0901642 [2009] RRTA 502 (3 June 2009)

DECISION RECORD

RRT CASE NUMBER:	0901642
DIAC REFERENCE(S):	CLF2008/155975
COUNTRY OF REFERENCE:	Australia
TRIBUNAL MEMBER:	Antoinette Younes
DATE:	3 June 2009
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the following directions: i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and (ii) that the second and third named applicants satisfy cl.866.222(a) of Schedule 2 to the Migration Regulations, being members of the same family unit as the first named applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

2. The applicants, who claim to be stateless, were born in Australia to parents who are citizens of China (PRC)**.** The applicants applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] November 2008. The delegate decided to refuse to grant the visas [in] February 2009 and notified the applicants of the decision and their review rights by letter [on the same] date.

3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

4. The applicants applied to the Tribunal [in] March 2009 for review of the delegate's decisions.

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 applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

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

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

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

14. Second, an applicant must fear persecution. Under 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.

15. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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

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

18. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants 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.

21. Only the first named applicant, [name deleted in accordance with s.431(2) of the Migration Act 1958 as it may identify the applicant]**,** submitted her own claims to be a refugee, the other two applicants (siblings) relied on membership of her family unit. The Tribunal will refer to [the first named applicant] as the applicant.

22. In a statement in support dated [in] November 2008 (folios 42-44), the applicant claimed:

23. She was born in Australia in 2005 and she has two siblings, a sister and a brother. Although her parents are both Chinese, they were unable to apply for Chinese passports for the children because their household registration was cancelled by the Chinese authority and they did not hold any current Chinese National Identity cards or register their marriage. Those are only some of the reasons given by the Chinese Consulate General in Sydney for not being able to issue passports to the children or the parents. As the children were born to two Chinese nationals and neither held an Australian permanent resident visa or is an Australian citizen, the children were not recognized as Australians. They are therefore stateless.

24. Without legal permission to stay, the children were told that they would be deported to China, a country about which the children know nothing. They only know that it is not possible for them to be recognized as Chinese or be registered in a household card. Without household card, none of the children could access public education, public health, or social welfare. Living in that kind of environment would be intolerable.

25. Her parents understood that should they be able to return to China, they could only register one child into household because the Chinese government has the one child policy. Any second child or third child would be fined and even if the fine is paid, there is no guarantee of registration. During the years of her parents living in Australia, they had struggled to raise the three children. There was nobody to give them a hand and they had limited ability in speaking English. If they return to China, their lives and the children's lives would be completely different.

26. The Chinese government is a very cruel government with no human rights at all. Not only would her parents have to pay a large unaffordable fine to the government, they would have to sign an agreement saying that they would be willing to accept sterilization procedures Having applied for refugee status, living overseas for so many years with three children, it would be extremely difficult for her parents to find proper jobs to enable them afford those fines. Even if they accept all of those conditions, they would not be able to access any social benefits. It would be impossible for them to work in a government owned company or any government related work. They may have to work for themselves. The government would never care about their living arrangements.

27. For the children, without being registered in a household card, no public school would accept them and her parents would never be able to send them to private schools given their situation; no public hospital would accept them unless they pay expensive fees. She does not think that her parents could afford that and their health would be jeopardized given their financial situation. Without being registered, they would not be able to obtain national cards and there would not be a possibility to be offered any jobs after they grow up. There would not be any possibility to

register their marriage in the future. Essentially, they could hardly live in China as normal human beings. Given the current situation, no one in the family would be able to get a passport, or return to china. The children were born here and have grown up with Australian cultures, values and customs.

28. In support, the applicant provided a translated article relating to the difficulties faced by children born outside family planning (folios 3-6).

Statement of [Person 1] (folios 67-68)

29. [Person 1] stated that he lives in [place names deleted: s.431(2)] Fuqing City Fujian Province China, and that his wife [name deleted: s.431(2)] is from [place names deleted: s.431(2)] Fuqing city.

30. [Person 1] referred to the birth of his daughters [in] September 2000 and [in] February 2005 and to the subsequent ill-treatment by the PRC authorities, including hiding, fleeing to the country, an induced abortion of a 7 months old male fetus, and a forced sterilization procedure.

