

**1109018 [2012] RRTA 16 (4 January 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1109018

**DIAC REFERENCE(S):** CLF2011/77966

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

**TRIBUNAL MEMBER:** Rowena Irish

**DATE:** 4 January 2012

**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 may identify the applicant] July 2007 and applied to the Department of Immigration and Citizenship for the visa [in] May 2011. The delegate decided to refuse to grant the visa [in] August 2011 and notified the applicant of the decision.
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 applicants applied to the Tribunal [in] August 2011 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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.
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.
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. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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.

### **Departmental file and evidence**

20. The application form (completed with the assistance of a registered migration agent) states that the applicant was born on [date deleted: s.431(2)] in Fujian, China. She claims to be a Chinese citizen and not to have citizenship of, or a right to enter or reside in, any other country. She speaks, reads and writes Chinese. She lists her religion as “Christian”. She had 12 years education and lists her occupation as “student”. Her parents and brother live in China.
21. She arrived in Australia [in] July 2007 travelling on a Chinese passport. She entered on a Student visa which was valid until [a date in] March 2010. She left the country legally and had no difficulties obtaining her passport. Before travelling to Australia she had never been outside China. Since 2001 she had lived at the same address in Fuqing City, Fujian Province.
22. Her de facto partner, [Mr A], is currently in Australia. He previously lodged a protection visa which was refused by the Department of Immigration and affirmed by the Refugee Review Tribunal on [date deleted: s.431(2)].
23. The applicant provided a statement together with her protection visa application which claimed:
  - Her parents put a lot of pressure on her in relation to her studies in Australia but she found it difficult to cope in Australia which is why “later I entered up with a chaos”.
  - She met her partner, [Mr A] in March 2010 in Sydney. He had also come to Australia on a student visa. They began a relationship and [in] 2010 the applicant became pregnant. She told her parents who had concerns that if she returned the child would not be entitled to the same rights as other children because it was illegitimate and she and the child would be discriminated against.
  - She does not wish to return to China on the basis that she is a member of the particular social group of “single mothers” and/or “unmarried woman with a child” and will be subject to discrimination such as large fines, denial of education and employment, rejection of household registration and social welfare.

- She provided information on Chinese family planning laws and the difficulties faced by “black children”.
- Unmarried mothers find it much harder to get married in China as they are commonly disowned by their families and are seen as “tainted goods” by the family of any prospective husband. Furthermore she could not have any more children as she would be subject to pressure to be sterilised or an abortion if she did get pregnant again.
- Unmarried mothers have particular difficulties in less developed cities or areas like the applicant’s because it is difficult or impossible for them to gain legal access to a residency permit as required by family planning rules.
- [In] July 2010 she was baptised as a Christian.
- In summary she states:

For the above reasons if I and my child return to China, we will face persecution because I give birth outside of marriage. My child will face persecution, including being restricted in employment opportunities and denied social services such as free/ state subsidised health care, education, unemployment benefits and disability and old age benefits. In particular I will face a high financial penalty imposed on me in violation of China family planning policy, and when I can not afford to pay, my child will not be able to obtain household registration, making it impossible to access education or welfare services. I believe I and my child are persons to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

24. Together with the application the applicant provided a copy of her Chinese passport.
25. The applicant was interviewed by the delegate [in] July 2011. The Tribunal has listened to a recording of that interview and sets out below a summary of the discussions that occurred.
  - The applicant confirmed that the details provided in the application form are correct. She wrote the statement herself after discussions with her family and agent. She is still living with her partner at the same address. They have not gotten married because she did not know that she could do that here in Australia and would consider getting married here now that she knows she can.
  - She stated that she is Christian and discovered she was pregnant [in] 2010. Her family used to send her money when she was a student but they stopped doing this in January 2009. In February 2009 she moved to Sydney and started doing casual work. She stopped studying in January 2009 because of a lack of money.
  - She speaks with her parents about once a week. They live in Fuqing City, Fujian and are not Christians.
  - The applicant stated that she did not know what denomination of Christian she is but she belongs to the “family church” She has been attending church in [suburb deleted: s.431(2)] since May 2010. It is called the [name deleted: s.431(2)] Church. Before she was pregnant she went every week but now her belly is too big and she moved to [suburb deleted: s.431(2)] so it is not convenient. She stated that her main concern is her child but she will also face problems in China as a Christian. She does not know much about

registered Christian churches in China. She became a Christian [in] June 2010 and was no religion before this.

