0908992 [2010] RRTA 389 (14 May 2010)

DECISION RECORD

RRT CASE NUMBER:	0908992
DIAC REFERENCE(S):	CLF2009/112260 CLF2009/98641
COUNTRY OF REFERENCE:	Stateless
TRIBUNAL MEMBER:	Tony Caravella
DATE:	14 May 2010
PLACE OF DECISION:	Perth

DECISION: The Tribunal affirms the decision under review

The Tribunal considers that this case should be referred to the Department to be brought to the Minister's attention for possible Ministerial intervention under section 417 of the Migration Act.

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 claims to be stateless. The applicant claims to have been born in Indonesia and to have lived there from birth to 1967. He claims he then moved to the People's Republic of China and lived there until 1971 when he claims he moved to the British Overseas Territory of Hong Kong where he lived from 1971 to 1985. The applicant arrived in Australia [in] October 1985 and applied to the Department of Immigration and Citizenship ("the Department") for a Protection (Class XA) visa [in] August 2009. The delegate decided to refuse to grant the visa [in] October 2009 and notified the applicant of the decision and his review rights by letter [on the same date].

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

4. The applicant applied to the Tribunal [in] November 2009 for review of the delegate's decision.

5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

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

Definition of 'refugee'

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

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

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

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

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

13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve "serious harm" to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

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

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

16. Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution

for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

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

18. As the applicant in this case claims to be stateless, in this context, "nationality" refers to "citizenship" (UNHCR Handbook, at [87]; see also *VSAB v MIMIA* [2006] FCA 239 (Weinberg J, 17 March 2006) at [50]-[53]) and the word "country" in "country of nationality" denotes a country capable of granting nationality (*Koe v MIEA & Ors* (1997) 78 FCR 289).

19. In *SZFJQ v MIMIA & Anor* [2006] FMCA 671 (Scarlett FM, 27 April 2006) the court held that it is fundamental to the jurisdiction of the Tribunal to make a finding as to nationality and that an applicant's own assertion is not sufficient without proper consideration.

20. 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

21. 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.

Application for Protection Visa

22. The applicant was born in [City A], East Java, Indonesia on [date deleted: s.431(2)]. He declares that he arrived in Australia [in] October 1985 and was granted entry to Australia on a visitor visa [visa class deleted: s.431(2)] The applicant has not left Australia since his arrival in 1985.

23. [In] August 2009, the applicant lodged an application for a Protection Visa. The applicant's protection claims were set out in response to questions 40 to 45 of Part C of the application form. The applicant's respective responses are set out in the paragraphs that follow

24. In response to question 40, the applicant stated that he is seeking protection in Australia so that he does not have to go back to China and Indonesia. Based on the applicant's claims at the hearing (see below) the Tribunal determined that the applicant seeks protection against returning to both the People's Republic of China and the Hong Kong Special Administrative Region (HKSAR), and Indonesia.

25. In response to question 41 which asks Why did you leave that country, the applicant stated the following:

In 1967 due to the anti Chinese riots and unrest in Indonesia and the discrimination against the ethnic Chinese minority I left Indonesia and went to China to study. My brother [name] had gone there one year before me but he was not able to tell me what the conditions were like there before I left Indonesia. The Indonesian authorities informed me that if I went to China I would not be able to return to Indonesia because I would be considered a communist sympathiser. My Indonesian residency permit (my SSK) was seized.

When I arrived in China, I was not allowed to study because in China there was great unrest due to the Cultural Revolution The local students had declared themselves as revolutionary guard and all those who had overseas connections, or had bourgeois and landlord family backgrounds were targeted. People like me were not trusted by the regime. I had no chance of normal study and I ended up working in a factory at the age of [age] at a salary of 15 Yuen (sic) per month. I found life very difficult because of how I was treated.

In 1971 I left China and went to Hong Kong I had little money and little Cantonese. I obtained work there and was able to obtain residency in Hong Kong because I was unable to return to Indonesia. I was issued with an identity card with no right to a passport. I was able to use the certificate of identity as a travel document, in which many countries did not accept as substitution of valid passport.

In 1973 I became a merchant seaman and worked as a seaman until I came to Australia in 1985. I was on leave in Hong Kong and flew to Australia for a holiday. I did not leave Australia after my visitors visa expired.

I have never been qualified or been issued a passport of Indonesia or China or Hong Kong British."

26. In response to question 42, which asks "What do you fear many happen to you if you go back to that country", the applicant states:

"I fear that I may suffer discrimination and hardship if I return to China. I was not born in China and speak Mandarin and Cantonese with a heavy Indonesian accent. Chinese people from overseas are treated like second class citizens in China. They are discriminated against and naturally attract suspicion. The authorities give them a very difficult time. Overseas born Chinese have difficulty in obtaining work in China because locally born Chinese will usually be preferred. When I was in China I was denied travel permission within China."