Statement of [Person 2] (folios 71-72)

31. [Person 2] referred to the birth of his first daughter and his wife's second pregnancy in 1999 that led to their hiding, the birth in 2000 of their second daughter "*in the pigsty*" without hospital nursing care and the fear they experienced.

Submissions dated 16/2/09 (folios 76-77)

32. The advisor referred to RRT case 0803287 where the Member found that Australia owed protection to the main applicants who were Australian born children with parents of Chinese nationals.

A translation of Longtian Neighborhood Committee Office of Fuqing City (Notice), Notice About Standardizing Social Compensation Fees Longtianban [2007] No. 56 (folios 74-75)

33. The document essentially notes that "*….any person who have [sic] breached the laws, or regulations and have given birth more than the limit, should be charged social compensation fees by the standard given as follows…..Secondly, payer may apply for partial payment if they suffer from sever financial difficulties and have no capability to pay the full fees temporarily; however the full fees should be collected within half a year to those who have given birth to a child before reaching the age of legal marriage. To those who have given birth to their second child without permission, the full fee should be paid within a year. To those who give birth to their third child or have more than three children, their first payment should not be less than one third of the total amount. Thirdly, should any person fail to pay the fee within the time limit, an overdue fines will be charged at rate of 5 0/00 of the balance of the compensation fees every month. Should the full fees arc not paid within the time limit, the total outstanding fees plus any overdue charges will be collected by lump sum according to law*".

Material provided to the Tribunal

34. [In] April 2009, the Tribunal received the following:

    a. A report dated [April 2009] from [Person 3], clinical Psychologist, the Sydney West Area Health Service, referring to the applicant's mother, [name deleted:

s.431(2)] (folios 33-34), referring to a diagnosis of her by a Consultant Psychiatrist of "*Obsessional Compulsive Disorder and Anxiety Disorder*" and the prescribing of an antidepressant.

b. Three letters entitled *To whom It May Concern*, from the [a] Chinese Congregational Church, dared [April 2009] (folios 35-37), referring to the applicant's parents regular attendance at the Church.

HEARING

35. The applicants and their parents appeared before the Tribunal [in] April 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Fuqing and English languages.

36. The applicants were represented in relation to the review by their registered migration agent.

Evidence of the applicant's mother – on behalf of the applicant

37. The Tribunal advised the applicant's mother that the first named applicant is the applicant in this matter and that the other two children have relied on the first named applicant's claims which means that if the claims of the first applicant would be unsuccessful, it would follow that the claims made and relied on by the other two children would be unsuccessful.

38. The Tribunal advised the applicant's mother that in relation to the claim of statelessness, information before the Tribunal would suggest that she and her partner are nationals of China and as such, the Tribunal considers that China is the country of nationality of the three children. The Tribunal indicated that the children would not be considered to be stateless.

39. The applicant's mother stated that she has been to the Chinese Consulate in Sydney to apply for passports, but she has been unsuccessful. She stated that the Embassy has refused to issue the Chinese passports. She said that they refused because she had applied for a protection visa. She said the Consulate staff appeared to know about the protection visa. The Tribunal asked her how the staff would know so, and she stated she had told them herself because of the bridging visa. She said she showed them the visa and then she disclosed to them that she had applied for a protection visa in 2001. She stated that she had applied in 2001 for a protection visa but it was refused by the Department. She said subsequent to the refusal she remained in Australia unlawfully. The Tribunal asked the applicant's mother about any application for a protection visa lodged by her partner and father of the children, [Person 4] She stated that he had also applied for a protection visa which was refused. She said he had sought a review by the Refugee Review Tribunal, which had affirmed the delegate's decision to refuse [Person 4] a protection visa.

40. The Tribunal discussed with the applicant's mother the three letters that the Tribunal had received entitled "*To whom it may concern*" from [a] Chinese Congregational Church dated [in] April 2009 (Folios 35-37) referring to the applicant's parents' regular attendance at the Church. The Tribunal asked the applicant's mother when she had started to attend the Church and she stated that they started to attend the Church in 2003. The Tribunal indicated that the letters from the Church did not say that they had started to attend in 2003. She stated that there had been three different priests at the Church during that time and that the priest who had written those letters is new, and he does not know for how long they had been attending the Church.