- The delegate discussed with her whether she would be willing to worship in a registered church. She replied that these types of churches are different to hers. When asked how she replied that they have a different name but otherwise she does not know. However she heard from the uncles in the church in Australia that she should not go there because the two churches are different. She stated that she is not very devout at the moment because she hasn't been a Christian for that long.
- The delegate asked the applicant about her church's views on sex before marriage. She replied that the church does not agree with it but she knew her boyfriend before she went to church. They then discussed whether the pregnancy was accidental or planned. The applicant claimed it was accidental although they were not using any contraception. She stated that when she first met her boyfriend he said he wanted to find someone to get married and have children but she said no at that stage because it was too early.
- She stated that her boyfriend, [Mr A], supports her financially by working in construction. She believes that they will get married but her family would not be able to come to the wedding. His parents know she is pregnant and they worry about the child going back to China and family planning policies. Her own parents do not have any other grandchildren but her boyfriend's sister just had a baby. She is [age deleted: s.431(2)] years old and is not married. She is in South Africa.
- The delegate asked what she could say about Christianity. The applicant replied that she had not learnt much because she hadn't been going for a while. Sometimes at home she reads the first chapter of the Bible but she cannot recall what that is called. She was baptised in [suburb deleted: s.431 (2)] with a group of people. When asked if she had to do any preparation she stated that they asked some questions such as the name of Jesus' parents. The delegate put to her that normally there would be lessons before a baptism. She stated that she learnt those things at the time but has now forgotten them. When asked what a baptism is she replied that she did not know but it is to give herself to God and be in one body with God. A person is baptised in order to become a Christian but she does not know anything more than that. She stated that Jesus was the son of God but she does not know why he was born. She does not know what the last supper was or about the resurrection.
- The applicant stated that the baby is due on [date deleted: s.431(2)]. If she returns to China the child will not have access to civil and social requirements if she does not pay the fine. Also if she wants to have more children she will not be able to because of the one child policy. The delegate put to her that her parents and [Mr A]'s parents both had more than one child. The applicant replied that her mother was detained for two days and had to pay a fine after the birth of the applicant's brother. In Australia she can have as many children as she wants. In China it is hard to get registered. The delegate put to her that she could get registered if she paid the fine. The applicant replied that she does not know how much the fine would be.

## **Tribunal file and evidence**

26. The applicant appeared before the Tribunal [in] December 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by her registered migration agent who did not attend the hearing. The applicant brought with her her very young baby without anyone to care for it during the hearing. The Tribunal attempted to commence the hearing. However the baby was very unsettled and the Tribunal did not consider that the applicant was able to concentrate on what was being said in the hearing as she was needing to walk around the hearing room, pick up items that the baby threw and was attempting to entertain the baby while the Tribunal was speaking with her. The Tribunal considered that in the circumstances it would be unfair to proceed with the hearing that day. Therefore the hearing was adjourned and the applicant was asked to make alternate arrangements for the care of her baby during the resumed hearing. The Tribunal stated that it would resume the hearing on the following Friday. The applicant confirmed that she would be available and would arrange someone to care for the child.
27. The applicant appeared again before the Tribunal [a week later]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by her registered migration agent who did not attend the hearing.
28. The applicant stated that she is a citizen of China and no other country. She does not have the right to enter or live in any other country. She stated that the statement she provided with the application was prepared by herself in Chinese and then her agent translated it. Her agent read back the statement to her to ensure its accuracy and she is confident that it is all correct. There is nothing that she wants to change or add to her claims.
29. She stated that she is currently living in [suburb deleted: s.431(2)] with her boyfriend and baby. They are renting the place they are living in. They have a car which they bought second hand for \$2000. She is not working but [Mr A] is. He works full-time in [occupation deleted: s.431(2)]. She does not know the details of how much he earns but he pays for all their expenses. They do not have any savings and do not receive any money from anywhere else.
30. She stated that before coming to Australia she lived [in] Fuqing City where she had lived for 18 years. She has never physically lived anywhere else in China and this is where her hukou is registered.
31. She stated that she is Christian but does not know what denomination of Christian but knows that it is not Catholic.
32. Her parents and younger brother live in China at the same address as above. They are no religion. Her brother is [age deleted: s.431(2)] years old. She speaks to them every week. They are not supporting her financially, having stopped in 2009 when she stopped attending school and started working so did not need them to support her. The last time that they sent her money was in 2009 when a friend brought AUD2000 for her. The applicant brought with her AUD1500 from China. The agent provided accommodation and some vegetables and the applicant worked part time [occupation deleted: s.431(2)] to earn the rest of the money she required. Her boyfriend and her paid for her current migration agent. It cost about

100,000RMB to come to Australia which was paid to the agent in China. She does not know whether [Mr A]'s parents send him money.

