicant said that every year there was a free compulsory examination for all women of child bearing age. However, she also said that she was sent home after the abortion and she did not have any more contact with the family planning clinic. However, at the second hearing, the applicant said that women were required to take an annual gynaecological test to ensure they were disease free. She had received a notice and she did not always attend, as her periods were irregular and she was scared. The applicant claimed that she went into hiding from the end of 2005 in order to avoid contact with the family planning officials. The applicant had not previously made any claim to have gone into hiding in order to avoid family planning officials. The Tribunal is of the view that if the applicant had been in hiding from late 2005 then this is a significant claim and she would have said so on her application form, or at her interview with the Department or at the first hearing. Instead, the applicant previously gave evidence to the Department and to the Tribunal that she had not contact with the authorities after the forced abortion in 2005 and she said nothing about having been in hiding. The Tribunal does not accept that the applicant went into hiding from the end of 2005. The applicant's inconsistent evidence about whether she had contact with the family planning authorities or not also leads the Tribunal to find that the applicant has fabricated her claim that she was sent a notice to attend the family planning clinic either for the purpose of attending an examination or to have an IUD fitted. This inconsistent evidence about what contact the applicant had with the family planning authorities after the forced abortion also leads the Tribunal to not accept that the applicant had been forced to have an abortion in 2005.
95. In regard to her use of contraceptives after the forced abortion, the applicant said at the first hearing that after the abortion, the authorities had not forced her to use contraception but she has used condoms to give her body time to recover and because she did not want to risk a second abortion, which might impact upon her fertility, she had used condoms until she came to Australia. She also said that the authorities had asked her to use contraception but she did not take the contraception that they offered because it would give her back pain. The authorities accepted this but told the applicant not to become pregnant.
96. However, at the second hearing, the applicant first said that she used no contraception and then she said that she used condoms for a short period, and then she said she used no contraception because she wanted to have a second child. When this inconsistent evidence was discussed with the applicant she said that maybe her answers are not very accurate but when she decided to have a second child, she did not use any contraception. The Tribunal is of the view that there is a significant difference between using contraception from 2005 until 2008, and not using contraception at all or using it for a short period. The Tribunal does not accept that the applicant was affected by nerves or that she misunderstood the Tribunal's questions because the applicant gave a detailed explanation at the first hearing about why she had used contraception, and at the second hearing, about why she had not used contraception. She said that she did use contraception as she did not want to risk a second abortion, which

might adversely affect her health and her chances of falling pregnant, but at the second hearing, she said that she did not use contraception as she wanted to have a second child and if she fell pregnant she would have tried to find a contact or arrange to leave the country. This inconsistent evidence about her use of contraception, when combined with the Tribunal's other findings, leads the Tribunal to find that the applicant is not a witness of credit. The Tribunal does not accept that the applicant wanted to have a second child in China or that she came to Australia in order to have a second child.