41. The applicant's mother stated that she is a Christian and that she was a Christian whilst she was in China. She said she was a member of the underground Church in China. The Tribunal asked the applicant's mother if she had claimed Christianity as a ground for seeking protection in Australia when she lodged the application for a protection visa in 2001, and she stated that she did not claim Christianity. The Tribunal asked her to explain why she did not, and she stated that she went to a migration agent whom she told that she could not go back to China. She said the agent had done it all. The Tribunal asked the applicant's mother what claims she had made in 2001 when she lodged her application for a protection visa and she stated she relied on Falun Gong. The Tribunal asked her if the Falun Gong claims she had made in the application for a protection visa were true or false. The applicant stated that the claims were not true. The Tribunal indicated that lodging an application for a protection visa on false claims is a very serious matter to which the applicant's mother replied that she did not know. She said that she just told the agent that she could not return to China She said maybe she did not have a full understanding that God was precious. She said she was afraid of returning to China.

42. The Tribunal indicated that whilst the Tribunal is dealing with the children's claims, the Tribunal needed to consider her own claims as well. The applicant's mother stated that the letters from the Church prove that she is a Christian and that if she were to return to China, she would follow God. She said for the past few years, she has suffered both mentally and physically. She said she has been weak, and she has been relying on God.

43. The Tribunal referred to the report dated from [Person 3], a clinical psychologist referring to the applicant's mother's diagnosis by a consultant psychiatrist of "*obsessional compulsive disorder and anxiety disorder*" and the prescription of anti-depressants. The Tribunal indicated to the applicant's mother that the Tribunal is aware of her clinical status and that the Tribunal would give regard to the report by [Person 3] The Tribunal, however, asked her why she had decided to give evidence on behalf of the applicants instead of the father of the children, [Person 4], given her anxiety level. She stated that [he] would say the same thing as she would say. She said she wants to give evidence herself and she does not want him to give evidence. The Tribunal offered to adjourn the hearing to allow [Person 4] to give evidence on behalf of the children, given that the mother became distressed in the course of the hearing. However, the applicant's mother insisted that she would like to give evidence and not the father of the children who was waiting outside with the three children. The Tribunal however indicated that the Tribunal would consider carefully the report from [Person 3] and would further consider the weight that it would place on that report in assessing the claims made by the children.

44. The Tribunal asked the applicant's mother if the three applicants had been baptized and she stated that the children had not been baptized. The Tribunal asked her why they have not been baptized and she stated that the Church had said that the children should wait until they turn 18 and until they are mature. The applicant's mother stated that she has heard from people in the Church that the children would be baptized when they turn 18 years of age and when they can accept God. She said she hopes that the whole family would follow God.

45. The Tribunal suggested to the applicant's mother that there are many Christians in China who can practise Christianity in registered churches without facing any harm by the Chinese authorities. She stated that she had attended the underground church whilst she was in China She said she did not know that her Christianity could have been connected to the application for a protection visa.

46. The Tribunal asked the applicant's mother if she is working in Australia and she stated that she has worked in vegetable packing. She said she had done odd jobs before her first child was born.

The Tribunal asked her if [Person 4] is working. She said he has been working on and off. She said she and [Person 4] had been living in Australia since 2004. In relation to not being married, she stated that she has thought about it and she has made inquiries, but she has been told that she needed her passport. She said [Person 4] does not have a passport. The Tribunal referred to [Person 4]'s passport that had been brought to the hearing and noted that it had expired.

47. The Tribunal asked the mother what type of work she did whilst she was in China She stated that she was a student at the time. She said she is now 26 years of age. She said she had left China to escape. She said that she came to Australia on a sub-class student 560 visa. She said at her age, a person could only get a student visa in order to come to Australia. She said [Person 4] had gone to Papua New Guinea and his purpose was to leave China. In relation to his current employment, she stated that [he] does different jobs, such as lifting, transport, and other types of jobs.