33. The applicant stated that her father currently does not work but stays at home because he has [physical condition deleted: s.431(2)] so he cannot do anything. He stopped work in 2010. Before this he worked for 20 years driving a [vehicle]. Her mother works [occupation deleted: s.431(2)]. She started doing this when her father stopped working. Before that she had never worked. The Tribunal put to the applicant that in her application it states that her father and mother worked at a [factory]. The applicant stated that she does not know about this as it was all handled by an agent but that information is false. The Tribunal asked how her parents had afforded for her to come to Australia. She replied that they borrowed the money and are still paying it back. They also plan for her brother to come to Australia but she is not sure how they will afford this.
34. The applicant stated that her parents own the house they live in but when asked how much it would be worth she stated that it was built by themselves. She does not know if they have any savings. She does not know anything about [Mr A]'s family's financial situation. His mother is a farmer and sometimes does nothing and his father runs a shop with a partner. She does not know whether they are well off.
35. The applicant stated that she came to Australia to study and planned to remain here permanently. When asked if she had difficulties getting her passport she replied that she did not know as the agent handled all of this. She had no problems at the airport when leaving China.
36. The Tribunal asked why she fears returning to China. She replied that she has had a baby and they are not married so she is afraid that if they went back to China they would be fined and arrested. The Tribunal asked how much she would be fined. She replied that she did not know but was told that it would be a large amount. Her parents advised her not to come back.
37. She started her relationship with [Mr A] in March 2010. They are not married. The Tribunal asked why not. She replied that they have a baby and do not know how to get married in Australia. The Tribunal asked whether she had made any enquiries. She replied that she had not as she was too busy caring for the baby. She stated that they would get married if they returned to China.
38. The Tribunal explained that the role of the Tribunal is only to consider whether she would suffer from persecution if she returned to China and not her baby as the child is not included in the application. It asked why she would suffer from harm. The applicant replied that they had a baby before they got married and her age is not qualified to get married according to the regulations so definitely they will be detained and fined. She stated that the baby was born [in] 2011. At that time she was [age deleted: s.431(2)] years old. [Mr A] was [two years older]. The Tribunal put to her that according to *Article 6 of the Marriage Law of the People's Republic of China*, women can legally marry at the age of 20 and men at the age of 22, including in Fujian. The applicant replied that her family had said that she had to be 22. The Tribunal asked what she thought would happen if she was at the age where she could marry. She then stated that she can get married at 20 but is not allowed to have a baby before 22 or 23. The Tribunal put to her that this is not supported by any country information that the Tribunal is aware of. The Tribunal stated that the information before it suggests that there would be a social compensation fee payable to have the baby registered but this would be



payable because the baby was born out of wedlock, not because of the applicant's age. The applicant stated that she had no comment on this.

39. The Tribunal put to the applicant that the independent country information before it suggested that the amount of the social compensation fee would be AUD3500 – AUD5500 and asked why she would be unable to pay that. She replied that the money her boyfriend earns is only sufficient to afford the expenses they are having. The Tribunal put to her that in Fujian there is provision for payment of the social compensation fee by instalment over a number of years and asked why she and/or [Mr A] could not work in China and pay off the fee over a number of years. She replied that she does not know but the reason they do not want to go back is that they would not have to pay the fee at all here in Australia and it is different treatment. The Tribunal discussed with the applicant the definition of a refugee and the requirement that the persecution involve some kind of serious harm. It stated that financial disadvantage may not be sufficiently serious to constitute serious harm under the Convention. The applicant stated that she had no comment about this.
40. The Tribunal also discussed with the applicant the requirement that there be systematic and discriminatory conduct. It explained that China's family planning policy is a general law of application that applies equally to all citizens. The enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Refugees Convention because enforcement of it is not discriminatory. The Tribunal asked in what way the applicant believed she would be discriminated against by the application of China's family planning policy. She replied that people in her area prefer boys over girls and she gave birth to a baby girl. The Tribunal asked whether she thought the authorities would discriminate against her for this reason or whether she meant other people in the community. She replied that she meant other people in the community. The Tribunal asked how they would discriminate against her. She replied that because she gave birth to a baby girl her family would force her to have another child. The Tribunal asked how they could do this when she is an adult. She replied that they would kick her out of their home. The Tribunal asked whether she and [Mr A] would establish their own home anyway given her evidence that they would get married. She replied that they would. The Tribunal put to her that this did not appear to be serious harm then. The applicant replied that the details were already listed in her materials. The Tribunal asked what she meant by this. She stated that because they are not married they will be arrested and the other claim is that she is a Christian.
41. The applicant stated that if she returned to China she would initially return to her parents' home. Initially she stated that she did not know whether her hukou was registered as rural or urban but later stated that the area could be described as rural.
42. The Tribunal put to the applicant that the country information does not suggest that she would be arrested but does suggest that she would be fined. It asked why she believes that she would be arrested. She stated that her parents told her this. The Tribunal asked if there was any other reason she would be discriminated against. She replied that she is a Christian and she was told by an uncle that Christianity in Australia is different to Christianity in Fujian and that she should not go back.
43. The applicant stated that she first went to a Christian church in May 2010 and was baptised in June 2010. The Tribunal asked what the baptism involved. She stated that after the baptism she was a Christian. The Tribunal asked what the ceremony was for the baptism. She stated that at the beginning they needed to learn something about Christianity and then priest started arranging the ceremony. She knelt down and the priest used water to baptise her. The