27. In response to question 43 which asks "Who do you think may harm you if you go back?" the applicant stated that those that he fears will harm him are the Chinese authorities and those who do not like Chinese people from overseas.

28. In response to question 44 which asks why do you think this will happen to you if you go back, the applicant states:

Because I was not born in China and speak Mandarin and Cantonese Chinese with a heavy Indonesian accent.

29. In response to question 45 which asks "Do you think that the authorities of that country can and will protect you if you go back? If not, why not?", the applicant states:

> *The Chinese authorities will not protect me because they are prepared to tolerate the discrimination of a minority group like me.*

30. The Tribunal examined the Departments files which, amongst other documents, contain the following:

Documents on the Department's file 2009/98641

- Commonwealth bank superannuation rollover balance showing a balance of approx [amount deleted: s.431(2)];
- Australia Income Tax assessment for the year ending 30 June 2008 showing taxable income of [amount deleted: s.431(2)] and showing a refund issued;
- Evidence of Telstra shares held by the applicant;
- Rental agreement for applicant's apartment accommodation in [suburb deleted: s.431(2)];
- A colour copy of Qantas ticket for the applicant's travel from Hong Kong to Australia in 1985. The ticket shows the applicant was booked to travel from Hong Kong to Melbourne with a return flight to Hong Kong via Sydney booked [in] October 1985;
- A copy of a Certificate of Identity issued by the authorities in Hong Kong [in] July 1985;
- Various other documents including a bridging visa granted to the applicant [in] Jul 2009;
- Copies of the applicant mother and father's passport issued by the Republic of Indonesia.

Documents on the Department's file 2009/112260

- *Application for an applicant who wishes to submit their own claims to be a refugee* (Form 866C);
- Various articles on Indonesian-Chinese who returned to China in 1950's and 1960's (summarised list at folio 95).

The delegate's decision

31. [In] October 2008 the Department's delegate refused the applicant's claim for a Protection Visa. In the delegate's Decision Record the delegate states, amongst other things:

- The delegate decided that the applicant is a national of Hong Kong Special Administrative Region (HKSAR). After stating that the applicant claims to be

stateless, the delegate considers country information on the right of abode and on the right to land in HKSAR. The delegate then goes on to find that there is no evidence indicating that the applicant is not able to return to HKSAR and that he will have a right to land (RTL) in HKSAR and be able to live, study or work without restriction. The delegate also finds that the applicant may also be entitled to apply for permanent residence in the HKSAR by applying for verification of eligibility;

- The delegate states that the applicant has made no claims against the country of reference, namely HKSAR. The delegate finds that the applicant makes no claim to have been arrested or detained in HKSAR. The delegate also finds that the applicant was gainfully employed as a seaman for a number of years prior to departing HKSAR and that he makes no claim to have experienced a threat to his life, significant physical harassment, significant physical ill treatment, significant economic hardship, denial of access to basic services or denial of capacity to earn a livelihood. The delegate concludes on this point by finding the applicant has not experienced, or will experience, serious harm as defined in the Migration Act. The delegate finds that applicant will not be persecuted for any Convention reason if he returns to HKSAR now or within the reasonably foreseeable future.

- Regarding the applicant's circumstances and status in respect to The People's Republic of China (PRC), the delegate states, amongst other things, that the available country information indicates the applicant is not currently a citizen of the PRC. The delegate found that on the information available the applicant could, if he wished, avail himself of the 'right to enter and reside' in the PRC based on being a 'near relative of Chinese nationals'. The delegate finds the applicant's fear of persecution in the PRC is not well founded because in the delegate's view the applicant would not experience 'serious harm' if he were to reside in the PRC. The delegate found the applicant does not face a real chance of persecution in the PRC now, or in the reasonably foreseeable future.

- In respect of the applicant's circumstances and status in Indonesia, the delegate considered Article 9 of the Requirements and Procedures for Obtaining Citizenship of the Republic of Indonesia and concludes that the applicant makes no claims against return to Indonesia and that there is no evidence before the delegate that the applicant would be eligible to apply for citizenship in Indonesia.

Application for review

32. The Tribunal received an application for the review of the delegate's decision [in] November 2009.

Tribunal Hearing

33. The applicant appeared before the Tribunal [in] January 2010 to give evidence and present arguments.

34. The applicant was represented in relation to the review by [agency deleted: s.431(2)].

35. At the hearing the applicant's representative provided the Tribunal with a copy of three-page document titled *Hong Kong Certificate of Identity* taken from the internet

Wikipedia source. The applicant's oral evidence provided at the hearing is set out below under relevant country headings.