48. The Tribunal referred to the children's claims. The Tribunal discussed with the applicant's mother, China's one-child policy. The Tribunal indicated to her that China's one-child policy is a law of general application, and generally speaking, harm suffered or could be suffered on the basis of a law of general application does not amount to persecution. The Tribunal explained to the applicant's mother that the one-child policy in China has economic basis and that it is aimed at all nationals of China, although it would appear to be administered differently in certain parts of China.

49. The Tribunal indicated that if the family were to return to China it is plausible that they would face paying of a fine which would enable registration of the children as Chinese nationals. The Tribunal referred to forced sterilization and indicated to the applicant's mother that forced sterilization, although there have been some reports of it happening in certain parts of China, that practice itself is not supported by the Chinese central government.

50. The Tribunal discussed with the mother documents provided in support of the application for a protection visa. The Tribunal discussed the statement of [Person 1] referring, amongst other things, to the birth of his daughters and the subsequent ill-treatment by the Chinese authorities including forced sterilization procedure. The Tribunal referred to the statement by [Person 2] who referred to the birth of his first daughter and his wife's second pregnancy in 1999 that led to their hiding. The Tribunal referred to the document and its translation entitled "*Long Tian Neighbourhood Committee Office of Fuqing City (Notice about standardizing social compensation fees, Long Tian ban 2007 No.56*" (Folio 74-75). The Tribunal indicated that the Tribunal would consider the weight that it would place on those documents.

51. The applicant's mother responded to the Tribunal by stating that they do not have a home to return to in China. She said both she and her partner had applied for protection visas. She said if the family were to return to China she would be forced to undergo sterilization and they would be fined a great sum of money which they cannot pay. She said they would be arrested. She said that the one child policy has been there for a long time. She said she would not be able to register the children. The Tribunal indicated to her that generally speaking, the payment of the fines would mean that the children would be registered. She stated that the Chinese authorities tell outsiders differently to what goes on internally in China. She stated that the children would not be able to go to school in China. They would not be looked after medically. She said they would have difficulties in employment, marriage, and they would suffer mental problems like she has. She said they would suffer a lot. She said they would be discriminated against on the basis of being "*black children*". She said although they have financial difficulties in Australia, they are still happy in Australia. She said the whole family would not be happy if they were to return

to China. She said she would beg the Australian authorities to allow the family to remain in Australia. She said the children speak a little bit of English.

52. The Tribunal referred to the other Member's decision (No.0803287) and explained to the applicant's mother that each matter before the Tribunal is determined according to its own set of facts and merit. The Tribunal indicated to her that the Tribunal is not bound by other decisions made by other Members of the Tribunal.

53. The Tribunal asked her if there was anything else she wanted to say before closing the hearing. The applicant's mother stated that she hopes that the children would be able to stay in Australia She said she would like to raise them in Australia so that they can live a normal life. She said the family will not be a burden on the Australian community.

Oral submissions of the advisor

54. The advisor noted that she had spoken to a principal of a clinic in China who had told her that every member of the village where the applicant's mother comes from has been forced to undergo sterilization, which does not happen in the cities.

Further evidence of the applicant's mother

55. The Tribunal asked the applicant's mother why the family could not relocate to other parts of China such as in the cities, where forced sterilization does not occur. She said it would be the same as other parts in China. The adviser interjected and stated that it would be difficult to get household registration in other parts of China.

56. The Tribunal asked the applicant's mother if they needed more time to provide any further documentation and/or submissions and she did not request any further time.

FINDINGS AND REASONS

57. The applicant has provided birth certificates showing that the children have the same parents. On the basis of the available information, the Tribunal finds that the two second-named applicants are members of the family unit of the applicant. The applicant, her brother and sister were born in Australia, but in circumstances where they do not have Australian citizenship. The applicant has claimed that the children are stateless.

58. Under Article 1A(2) of the Refugees Convention, a person without a nationality (ie who is stateless) must be assessed against his or her "*country of former habitual residence*" (SZIPL v MIAC [2007] FMCA 643 (Raphael FM, 17 May 2007). In the present case, refugee claims are made by children born in Australia and it is thus necessary to determine the country of nationality or "*former habitual residence*" against which those claims are to be assessed. The nationality of the children is a question of fact to be determined on the basis of the evidence. In many cases involving children born in Australia, the child has been found to be of the same nationality as his or her parents. (*Chen Shi Hai v MIMA* (2000) 201 CLR 293; *SZEAM v MIMIA & Anor* [2005] FMCA 1367 (Nicholls FM, 20 September 2005)).