Tribunal asked what she learnt about Christianity. She stated that learnt some basics such as who is the son of God and about the Trinity but she does not know any details because currently she didn't get involved.

44. The Tribunal asked why she became a Christian. She replied that at the beginning she was into the Christianity and learnt something and became a Christian. She went to church every week by that time and an uncle inside the church just told her to become a Christian. She had never attended church in China. She has not told her family in China that she is a Christian. She does not know how they will react if she tells them. They have never talked about religion. The Tribunal asked why she has not told them given it is such a significant event. She replied that she does not think it is necessary because she lives in Australia by herself. The Tribunal asked if she would tell them if she returned to China. She replied that it depends on whether they mention it or not. If they mention it then she will tell them, if not then she will not. Her parents are illiterate so they don't know about this. The Tribunal put to her that generally Christians will want to tell others about their religion in order to convert them and save them. It asked given this why she did not have a desire to talk to her parents about it. She replied that they are illiterate so it is useless to talk to them, they won't go.
45. The Tribunal asked when she last attended church. The applicant replied that after her baptism in June she only went to church once. The Tribunal asked why she has not been more often. She replied that she had an abortion so she needed to rest and then she got [pregnant] again and she moved. The Tribunal put to the applicant that in her Departmental interview she had said that she did not go since November. She replied that she told the Department the same things. Sometimes she just went to church and left very quickly. She only listened carefully to the sermon once and the other times she just went there and left very quickly. The Tribunal asked why she left very quickly. She replied that she could not absorb the information. The Tribunal asked how many times she has attended church in Australia. She replied that she cannot calculate it. The Tribunal asked why she got baptised given that she had only listened to one sermon and left quickly each time. She replied that she just listened to the uncle at the church and he told her to go. She knew the uncle through an aunty with whom she lived. They are not relatives.
46. The church she attended was in [suburb deleted: s.431(2)] and was called [name deleted: s.431(2)]. She does not know the address. The services were at 10am on Sundays. She has not attended any other church. Besides attending the services she was not involved in any other activities.
47. The Tribunal asked how often she prays. She replied "very rarely" She stated that she had a Bible which the church gave her. She stated that she had read this sometimes before she had the baby but after that she didn't read it. She does not know who wrote the Bible. The Tribunal asked her what the Bible contains. She replied that she does not know. She reads the Bible just like a novel – occasionally but not very often. She just read it as a story because she does not understand a lot of things in the Bible. She stated that she believes the Bible is true. The Tribunal asked if she could tell it any of the stories from the Bible. She replied that she has only read two chapters – Genesis and the other is about leaving Egypt. The Tribunal asked if she could describe 3 or 4 of the major beliefs or practises of her religion. She replied that she did not know. The Tribunal asked her what it means to her to be a Christian. She replied that after she was baptism she just became a Christian but she seldom reads the Bible. She does not know why Christians celebrate Christmas.