Indonesia

36. The Tribunal asked the applicant to begin by explaining the circumstances leading to his departure from Indonesia. The applicant began his evidence by telling the Tribunal that when he lived in Indonesia before moving to China in 1967 there was a strong anti-Chinese feeling and there was a movement to force the Chinese population in Indonesia to close their businesses, to close their schools and generally to suppress the Chinese culture. He told the Tribunal there was pressure on the Chinese population to even change their names to Indonesian names. He told the Tribunal that he wanted to study civil engineering so he decided he would move to China in 1967 because he thought he would be able to undertake those studies there. He explained that his brother had moved to China the previous year and his mother and father's plan was that the applicant would move to China, complete his studies there then start work so he could assist his mother and father and the rest of the family to all move to China as well. The Tribunal asked the applicant to explain the timeframe of this plan and he replied the plan was for this to happen five or six years after the applicant moved to China He explained that his mother and father were also dissatisfied with the government in Indonesia because they had been forced to close their shop there due to the anti-Chinese feelings at the time.

37. The applicant explained that there was an attempted communist coup in Indonesia in 1966 and because of this the governing regime became suspicious of the Chinese population because they regarded the Chinese as supporters of the attempted coup. He explained that his mother and father moved from China to Indonesia when his father was in his twenties. He explained his father returned to China briefly to marry and then returned to Indonesia with his wife. He explained that his father first moved to East Java to work as cheap coolie labour growing coffee there. His father then moved to [City A] where the applicant was born in [year deleted: s.431(2)]. His father started and operated a [details deleted: s.431(2)] shop in [City A] and then operated a [business details deleted: s.431(2)]. He explained that his mother and father briefly left Indonesia and returned to China during the second world war when the Japanese invaded Indonesia. He told the Tribunal that the Japanese were killing the Chinese so his mother and father left around 1943 and lived in China until the war ended. The applicant said this explains why one of the applicant's siblings was born in China.

China

38. The applicant told the Tribunal that from the first day he moved to China in 1967 he regretted the move. He explained that the governing regime of that country prevented people leaving at the time he arrived however later, and possibly a result of US President Jimmy Carter's contacts with China, things were relaxed which meant he was able, in 1971, to leave China and move to Hong Kong. He said that he found that the Cultural Revolution in China at the time meant there was much fighting and generally anarchy in that country. He said that the effect of the Cultural Revolution and the disruption caused by it was that he could not do what he moved to China to do, that is, to study civil engineering. He said he was not even able to enrol in the course. He told the Tribunal that after waiting for a long time to study and discovering he was not able to study due to the disruption caused by the Cultural Revolution, he asked for work and he was sent to work in a factory that made [product deleted: s431(2)]. He explained at

the factory he was paid 15 Yuan per month and was provided with dormitory accommodation which he shared with eight other workers. He added that he also experienced discrimination as a returnee to China. He explained that upon moving to China he lived in Guangzhou for about a year then moved to Hang Zhou where he stayed for three years He said that the authorities decided that Guangzhou was overcrowded with Indonesian returnees so he, and others, were forced to relocate to another city. He chose to relocate to Hang Zhou. The Tribunal asked the applicant if he was politically active while in China. The applicant told the Tribunal that he was not politically active in China during the four years he spent there. He said that even though he may have personally opposed the regime he dared not speak out against it. He described how during the time in China he was forced to witness an execution as part of the "class education".

39. The Tribunal asked the applicant to explain why he claims his right to live in Indonesia was taken from him when he left Indonesia. The applicant told the Tribunal that when he left Indonesia to travel to China his Indonesia Residency Permit (SKK) was taken from him because the authorities were suspicious of the ethnic Chinese because they thought that communist China supported the attempted coup against the Indonesian government. He told the Tribunal that he believes that even though he has [number deleted: s.431(2)] siblings living in Indonesia he is not permitted to return there to live permanently. He added that only since 1984 has he been permitted to return to Indonesia as a visitor.

40. The applicant told the Tribunal that he was never given Chinese citizenship while in China and that he was only ever granted a Certificate of Identity in Hong Kong.

Hong Kong

41. The applicant told the Tribunal that before moving to Hong Kong he had a girlfriend in China. She also moved to join the applicant in Hong Kong about 8 months after the applicant moved, however the relationship eventually ended in Hong Kong. The Tribunal asked the applicant whether he owned any property in Hong Kong, he explained that he did not buy any property in Hong Kong but only rented accommodation, which was usually shared accommodation with other returnees (returnees from Indonesia). He explained that because he did not speak fluent Cantonese he did not associate much with the general population of Hong Kong but rather tended to associate just with other returnees.

42. The applicant told the Tribunal that his country of former habitual residence is the British Overseas Territory of Hong Kong as distinct from the Hong Kong Special Administrative Region (HKSAR). He explained that after an absence of almost 25 years from Hong Kong he assumed that he has lost his right of abode there. He said that he had tried to contact the Hong Kong Immigration office by telephone however he could not get through because the phone was constantly engaged.