59. It may be argued that it is inappropriate to apply the concept of "*former habitual residence*" to a country where a person has never been. On that view a child who was born in Australia, has never left this country, and is stateless, would be outside the parameters of the Convention definition. Either there is no country of "*former*" habitual residence, or alternatively the only possible relevant country for the purposes of Article 1A(2) must be Australia (*SZEAM v MIMIA*

& Anor [2005] FMCA 1367 (Nicholls FM, 20 September 2005)). On either approach, regardless of the possible merits of the child's case, the application could not succeed, not only because the applicant would not be outside their country of former habitual residence as the Convention definition requires, but also because there would be no room, under that definition, to investigate the applicant's claims in relation to any other country. However, having regard to the humanitarian purpose of the Convention, it may be appropriate in such cases to assess the child's claims against the country of nationality or former habitual residence of his or her parent(s), at least where that country is specified in the visa application as the country to which the applicant does not want to return and in which it is claimed he or she would suffer persecution and where no other relevant country emerges from the facts. In *SZEOH & Anor v MIMIA*, [2005] FMCA 1178 (Nicholls FM, 26 August 2005), where the applicant daughter was born in Australia and had no nationality or country of former habitual residence, the Court held that it was appropriate, sensible, practical and fair for the Tribunal to consider her claims against a return to Singapore, that being her mother's country of nationality and the country against which her claims of fear of harm were made.

60. Under the Hague Convention, it is for each state to determine under its own law who are its nationals. In order to establish whether an applicant is a national of a particular country, it may therefore be necessary to consider the operation of the municipal law of that country. Article 5 of *China's Nationality Law* states a person "*born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.…*" (CX105145: Australian/Chinese Nationality, Undefined, 20 October 2004). There is evidence before the Tribunal such as passports, Household Registration, other written evidence and oral testimony that the applicant's parents are nationals of China. On the basis of the available information, the Tribunal finds that the applicant's father is a citizen of China, and that he does not have Australian citizenship or permanent residence. The Tribunal similarly finds that the applicant's mother is a citizen of China and that she does not have Australian citizenship or permanent residence. The Tribunal is satisfied that the children will be able to secure recognition as Chinese citizens. Given this, the Tribunal does not accept that they are stateless. The Tribunal finds that they are citizens of China.

61. In essence, the applicant's claims to fear harm based on the administration of China's one-child policy. Whilst China's one child policy is arguably a law of general application and its administration would not generally amount to persecution, the Tribunal for the following reasons is satisfied that if the applicant were to return to China, she would suffer serious harm amounting to persecution as a result of the application of the one-child policy as well as the family's Christian faith.

62. The applicant has claimed to be a Christian. There is evidence from a pastor, [name deleted: s.431(2)], before the Tribunal that the applicant and other members of her family have engaged in Christian related activities in Australia (folios 35-37). Whilst the Tribunal has some concerns about the applicant's mother's credibility and the purpose of her engaging in Christian-related conduct in Australia, s.91R(3) refers to the applicant's conduct; in the applicant's case, her mother's conduct is irrelevant as far as s.91R(3) is concerned. Although the applicant has not been baptised, given the letter from [the pastor], the Tribunal is satisfied that the applicant is a Christian and that if she were to return to China, she would practise her religion. The Tribunal has doubts, but finds it plausible that the applicant and other members of her family would engage in underground church related activities. In consideration of the evidence as a whole, the Tribunal accepts that the applicant has been involved in religious activities in Australia. For the stated reasons, the Tribunal cannot disregard that conduct pursuant to Section 91R(3).