48. The Tribunal put to the applicant that she arrived in Australia in July 2007, her student visa expired in March 2010, she started attending church in May 2010 and got pregnant [in] 2010 but did not lodge a protection visa application until May 2011. It asked why she waited so long to lodge a protection visa application. She replied that she did not want to apply as a refugee but then the Department came to her home and said that they were going to detain her. She was pregnant and afraid. The Tribunal asked why she did not want to apply for a protection visa if she was afraid to return to China. She replied that she was pregnant and could not go back. Her mother called her crying telling her not to go back because she would have to have an abortion. The Tribunal put to the applicant that the delay in lodgment of her application suggests that she does not have a genuine fear and if she did have a genuine fear of abortion given that she has now had the baby she no longer holds that fear. The applicant replied that if they returned to China they would still be fined. Also, if they want to have another baby they definitely cannot go back because when her mother gave birth to the applicant's brother she was arrested and fined.
49. The Tribunal put to the applicant that it did not appear that she has any genuine interest in Christianity given her evidence to the Tribunal about her practise of Christianity and therefore it appeared to the Tribunal that she would not practise Christianity if she was to return to China. She replied that if she gets time in the future she would. Currently she cannot go because she has the baby and it is noisy. The Tribunal put to her that the baby was only born in [recently] and she has only attended once since June 2010 so it is not just because of the baby. The applicant replied that she had moved so it was not very convenient to go to church. Also at the beginning of the pregnancy she was quite sick and therefore could not go.
50. The Tribunal asked whether she knew the difference between a registered and unregistered church in China. The Tribunal asked why she could not practise her religion through a registered church in China. She replied that she did not know but an uncle told her that she cannot go back.
51. The Tribunal put to her that the country information the Tribunal has suggests that Fujian is one of the most tolerant provinces in China in relation to religion, particularly Christianity and that many Christians are able to practise their beliefs within Fujian without difficulty, including in registered churches and in unregistered house churches. This may suggest that there is not a real chance that she would be subject to persecution if she was to return to China on the basis of her religion. The applicant replied that she did not know about this.
52. The applicant stated that she had no other reason to fear returning to China.
53. The Tribunal discussed with the applicant the need for it to consider the reason that an applicant has undertaken activities in Australia. It stated that if it did not think that it was being given a truthful account of what happened it may consider that the activities in Australia were undertaken solely for the purpose of strengthening the protection visa application. If that was the case the Tribunal would be required by law to disregard those activities in assessing the claims. The applicant replied that her activities were not for the purpose of her refugee claim.
54. The Tribunal put to her that in her written statement she had raised a number of claims in relation to the effects of being unmarried including social ostracism, rejection by the family and inability to find a husband. The Tribunal put to her that given her evidence that she and

[Mr A] would get married these claims no longer apply. The applicant's response indicated that she agreed.

55. The applicant had no other comments.

## **FINDINGS AND REASONS**

56. On the basis of her Chinese passport, provided with her application, the Tribunal finds that the applicant is a citizen of the People's Republic of China. The Tribunal finds that the applicant is outside her home country. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than her country of nationality, the People's Republic of China. Therefore the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.
57. The applicant claims to fear returning to China on the because she has had a child born in Australia out of wedlock and therefore if she was to return to China she would be penalised for having breached Chinese family planning laws. She also claims to fear returning to China because she is Christian.
58. The Tribunal accepts the difficulties of proof faced by applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraph 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

### **Claims relating to family planning laws**

59. The Tribunal accepts that the applicant has had a child born in Australia out of wedlock when she was [age deleted: s.431(2)] years old and the baby's father was [age deleted: s.431(2)] years old. The applicant claimed that she would be in breach of Fujian's family planning laws because she had a child at an age before which she was legally allowed to marry. The Tribunal does not accept this claim. Article 6 of the *Marriage Law of the People's Republic of China* states that women can legally marry at the age of 20 and men at the age of 22.<sup>1</sup>

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<sup>1</sup> People's Republic of China 2001, 'Marriage Law of the People's Republic of China', Adopted at the Third Session of the Fifth National People's Congress on September 10, 1980, and amended in accordance with "Decision Regarding the Amendment (of Marriage Law of the People's Republic of China)" passed at 21st

Therefore, based on the applicant's own evidence about her and [Mr A]'s ages at the time of the birth of their daughter, the Tribunal finds that they were of marriageable age in China. When this was put to the applicant she then changed her claim and stated that she would be in breach because although she was entitled to marry she was not entitled to have a child before the age of 22 years old. The Tribunal does not accept this claim. The applicant has not provided any evidence in support of this claim, merely stating that this is what her parents told her. The Tribunal is not aware of any regulations in China which restrict the age for childbearing to 22 years old and can see no logical basis for why the authorities would introduce such a law when a woman is permitted to marry at 20 years of age.