Australia

43. The Tribunal asked the applicant if his travel to Australia in 1985 was his first ever visit to this county. The applicant told the Tribunal that during his work as a merchant seaman he had travelled to [town deleted: s.431(2)] in Western Australia on [number deleted: s.431(2)] occasions. He explained that in 1985 he had some leave so he booked a two week trip and flew to Melbourne. He held a two-week visitor visa for

Australia and was booked to take an eight-day tour at the beginning of his two-week visit to Melbourne The applicant told the Tribunal that after the eight-day tour he took a flight to Perth where he has resided ever since.

44. The Tribunal asked the applicant why he had not come forward to the Australian immigration authorities before now. He replied by telling the Tribunal that from the time he arrived in Australia in 1985 until the Bicentennial in 1988 he heard rumours about Australia offering an immigration amnesty. He said he relied on the amnesty being granted and added that he did not have a "retreat plan" in the event, as things turned out, no amnesty was granted. He claimed that in 2000 the USA and New Zealand both offered immigration amnesty. He then told the Tribunal that he eventually forgot that his immigration status was unlawful and he tried to live as normal as he could however he was often reminded that he did not have the same rights as Australian citizens because he did not have access to Medicare or to unemployment or other Centrelink benefits. He added that during the 24 years in Australia he experienced difficult times when he had no work and no income or social security benefits.

45. The Tribunal asked what caused him to now come forward about his immigration status. The applicant replied that after twenty-four years he is tired of hiding and of playing cat and mouse about it so he decided to approach the Department voluntarily.

The applicant's fear of returning to Hong Kong Special Administrative Region (HKSAR)

46. The applicant told the Tribunal that he has a fear of the discrimination he will suffer if he returns to HKSAR He explained that he is not fluent in Cantonese which is generally spoken in HKSAR and because of this he will be identified as not being from HKSAR. He said this will mean he will face discrimination when looking for a job. He said people would laugh at him because of his accent and pronunciation. He added that his fear is psychological rather than physical. He added that he has been in Australia for twenty four years so it would be difficult to adjust to life back in HKSAR. He told the Tribunal that he believes HKSAR is different now and he believes it is controlled by the communist government in Beijing and soon it will be a rubber stamp to the wishes of the Beijing regime. He added he fears that because he is not a citizen of Hong Kong he would not be able to get a passport which would restrict his ability to travel. He said that he might be entitled to a Document of Identity but such documents are not accepted by all countries so his future travel would be restricted.

47. The Tribunal asked the applicant why he could not join his siblings in Indonesia to which the applicant relied that he believes he does not qualify for permanent residence back in Indonesia.

Post hearing submission

48. [In] January 2010 the Tribunal received a detailed submission prepared by the applicant's representative. A copy of the submission has been attached to the applicant's Tribunal file. The most relevant points in that submission are set out below:

    - The applicant has never married and has no children;

- The applicant did not leave Australia after the expiry of his visa and did not apply for another valid visa whilst in Australia until he attended the Perth Office of the Department [in] August 2009 and "turned himself in";

- At the hearing before the Tribunal, the applicant gave evidence that he had worked as a merchant seaman between 1973 and 1985 and that as a merchant seaman he was not present in Hong Kong for extended periods of time. In this submission, the applicant provides details of the vessels he worked on and the dates of his contracted services on those vessels. The submission claims that between the contracted dates the applicant was not physically present in Hong Kong. The submission includes a table showing the vessel name, and the start and finish dates from 1973 to 1985. From the table provided the Tribunal calculated the applicant was absent from Hong Kong for a total of approximately 6 years (72 months) in the 12-year period from 1973 to 1985;

- Under a heading *Issue: Does the applicant have the Right of Abode ("ROA") in Hong Kong?* the submission states that in 1971 the applicant was granted an exit permit by the PRC and went to Hong Kong. He was unable to return to Indonesia and was granted residency in the then British Overseas Territory of Hong Kong. The applicant never obtained citizenship in the PRC or in the British Overseas Territory of Hong Kong. The applicant has never lived in Hong Kong when it has been the Special Administrative Region of the PRC;

- The submission discusses the law relating to permanent residency in Hong Kong (Immigration Ordinance CAP115). The submission concludes that the applicant accepts that it is likely that the authorities in HKSAR will determine that he has the "right to land" in Hong Kong by the operation of section 2AAA(1)(b) of the Ordinance which grants the applicant the right to land because he ceased to be a permanent resident by virtue of the operation of Clause 7 of the Schedule 1 of the Ordinance;