63. Independent country information available to the Tribunal indicates, *inter alia*, that "*China's constitution guarantees freedom of religion, but the government restricts spiritual expression to government-registered temples, monasteries, mosques, and churches The government vets religious personnel, seminary applications, and religious publications, and periodically audits religious institutions' activities, financial records, membership, and employees. The Chinese government considers all unregistered religious organizations, including Protestant "house churches," illegal; members risk fines and criminal prosecution. It also continues to designate certain groups as "evil cults," including the Falun Gong, and regularly cracks down on followers. Official repression of religious activists continued during the Beijing Olympics. On August 10, police detained veteran house church leader Hua Huiqi as he was en route to a church in Beijing where US President George W. Bush was scheduled to attend religious services. Hua was confined to a makeshift detention center for several hours until he managed to escape*" (Human Rights Watch world report 2009 (Released January 2009) http://www.hrw.org/en/node/79301).

64. The US Deaprtment of State Report notes that "*The constitution and laws provide for freedom of religious belief and the freedom not to believe, although the constitution only protects religious activities defined as "normal." The government sought to restrict legal religious practice to government-sanctioned organizations and registered places of worship and to control the growth and scope of the activity of both registered and unregistered religious groups, including house churches. To be considered legal, religious groups must register with a government-affiliated patriotic religious association (PRA) associated with one of the five recognized religions: Buddhism, Taoism, Islam, Protestantism, and Catholicism. The PRAs supervised the activities of each of these religious groups and liaised with government religious affairs authorities charged with monitoring religious activity. The government tried to control and regulate religious groups, particularly unregistered groups, and repression and harassment of unregistered religious groups intensified in the run-up to the Olympics. Nonetheless, freedom to participate in religious activities continued to increase in many areas. Religious activity grew not only among the five main religions, but also among the Eastern Orthodox Church and folk religions*" (US Dept of State Country Report on China for 2008 (Released 25 February 2009) \\NTSSYD\REFER\Research\usdos\2008us_rep\web\China2008.htm)

65. The Tribunal is satisfied that independent country information indicates that members of an underground church can be persecuted by the Chinese authorities. In consideration of the evidence as a whole, the Tribunal accepts that, if the applicant were to return to China, there is a real chance that she would be persecuted for her and the family's religious activities and religious beliefs. The Tribunal is satisfied there is a real chance that for reasons of those religious beliefs and/or activities, the applicant would suffer serious harm. The evidence before the Tribunal indicates that members of the underground church in China are persecuted and can be severely ill treated by the Chinese authorities who suppress the practice of religion in other organisations but the officially registered churches.

66. In relation to the applicant's claims based on China's on-child policy, it is well established that enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225) for the reason that enforcement of such a law does not ordinarily constitute discrimination. As Brennan CJ stated in *Applicant A*:

> … the feared persecution must be discriminatory. … [It] must be "for reasons of" one of [the prescribed] categories. This qualification ... excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of

"refugee". (at 223)

67. Consistently with Australian law, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* states at paragraph 56:

> 56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim - or potential victim - of injustice, not a fugitive from justice.

68. Examples of circumstances which have been found to involve non-discriminatory enforcement of generally applicable laws and outside the scope of the Convention include enforcement of China's "one child policy" as applied to parents who "*having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised*" (*Applicant A & Anor v MIEA & Anor*, ibid).

69. While the implementation of laws of general application does not ordinarily constitute persecution, there is no reason that the implementation of such laws can *never* amount to persecution. A law of general application is capable of being implemented or enforced in a discriminatory manner. Where laws of general application are selectively enforced, in that the motivation for prosecution or punishment for an ordinary offence can be found in a Convention ground, or the punishment is unduly harsh for a Convention reason, then Convention protection may be attracted. In *"Z" v MIMA* (1998) 90 FCR 51, Katz J pointed to selective prosecutions for a Convention reason, or the imposition of greater punishments for a Convention reason, as features which would render enforcement of a generally applicable criminal law persecution for a Convention reason. Noting that the Full Federal Court in *Applicant A* did not identify the additional features which would render enforcement by a country of one of its generally applicable criminal laws persecution for a Convention reason, his Honour inferred that

> what they had in mind was either selective prosecutions under the relevant law, the criterion of selection of persons for prosecution being those persons' race, religion, nationality, membership of a particular social group or political opinion, or the imposition of punishments on persons convicted under the relevant law, such punishments being greater than they would otherwise have been by reason of the convicted persons' race, religion, nationality, membership of a particular social group or political opinion. (*ibid*, at 58).