97. The applicant told the Tribunal that she may have given inconsistent evidence to the Tribunal and the Department because she was nervous. However, although the Tribunal accepts that the applicant may well have been nervous, and that nervousness may result in minor differences in evidence given on different occasions, the Tribunal does not accept that nerves accounts for the applicant's inconsistent and indeed often quite contradictory evidence. The Tribunal is of the view that if the applicant was recalling events which had actually occurred to her, and which were so significant that she fled China, she would have recalled those events in broadly consistent terms, for example, whether her husband was at home or not when she was taken for a forced abortion, whether she was in hiding or not after the forced abortion, whether she wanted to have a second child after the forced abortion and had or had not used contraception. The Tribunal is of the view that the applicant gave inconsistent evidence because she was relying on her recall of what she said previously rather than her recall of what had actually happened to her. The Tribunal is of the view that the applicant has fabricated her claims regarding being forced to have an abortion and having to go into hiding because she wanted a second child.
98. The Tribunal also does not accept that the applicant left China to avoid persecution because in 2007 she travelled to 5 countries in Europe but she did not apply for protection in any of these countries, and she then voluntarily returned to China. The applicant said that she had not applied for protection in Europe because she had already decided to come to Australia and she was going through a long and expensive process to obtain a visa for Australia. The applicant's evidence is that she made a deliberate decision to come to Australia and she spent some years establishing a record of travel so that she could obtain a visa to enter Australia. In the Tribunal's view, if the applicant was genuinely concerned about her safety and well-being, she would have taken steps to make inquiries about protection and to seek protection when she first departed China. Instead, she did not even consider this option and instead voluntarily returning to China. The applicant's failure to apply for protection in Europe or to even make enquiries to do so, and her voluntary return to China, leads the Tribunal to not accept that the applicant fled China and came to Australia because she feared persecution, or because she wanted to have a second child.
99. Furthermore, the applicant delayed lodging a protection visa in Australia for about 2 years. The applicant arrived in Australia [in] May 2008 and she applied for a protection visa [in] June 2010. The Tribunal considers that the delay in lodging the protection visa application for some 2 years after her arrival in Australia is inconsistent with the applicant's claim that she feared persecution, and in particular, another forced abortion, at the time of her arrival in Australia. The applicant claims to have decided to come to Australia to seek protection and so that she could have a second child but she then made no efforts to apply for protection for more than 2 years after her arrival. She did not approach a migration agent or lawyer for advice about how she could stay in Australia, or how her husband and son could join her, but instead accepted advice from people from her community to the effect that if her application was declined, she could never return to China, and if she returned to China she would be

targeted by the authorities. The Tribunal is of the view that if the applicant had decided some years earlier to come to Australia in order to have a second child, and if she had travelled to Europe as part of a staged plan to come to Australia, it is not consistent that after her arrival in Australia the applicant then did not apply for protection for more than 2 years. The Tribunal finds the applicant's reasons for the delay in lodging a protection visa to be weak and not persuasive. The applicant claims that in China she paid a large sum of money to an agent who assisted her to obtain a visa for Australia and the process took about 2 years. This indicates to the Tribunal that before she came to Australia the applicant was aware of the availability of agents who could give migration advice. The Tribunal therefore does not accept the applicant's explanation that once she arrived in Australia she did not apply for protection because she received informal advice that scared her off applying for protection. The Tribunal is of the view that if the applicant had fled persecution and if she wanted her husband to join her as soon as possible so that they could have a second child, she would have sought proper advice much sooner. The applicant could have approached an agent, or lawyer, or the Department, regarding her options for staying in Australia but instead, she stayed in Australia unlawfully for more than 2 years.

100. The applicant also claimed that she wanted to apply for protection earlier but her husband said that their son was very sick and she should return to China but she did not do so. She claims that she did not apply for protection because she was told by people from her community that if the application was refused she could not return to China and that it was not easy to bring her husband and son to Australia. The applicant also gave evidence that when she came to Australia, her husband could not afford to do so and he had to save up. The Tribunal does not accept that the ill health of her son or her concerns about whether her husband and son could join her in Australia, or her concerns about whether she would be able to return to China, prevented the applicant from applying for protection. The Tribunal also does not accept that her husband's inability to afford to come to Australia prevented the applicant from applying for protection. The Tribunal is of the view that if the applicant wanted to be reunited with her husband and son as soon as possible, and if she wanted to have a second child as soon as possible, her son's ill health would have acted as a further incentive for the applicant to properly investigate her options for legally staying in Australia, including seeking permission to work which might have helped overcome any financial difficulties that her husband had so that he and their child could join the applicant.
101. The applicant claimed that she was not aware until recently that she could have applied to bring her husband and child to Australia if her claim for protection was successful. The applicant's reliance on the opinion of people from the community is not consistent with her conduct in China where she relied on the advice of an agent about how to obtain a visa to come to Australia. The Tribunal is not satisfied that the applicant delayed lodging an application for protection because of the advice she received from people in the community. The Tribunal is of the view that the applicant intended to work when she came to Australia and that she and her husband had planned that after they saved some money, the applicant's husband would obtain a visa to come to Australia, using the same agent in China that the applicant used. The Tribunal is also of the view that the applicant had intended to remain unlawfully in the community and that her husband would also join her and be unlawful, and that she only applied for protection because her earlier plan for her and her husband to work and save money has not eventuated.
102. The applicant claims that she has wanted to have a second child for many years, since at least 2004, that she is concerned about the impact of growing older on her capacity to have another