60. However, the Tribunal accepts that if the applicant was to return to China she would be considered to be in breach of Fujian's Family Planning Regulations because she had a child out of wedlock. In general, couples are allowed one child without being fined, however they must meet requirements including being married. It is forbidden for a couple to give birth 'before the stipulated time' under Article 14 of the *Population and Planning Regulation* for Fujian Province. Article 14 states:

Under any of the following circumstances, the child born is regarded as born before the stipulated time by the Regulation:

(1) Those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age).<sup>2</sup>

61. The Tribunal accepts that the penalty for this would be that she would be required to pay a social compensation fee. The applicable social compensation fees for Fujian are set out in the Fujian Family Planning Regulations of 2002.<sup>3</sup> Article 39 of the regulations stipulates that the fines are based on the corresponding number of times of the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the year prior to the birth of the child, unless the actual annual income of the parties concerned exceeds this.<sup>4</sup> Fuqing is a largely rural 'county-level city' consisting of 20 townships and their surrounding villages. Although the applicant was unclear she indicated that she thought her area would be considered rural. Assuming the applicant is a rural resident, for a first child born of wedlock the applicable social compensation fee would be four to six times the annual per capita net income for rural residents.<sup>5</sup> The most recent income statistics for Fujian, from the *Fujian Statistical Yearbook 2010*, give an annual per capita disposable income for rural residents of 6,680 for the 2009 year.<sup>6</sup> This gives a potential fine of 26,720 and 40,080 Yuan (\$AUD 3632 – 5560<sup>7</sup>).

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Session of the Standing Committee of the Ninth National People's Congress on April 28, 2001  
<http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm> – Accessed 15 November 2010

<sup>2</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website

<sup>3</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website. <http://www.unhcr.org/refworld/pdfid/4242b7394.pdf> – Accessed 5 December 2011

<sup>4</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website. <http://www.unhcr.org/refworld/pdfid/4242b7394.pdf> – Accessed 5 December 2011

<sup>5</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website. <http://www.unhcr.org/refworld/pdfid/4242b7394.pdf> – Accessed 5 December 2011

<sup>6</sup> 'Per Capita Annual Income of Urban and Rural Households, 1978-2009' 2010, *Fujian Statistical Yearbook 2010*, Sec.6-1, Fujian Provisional Bureau of Statistics website

62. The applicant claimed that she would be arrested for having breached Fujian's Family Planning Regulations. The Tribunal does not accept that there is a real chance of this occurring. The following Independent Information indicates that returning Chinese may be treated more leniently. Document CHN103033.E dated 29/01/09 from the Research Directorate Immigration and Refugee Board of Canada advises:

Parents responsible for pregnancies or births without permission in China could face difficulties but Chinese couples living abroad are not bound to the One-Child-Policy. Chinese citizens studying or working in foreign countries can return with more than one child without any serious problem.

In general, people who return to China from abroad are actively welcomed back to the motherland, and children born outside China largely forgiven.

63. In addition, according to a 2004 DFAT report, in general, Fujian was said to have one of the "least coercive family planning regimes in China". According to the report, enforcement is undertaken by local authorities and some enforce family planning rules more vigorously than others. This has resulted in a "patchwork of different rules and enforcement across the province" Rules are more strictly enforced in the larger cities such as Xiamen and Fuzhou and in areas where state-owned industry is stronger, such as the steel making city of Sanming. This is less so in the poorer countryside, including mountainous or coastal fishing areas where one child families are less common.<sup>8</sup> According to the US DOS, "Fujian province's lax enforcement of family planning rules has been criticized in the official press". The report notes that, in rural areas two children were often permitted without the necessity of paying a fine for the second child.<sup>9</sup> A 2000 fact-finding mission by the Canadian embassy to Fujian assessed that the family planning policies were less effectively enforced than in other parts of the country. The report states:

It is evident that to date the Fujian local authorities in the four counties visited have lacked the capacity or will to effectively implement the Central Government's national birth control policy. Fujian is far from Beijing and a long tradition of false reporting to central authorities and only feigned compliance with national edicts is very well established in the province's history.<sup>10</sup>

64. Compliance was said to be encouraged more through incentives than through enforcement. In all the counties visited by the mission, it was noted that extracting social compensation fees from villagers was difficult. It was also found that family planning officials were required to pass qualifying examinations to demonstrate understanding of government birth control policies and practices.<sup>28</sup> By the mid-1990s the use of coercion in enforcement had

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<file://ntssyd/refer/research/library/downloads/fujian%20statistical%20yearbook%202010/en/html/0601.htm> – Accessed 5 December 2011;

<sup>7</sup> According to the Commonwealth Bank website's 'Foreign Exchange Calculator' <http://www.commbank.com.au/personal/international/tools-and-calculators/foreign-exchange-calculator/foreign-exchange-calculator.aspx> – Accessed 5 December 2011.