- Under the heading *Issue: What is the applicant's country of former habitual residence?* The submission states that because the applicant is a stateless person it is necessary to identify his place of former habitual residence prior to his arrival in Australia in order to determine his claim for protection. The submission goes on to state that at the hearing the applicant claimed that his country of former habitual residence no longer existed because on 1 July 1997 the British Overseas Territory of Hong Kong ceased to exist and Hong Kong reverted to the sovereignty of the PRC. The submission goes on to state "However, given the decision of Tamberlin J in the Federal Court in *Tjhe Kwet Koe v Minister of Immigration & Ethnic Affairs & Ors* [1997] FCA 912 (8 September 1997) this argument would appear to be without merit";

- Under the heading: *Issue: Is the applicant likely to suffer serious harm in Hong Kong?* the submission states the applicant expressed fears of discrimination if he returned to the HKSAR and while this is part of the PRC it is clear that conditions in Hong Kong are markedly better than those "on the mainland". The submission goes on to say that the applicant accepts that the discrimination he fears does not meet the definition of "serious harm" contained in section 91R of the Migration Act 1958;

- Under the heading: *Referral for Ministerial intervention?*, the submission states that in the event that the applicant's review is unsuccessful the applicant requests the Tribunal refer his case to the Minister for Immigration and Citizenship for consideration under section 417 of the Migration Act 1958. The submission refers to relevant paragraphs from the Minister's Guidelines on cases involving unique or exceptional circumstances. The submission states:

> It is submitted that this is a unique and exceptional case given that the applicant has been in Australia over 24 years. During that time he has worked, paid taxes and integrated into the Australian community. The applicant has not left Australia since arriving here in 1985.
>
> The applicant is now [age] and is a single man. He has very few assets. He has no family in Hong Kong He is currently unemployed, but is in good health. He has no job prospects in Hong Kong. If Hong Kong authorities give him the right to land in Hong Kong he will find himself in very difficult circumstances. It will be very difficult for the applicant to obtain work in Hong Kong given his age and will suffer significant hardship.

Country Information

49. The applicant provided several pieces of country information which are summarised at the end of this part of the decision. At the hearing the Tribunal also had access to other country information prepared by the Tribunal. The Tribunal raised relevant country information with the applicant during the hearing which suggested that circumstances appear to have changed in the countries of reference and may suggest that there is not a real chance of serious harm amounting to persecution in the countries of reference. The Tribunal did not reach a concluded position on this at the hearing.

Indonesia

50. Under the provisions of *Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia*, applicable at the time of the applicant's birth, Article 1(h) indicates that a person born in Indonesia to unknown parents or to parents of unknown nationality "shall be an Indonesian citizen".

    The full provisions of Article 1 of *Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia* are as follows:

> **Article 1. A person shall be an Indonesian citizen if:**
>
> (a) He belongs to the indigenous population of Indonesia; or
>
> (b) Though not falling within that class, he is a descendant of a person of that class and was born and domiciled within the territory of the Indonesian State, or, though not a descendant of a person of that class, he was born within the territory of Indonesia and has been domiciled therein for at least five consecutive years, and has attained the age of 21 or has married, unless there has been submitted a declaration that he should not become an Indonesian citizen because he is a citizen of another State;
>
> (c) He has been granted Indonesian citizenship by naturalization;

(d) He is a legitimate, legitimized or legally acknowledged child of a man who at his birth was an Indonesian citizen;

(e) His father, being an Indonesian citizen, died within 300 days before his birth;

(f) He has been legally acknowledged only by his mother, and she was at the time of his birth an Indonesian citizen;

(g) He has not been legally recognized by his father or mother but was born within the territory of the Indonesian State;

(h) He was born within the territory of the Indonesian State to unknown parents or to parents of unknown nationality. [*Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia* 1946]

Article 5 of the 1946 legislation provides for the acquisition of citizenship by naturalization, but requires that persons seeking naturalization should have "attained the age of 21", which the applicant had not attained before the introduction of a new law on citizenship in 1958.

51. On 1 August 1958, *Law No. 62 of 1958, Law on the Citizenship of the Republic of Indonesia* came into force. The provisions of Article 1 indicate that a child born in Indonesia to parents who were not Indonesian nationals would have been entitled to citizenship if either of Articles 1(h) or 1(i) applied:

> **Article 1. Citizens of the Republic of Indonesia are:**
> a. persons who, based on the legislation and/or treaties and/or regulations prevailing since the August 17, 1945 Proclamation, are already citizens of the Republic of Indonesia;
> …
> h.persons who are born within the territory of the Republic of Indonesia, if both parents have no nationality or as long as the nationality of both parents is unknown;
>
> i. persons born within the territory of the Republic of Indonesia who have not acquired the nationality of the father or mother at the time of their birth and as long as they do not acquire the nationality of either their father or mother (Source: *Law No. 62 of 1958, Law on the Citizenship of the Republic of Indonesia* 1958, UNHCR website http://www.unhcr.org/refworld/docid/3ae6b4ec8.html – Accessed 22 January 2010.