70. Therefore, the Tribunal needs to consider if the administration of the one-child policy in this case would be enforced against the applicant in a discriminatory or selective manner, and such selectivity can be attributed to a Convention ground.

71. Given the Tribunal's findings that the applicant is a Christian and that she and other members of the family would engage in underground Christian related conduct in China, the Tribunal is satisfied that whilst China's one child policy is a law of general application, in the applicant's case because of her Christian faith and the hardship the family would face, the application of the policy would amount to persecution. There is a report dated [April 2009] from [Person 3], clinical Psychologist, Sydney West Area Health Service, referring to the applicant's mother, who has been diagnosed by a Consultant Psychiatrist as having "*Obsessional Compulsive Disorder and Anxiety Disorder*" and that she has been prescribed antidepressant medication. The Tribunal gives weight to that report; the illness of a parent has a huge impact on the family, especially the three young children. [Person 3] notes that the mother would require further professional management and assistance. The Tribunal is satisfied that if the applicant were to return to China, the family would face serious financial hardship if forced to pay fines in order to enable the registration of the children; there is a chance that both parents would not be able to get employment in China and they would not be able to pay imposed fines. The Tribunal is satisfied that the fines and other penalties the family would face, would adversely impact on the family's

ability to survive financially in China In all the circumstances, the Tribunal considers there is a real chance that the parents may find themselves liable to an exorbitant fee in order to secure registration of the children. The Tribunal considers therefore that there is a real chance that they may not be able to afford to pay and that, as a result, the applicant may be denied registration.

72. Although arguably there is in China private medical services and private education, it could not be expected that a family which could not pay the fine for children would be able to afford to pay the private medical help and private education. The fines and penalties would include social compensation fees for bearing three children without permits for the births and social stigma. The applicant's family would have to pay for services required by the children who would be denied registration and accordingly denied access at an affordable price to education, medical, social and any other services. The Tribunal accepts that the children could be discriminated against for being "*black children*". In essence, the Tribunal is satisfied that the administration of the one-child policy in the applicant's case would be enforced against the applicant in a discriminatory and/or selective manner, and that such selectivity is attributed to Convention grounds, namely religion and membership of a particular social group ("*black children*").

73. The Tribunal considers that the denial of basic medical services could, in some circumstances, be life-threatening, and therefore constitutes "*serious harm*" within the meaning of s.91R. The Tribunal finds that there is a real chance that the applicant will suffer discrimination of sufficient seriousness as to amount to persecution because of her membership of a particular social group of unregistered children, or "*black children*." The Tribunal finds that the applicant's membership of that particular social group and religion are the essential and significant reasons for that persecution. It finds that the feared persecution involves systematic and discriminatory conduct.

74. In sum and in consideration of the evidence as a whole, the Tribunal is satisfied that the applicant has a well-founded fear of persecution for Convention reasons, namely her Christian religion and membership of a particular social group. The Tribunal is satisfied that if she were to return to China, there is a real chance that she would suffer serious harm amounting to persecution in the reasonably foreseeable future. In consideration of the evidence as a whole, the Tribunal finds that the applicant has a well-founded fear of persecution.

75. There is no evidence before the Tribunal which would suggest that the applicant has any right to enter, and reside in, any country other than China. The Tribunal therefore finds that she does not have such a right.

76. Therefore, the Tribunal finds that the applicant has a well founded fear of persecution for Convention reasons.

CONCLUSIONS

77. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

78. The other applicants applied as members of the first named applicant's family. The Tribunal is satisfied that they are members of the first named applicant family unit and that the fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant satisfies the criterion set out in s.36(2)(a), it follows that the other applicants will be entitled to protection visas provided they meet other relevant criteria.

DECISION

79. The Tribunal remits the matter for reconsideration with the following directions:

(i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and

(ii) that the second and third named applicants satisfy cl.866.222(a) of Schedule 2 to the Migration Regulations, being members of the same family unit as the first named applicant.

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