<sup>8</sup> Department of Foreign Affairs and Trade 2004, *DFAT Report No. 287 – RRT Information Request: CHN16609*, 22 April

<sup>9</sup> US Department of State, Office of Asylum Affairs, Bureau of Democracy, Human Rights and Labor, 1998, *China: Profile of Asylum Claims and Country Conditions*, 14 April, Section IV 1.b.2 'Claims based on coercive family planning'

<sup>10</sup> Immigration and Refugee Board of Canada 2000, *CX42323 – Report of a fact-finding mission to Fuzhou by political counsellor, Canadian Embassy, Beijing*, 23 March

come to be seen as a clear violation of central policy and officials had been ordered not to use forceful methods.<sup>11</sup>

65. Also, the applicant stated that she and [Mr A] plan to marry which the Tribunal considers would be likely to be viewed favourably by the authorities, although it would not mitigate the obligation to pay the social compensation fee outlined above. In light of all of the above, the Tribunal does not accept that there is a real chance that the applicant would be arrested as a result of the birth of her daughter outside of wedlock.
66. The applicant also claims that she would not be able to have another child in China (although she also claimed contradictorily that her family would force her to have another child) because of China's one child policy. The Tribunal accepts that the birth a second child to her in China may be in breach of Fujian's Family Planning Regulations, although the Tribunal notes that according to Article 10(5) of the *Population and Family Planning Regulations of Fujian Province* (The Regulations) a rural couple can apply for permission to have a second child if the couple only have one daughter.<sup>12</sup> Article 13 of the regulations states that a time span of four years is required before having an approved second child.<sup>13</sup>
67. However, even if the applicant was in breach of Fujian's family planning laws and was penalised for this 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 per McHugh J at 258 referring to *Yang v Carrol* (1994) 852 F Supp 460 at 467) for the reason that enforcement of such a law does not ordinarily constitute discrimination (*Chen Shi Hai v MIMA* (2000) 201 CLR 293, at [20]). As Brennan CJ stated in Applicant A [at 233]:

... 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".

68. The Tribunal accepts that Article 39 of the above family planning regulations provides for social compensation fees to be levied against individuals for family planning breaches, stating that "*Anyone* who violates this Regulation by one of the acts listed below shall be ordered to pay ..." the fees (Tribunal emphasis). The Tribunal also notes evidence that the Fujian Province Birth Planning Committee stipulates that social compensation fees are based on net per capita income levels for rural households and disposable per capita income for urban households, indicating an apparently disinterested application of the regulation.
69. The Tribunal has no evidence, and the applicant does not claim, that Article 39 is applied more harshly than are equivalent family planning regulations to residents of other provinces. The Tribunal is not satisfied that it is. When asked at the hearing whether there was any reason that the laws would be applied to her in a discriminatory manner the applicant initially claimed that they would be because of the sex of her child. However, when questioned

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<sup>11</sup> Greenhalgh, S. and Winckler, E. 2001 '*Chinese State Birth Planning in the 1990's and Beyond*', US Department of Justice, Immigration and Naturalisation Service, Citizenship and Immigration Services website, September, p 17 <http://www.uscis.gov/files/nativedocuments/pschn01001.pdf> – Accessed 15 November 2010

<sup>12</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website, Article 10.

<sup>13</sup> *Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website, Article 13.

further on this the applicant stated that she was referring to her family putting pressure on her to have another child because her child is a girl, which is not considered as a good as a boy in her local area. The Tribunal does not consider this to be discriminatory enforcement of Fujian's family planning laws. The applicant then claimed that she would be discriminated against because she is a Christian. As discussed below, the Tribunal does not accept that the applicant is a Christian or would practise Christianity if she was to return to China and therefore does not accept that she would be perceived by the authorities to be Christian or be discriminated against as a result of this. It has not been claimed, and there is no evidence to suggest, that the family planning regulations are enforced in a discriminatory way within Fujian in relation to any other group to which the applicant might belong, or be perceived to belong. The Tribunal is therefore satisfied that China's family planning policy enforcement in Fujian province, prompted solely by the applicant's parents having breached the regulations by choosing to have a child out of wedlock, would not be discriminatory in the Convention sense.