52. Article VIII of the "Concluding regulations" of the 1958 law indicates, however, that these provisions of Article 1 could not be applied with respect to a person born in 1946, the new law being retroactively valid only to December 1949. Article VIII states:

> This Law comes into force on the date of promulgation with the stipulation that the regulations in article 1 letter b to letter j, article 2, article 17 letter a, c and h are valid retroactively December 27, 1949.

53. Amongst the provisions of Article 5 of the 1958 law on the acquisition of citizenship by naturalization is the requirement at subparagraph 5(2) that the petitioner "have reached

the age of 21". From the applicant's evidence, he departed Indonesia in 1967, [and may not have] turned 21.

54. Article 17 is relevant because it deals with the loss of citizenship of the Republic of Indonesia and suggests that if the applicant had citizenship when he departed Indonesia in 1967, he would subsequently have lost that citizenship in accordance with Article 17(j) of the 1958 legislation if the Certificate of Identity granted in Hong Kong was considered to have had "the character of a passport" and was still valid:

> **Article 17.**
> The citizenship of the Republic of Indonesia is lost because of:
> …
> j.having a passport or certificate which has the character of a passport from a foreign country in one's name which is still valid

55. Alternatively, citizenship may have been lost under the provisions of Article 17(k):

> **Article 17.**
> The citizenship of the Republic of Indonesia is lost because of:
> …
> k.other than for state's service, domiciling abroad during 5 consecutive years by not declaring one's wish as to continue being a citizen before the period has lapsed and thereafter every two years; such a wish shall be declared to the Representation of the Republic of Indonesia at one's residence.

56. If citizenship was lost under Article 17(k), Article 18 allowed for citizenship to be regained on the former citizen's return to Indonesia:

> **Article 18.**
> A person who looses [sic] the citizenship of the Republic of Indonesia as mentioned in article 17 letter k. regains the citizenship of the Republic of Indonesia if the person is domiciled in Indonesia based on an Entry Permit and makes a statement as to that effect. Such a statement shall be made to the Pengadilan Negeri at the residence of the person within 1 year after the person is domiciled in Indonesia.

57. The current legislation on citizenship, *Law of the Republic of Indonesia No. 12 on Citizenship of the Republic of Indonesia*, was introduced in August 2006. The criteria for citizenship are provided in Article 4, and paragraphs 4(9) and 4(11) may be of relevance in this case:

> **Article 4**
> A Citizen of the Rep. of Indonesia is:
> (1). All persons whom by law and/or based on agreements between the Government of the Rep. of Indonesia and other countries prior to the application of this Decree have already become Citizens of the Rep. of Indonesia;
> (2). Children born through legal wedlock from an Indonesian father and mother;
> (3). Children born through legal wedlock from an Indonesian father and an alien mother;
> (4). Children born through legal wedlock from an alien father and an Indonesian mother;
> (5). Children born through legal wedlock from an Indonesian mother and a stateless father or
> whose country does not provide automatic citizenship to their offspring;

(6). Children born within 300 (three hundred) days after the father has passed away, under legal wedlock, and whose father is an Indonesian citizen;
(7). Children born out of legal wedlock from an Indonesian mother;
(8). Children born out of legal wedlock from an alien mother who is claimed by the Indonesian father as his natural child and such claim is declared before the child reaches the age of 18 (eighteen) or before the child has married; **net**
(9). Children born in Indonesian territory whose parents are of undetermined citizenship at the time of the child's birth;
(10). Children newly born and found in Indonesian territory and whose parent's are undetermined;
(11). Children born in Indonesian territory whom at the time of birth both parents were stateless or whose whereabouts are undetermined;
(12). Children born outside the Rep. of Indonesia from an Indonesian father and mother
due to law prevailing in the country of birth automatically provides citizenship to the child;
(13). Children born from a father and mother who was granted citizenship and died before the parents had sworn their allegiance. *Law of the Republic of Indonesia No. 12 on Citizenship of the Republic of Indonesia* 2006, UNHCR website, 1 August http://www.unhcr.org/refworld/docid/4538aae64.html – Accessed 22 January 2010

58. On loss of citizenshipin Indonesia, the current law states that:

Article 23

An Indonesian citizen will lose their citizenship due to the following:
...
h.) Possesses a passport or travel document equivalent to a passport from a foreign country or a letter that may be construed as a valid citizenship identity from another country on his/her name; or
i.) Living outside the territories of the Rep. of Indonesia for 5 (five) consecutive years for non official purposes, without legal reason and deliberately refuses to declare their intention to remain as Indonesian citizens before the 5 (five) year limit ends, and in each of the next 5 (five) years the said person fails to declare their intention of retaining their citizenship to the Indonesian Representative offices in which the said person's residence is under their jurisdiction although the said Representative Office has duly informed them in writing, as long as the incumbent does not become stateless because of such negligence.