child and that she does not fall pregnant easily because her periods are irregular. She claims that she spent considerable time and money arranging through an agent to come to Australia for the purpose of having a second child. However, despite these circumstances, once she arrived in Australia, the applicant did not apply for protection for more than 2 years. The Tribunal does not consider that there are any particular characteristics of the applicant that would have impaired her ability to obtain immigration advice or assistance at an early stage, had she really been in fear of suffering serious harm in China. The Tribunal is satisfied that the long delay in lodging the protection visa application further undermines the credibility of the applicant's claims that she fears, and faces, persecution in China. The applicant's significant delay in applying for protection leads the Tribunal to not accept that the applicant fled China because she feared persecution or because she wanted to have a second child or that she has a fear of persecution should she return to China.

103. The Tribunal does not accept that the applicant was forced to have an abortion or that she was in hiding after the forced abortion. The Tribunal accepts that if the applicant already has a child, and if she is registered as being a city dweller, then in general, she would not be permitted by the family planning policies to have a second child. The Tribunal also finds that China's family planning policies are set out in laws of general application that aim to limit the number of children that a couple may have. The Tribunal finds that this is a legitimate purpose. It is well established that enforcement of a law of general application does not ordinarily constitute persecution for the purposes of the Convention, and this has been found to be the case specifically in relation to China's Family Planning Regulations: see *Applicant A's case*.
104. The applicant has also claimed that she fears that if she returned to China and fell pregnant, she would be forced to have an abortion. Based on the independent information, the Tribunal accepts that there is a real chance that the applicant could be subjected to a forced abortion if she returned to Shandong and fell pregnant with a second child. The Tribunal is not, however, satisfied that the essential and significant reason for this harm is her membership of a particular social group or for any other Convention reason. The Tribunal finds that the reasons for the feared harm would be financial and because of pressure on officials to meet targets. The Tribunal has considered whether this pressure, and the State's failure in any other respects to guarantee the applicant's safety from the feared harm would be the significant and essential reason, that is, membership of a social group or any other Convention reason. However, the Tribunal finds that the essential and significant reason for any withholding or failure of state protection is not for a Convention reason but to limit population growth.
105. The Tribunal has not accepted that the authorities targeted the applicant or implemented the family planning policy itself in an unusually harsh or discriminatory manner for any Convention reason. Nor does the Tribunal accept that the Family Planning laws impacted more seriously on the applicant, in a discriminatory manner for any Convention reason, although it is not clear that, even if they did, this would be a sufficient basis on which to find that the laws themselves, which clearly do not intend to discriminate against particular groups, could thereby be construed as persecutory. The Tribunal therefore does not accept, on the available evidence, that any past or future penalty imposed on the applicant under the Family Planning Regulations would have the character of Convention persecution.
106. The Tribunal is satisfied that any penalty imposed on the applicant for breach of the Family Planning Regulations in the future would not constitute Convention persecution, as it would result from the implementation of a law of general application or, in the case of a forced abortion, that the essential and significant reason for this harm would not be for any

Convention reason.. The Tribunal does not accept that the Family Planning Regulations would be applied selectively or discriminatorily to the applicant for any reason or that it would be discriminatory in its impact on the applicant for a Convention reason.

107. Having considered all the evidence, and the claims both singularly and cumulatively, the Tribunal is not satisfied that the applicant has a well founded fear of persecution for any Convention reason if she returns to China now or in the reasonably foreseeable future.

CONCLUSIONS

108. 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

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