### **Claims relating to Christianity**

70. The applicant claims to have become a Christian since arriving in Australia. The Tribunal found her evidence in relation to this to be very unpersuasive and is not satisfied that the applicant has become a Christian or is committed to practicing Christianity.
71. The applicant stated that she considered herself a Christian because she had been baptised. She stated that the reason she was baptised was because an "uncle" in the church told her she should get baptised. She claimed that she had undergone a course leaning about Christianity before the baptism but could not remember any of the information she had learnt. The Tribunal considers that this demonstrates a lack of commitment to Christianity and her inability to recall details of the course demonstrates a lack of interest in the subject matter.
72. The applicant stated that since she was baptised in June 2010 she has only been to church once and that she has only ever listened properly to a sermon once and on the other occasions that she attended church she left quickly. The applicant claimed that the reason for her lack of attendance at church was that she previously had an abortion, then later she was pregnant and then she moved. The Tribunal is willing to accept that she may have had to rest for a short period of time following an abortion or that she may have been ill for some time during her pregnancy. However, the Tribunal does not accept that any of these reasons would be sufficient reason for a committed Christian not to attend church more than once in nearly a year. Rather, the Tribunal considers that her lack of attendance at church demonstrates a lack of real interest in Christianity.
73. Furthermore, the applicant stated that she "very rarely" prays and does not read the Bible regularly (for example she has not read it since her baby was born). Again the Tribunal considers that this demonstrates a lack of interest in Christianity. Even if a Christian was prevented from attending church due to illness or restraints the Tribunal would expect them to continue to practice their religion at home which the applicant does not appear to do in any meaningful way.
74. Finally, the Tribunal found that the applicant had almost no knowledge of Christianity. She was unable to describe any of her beliefs or practices, she could not describe what it meant to be Christian (other than that she had been baptised), she did not know who wrote the Bible, she did not know why Christians celebrate Christmas, she could not recall any stories or content from the Bible and she stated that when she read the Bible she read it "like a novel".



75. Therefore the Tribunal is willing to accept that the applicant has attended church in Australia on a few occasions and that she was baptised in June 2010. The Tribunal accepts that at that time she had some interest in Christianity, although the Tribunal considers that this was only brief and very superficial. However, the Tribunal does not accept that she was baptised because of any genuine commitment to Christianity but rather because it was suggested by an uncle that she do this. Since her baptism she has demonstrated very little interest in Christianity and the Tribunal does not accept that she now has any ongoing interest. In this context, the Tribunal has considered the provisions of s.91R(3) of the Act, but has not applied them, because the Tribunal accepts that the applicant attended the church services and was baptised at the request of her friend and because at that time she had some passing interest in Christianity, and not to strengthen her claims for protection. The Tribunal does not accept that the applicant has not had time to practise Christianity in Australia since being baptised or that she would practise it in the future if she had time.
76. The applicant stated that she has not told her family in China about her interest in Christianity. The Tribunal considers that this is because she does not have any genuine interest in Christianity and finds that for this reason, she would not practice Christianity if she was to return to China and therefore would not be persecuted for this reason. Although the Tribunal accepts that the applicant has been baptized, it does not accept that she would practice Christianity in China and therefore does not accept that she would be known to others as a Christian despite being baptized. Therefore the Tribunal does not accept that she would be persecuted solely for the reason of having been baptized.

#### **Other claims**

77. The applicant made a number of claims in her written statement relating to the welfare of her child if she was to return to China, including her inability to access employment opportunities and social services. As discussed with the applicant at the hearing the application before the Tribunal does not include her daughter. Therefore, these are not claims relevant to the applicant's current application.
78. The applicant also made a number of claims in her written statement about the effects of being an unmarried mother in China, such as difficulties finding a husband, being disowned by family, denial of access to residency permits, denial of education and employment, rejection of household registration and social welfare. The applicant claimed that these difficulties would result from her being a member of the particular social group of "single mothers' and/or unmarried woman with a child" However at the hearing the applicant stated that she and [Mr A] plan to get married and, as discussed above, the Tribunal considers that they are now of marriageable age in China. They are also of marriageable age should they choose to marry here in Australia. As put to the applicant at the hearing, the Tribunal therefore considers that she not be returning as a single or unmarried mother and that these claims no longer apply and she would not suffer any persecution on this basis.
79. Having considered the applicant's circumstances singularly and on a cumulative basis, the Tribunal is not satisfied that there is a real chance that the applicant would be subject to persecution for any Convention reason if she returned to China now or in the reasonably foreseeable future.

## **CONCLUSIONS**

80. 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**

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