59. On the question of whether the applicant may now be able to apply to gain citizenship through naturalization, if the applicant has previously held but lost Indonesian citizenship, Article 32 provides that "[a] person who has lost their Indonesian citizenship may regain their citizenship through naturalization procedures as stipulated in Articles 9 to Article 18 and Article 22". With respect to either gaining or regaining citizenship, the Act includes the following criteria for acquiring citizenship through naturalization:

REQUIREMENTS AND PROCEDURES FOR ACQUIRING CITIZENSHIP OF THE REP. OF INDONESIA

Article 8

Citizenship of the Rep. of Indonesia may be acquired through naturalization.

Article 9

Requests for naturalization may be forwarded by the applicant upon meeting the following requirements:

a. Aged 18 (eighteen) or married;
b. At the time of forwarding the application, the applicant has resided in Indonesian territory for at least 5 (five) consecutive years or at least 10 (ten) years intermittently;
c. Sound in health and mind;
d. Able to speak Bahasa Indonesia and acknowledges the state basic principles of Pancasila and the 1945 Constitution;
e. Was never legally prosecuted due to acts of crime and sentenced jail for 1 (one) year or more;
f. Upon acquiring Indonesian Citizenship, will relinquish any other citizenship;
g. Employed and/or has a steady income; and
h. Pay a naturalization fee to the Government Treasury.
...

Article 13

(1). The President shall grant or reject requests for naturalization.
(2). The granting of requests for naturalization as mentioned in Paragraph (1) is determined through a Presidential Decree.
(3). The Presidential Decree as stipulated in Paragraph (2) shall be determined at the most 3 (three) months since the application is received by the Minister and will be informed to the applicants within 14 (fourteen) days since the Presidential Decree is issued.
(4). Rejection of naturalization as mentioned in (1) must be supported by reasons and informed by the Minister to the incumbent at the most within 3 (three) months since the application was received by the Minister.

60. Information from the website of the Embassy of the Republic of Indonesia in Canberra on the subject of Temporary Stay Visas makes specific mention of those "seeking repatriation", as follows:

> Temporary Stay Visa is good for a single entry if presented within 3 (three) months from the date of issuance and is valid for a maximum stay of 1 (one) year). It is granted upon the authorization of the Directorate General of Immigration in Jakarta. To expedite the authorization, it is advisable to have the sponsor in Indonesia submit also the application directly to the Directorate General of Immigration in Jakarta VITAS can be extended in Indonesia.
>
> VITAS are for working and non-working purposes; such as foreign investment, family re union, repatriation, and retirement.
> ...
>
> For those seeking repatriation (returning to the country of origin), must provide proof of former Indonesian citizenship and proof of a guarantee of living expenses in Indonesia. (Source: 'Temporary Stay Visa (VITAS)' (undated), Embassy of Indonesia in Canberra website http://www.kbri-canberra.org.au/consular/visa/visa_temp.htm – Accessed 22 January 2010).

61. What remains unclear is how this law reform affects people who were born in Indonesia who have since left an extended period of time without acquiring foreign citizenship. In researching the residency and citizenship law applicable to Indonesia it

appeared that the information was inconclusive so the Tribunal wrote to the Embassy of the Republic of Indonesia in Canberra [in] February 2010 and requested information on whether a person in circumstances such as the applicant's would have a right to enter and reside in Indonesia. A reply was received by the Tribunal to this request [in] May 2010 The reply states, relevantly:

> Firstly, Indonesia does not recognize a person withholding a status of being "stateless" or "apatride". Law No. 12/2006 (the Law) provides a legal basis for a person who lost their citizenship due to unnatural causes/*force majeure* (e.g. a child who was born in Australia "must" become an Australian citizen even though they have the unwillingness to do so). According to the law, children under 18 years of age and never been lawfully married, born from mix marriages, could enjoy limited dual citizenship. When the child reaches 18 years of age or gets married, they are required by the law to decide on becoming an Indonesian or foreign citizen
> There are several causes of becoming an Indonesian Citizenship [please refer to Law No. 12/2006, Chapter II on Indonesian citizen, Chapter III on Requirements and Procedure of Obtaining Citizenship of the Republic of Indonesia (Art 8,9,10; Art 19-22)]: A person will automatically become an Indonesian citizen if they are born in Indonesia with both parents being Indonesian citizens. If such a person born in Indonesia with one parent being Indonesian citizen and another being a foreigner by lawful marriage, the law entitles the person the right to acquire dual citizenship until the age of 18 years old. But if the person was born in Indonesia from a parent who has never been legally married, the law states that the person must be of the same citizenship as the mother; A foreigner could become an Indonesian citizen by marriage; or citizenship of the Republic of Indonesia can also be obtained through naturalization.
>
> A person who was born in Indonesia and has once owned valid Indonesian documents as a proof of identity, then later travelled overseas but never validly registered their presence to the Indonesian missions abroad for more than 5 consecutive years (as stated in Article 23 letter i of Law No. 12/2006) and has been declared illegal by the receiving State, the situation could cause the Indonesian government to cease their citizenship provided that the person would not become stateless. If the receiving State shall not grant any citizenship to such person, then the person has the right to reapply for an Indonesian citizenship from the State of residency by providing valid documents as proof of identity of Indonesian citizenship.
>
> In accordance with Articles 8 – 22 and 31 – 35 of Law No. 12/2006, the appropriate procedures for obtaining and regaining Indonesian citizenship are regulated as attached on Annex 1.
>
> Note: Since Indonesia does not recognize the status of "stateless" or "apatride" as mentioned previously, the Law regulates that a person who wishes to regain their Indonesian citizenship must submit an application with a proof of valid documents stating their previous citizenship.
>
> Indonesia does not fully recognize a permanent residency mechanism, the Directorate General of Immigration only applies a temporary resident card for foreign citizens desiring to reside in Indonesia for a maximum period of 1 (one) consecutive year.
>
> The Government of Indonesia c.q. Indonesian Missions abroad possess the right to issue a legal travel document to act as a passport for one way trip to Indonesia called the *Surat Perjalanan Laksana Paspor* (SPLP) but only applies to Indonesian citizens. The said document is intended for a person who is travelling overseas without proper or valid documents then declared unlawful by the receiving State and must return immediately to Indonesia Instead of issuing a passport to that person, Indonesian Missions abroad only issues an SPLP. Once again, since

Indonesia does not recognize the status of "stateless", then it would not have the right to issue a travel document to a person without a valid citizenship under any Indonesian law.

FIRST SECRETARY/CONSULAR
EMBASSY OF THE REPUBLIC OF INDONESIA
YARRALUMLA, ACT 2600
AUSTRALIA

62. [In] March 2010, the Tribunal despatched an information request to the Department of Foreign Affairs and Trade (DFAT). DFAT provided a response [in] April 2010. The response provides the following information:

On the question of whether the 2006 reform to Indonesia's citizenship law allows ethnic Chinese people born in Indonesia who have left the country, and who have not taken out citizenship of another country, the right to Indonesian citizenship:

DFAT advice indicates that the 2006 reform to Indonesia's citizenship law does not automatically grant citizenship to hitherto stateless ethnic-Chinese persons born in Indonesia Rather, DFAT confirms that persons in such circumstance have the right to apply for Indonesian citizenship, providing they also meet other criteria:

> 5. Article 8 of Law 12/2006 provides that Indonesian citizenship can be acquired through naturalisation. Under Article 9, applicants may apply for Indonesian citizenship if:
>
> a. they are 18 years old or married;
>
> b. at the time of submitting the application they have resided in Indonesia for at least five consecutive years or at least ten years intermittently;
>
> c. they are of sound mental and physical health;
>
> d. they are able to speak the Indonesian language and acknowledge the basic principles of Pancasila and the 1945 Constitution;
>
> e. they have never been convicted of a crime punishable by jail sentence of one year or more;
>
> f. by acquiring Indonesian citizenship, they will not retain dual citizenship;
>
> g. they have a job or steady income; and
>
> h. they have paid a naturalisation fee to the Government Treasury.
>
> 9. In response to questions raised by IDN36426, Post has confirmed that Law 12 of 2006 allows an ethnic Chinese person who was born in Indonesia, who has left the country, and who has not taken out citizenship of another country, has the right to apply for Indonesian citizenship. The success of the application would depend on the applicant's ability to fulfil the legal criteria and follow the processes...

If the applicant has the right to Indonesian citizenship, what is the procedure for regaining citizenship? What documents would he need to demonstrate that he was born in Indonesia?

DFAT notes that there are no provisions in either the 2006 law or in the accompanying regulations for citizenship applicants to lodge their applications outside of Indonesia. Indeed, Article 10 of the Law stipulates that the application be

made in Indonesia. Nevertheless, advice to DFAT from "Ministry officials" indicates that it is possible. The processing of citizenship applications can take up to six months:

> 6. Article 10 stipulates that applications to acquire citizenship by naturalisation should be made in Indonesia and addressed to the President, through the Minister for Law and Human Rights. The application must be written in the Indonesian language on paper affixed with the correct duty stamp and the application file must be submitted to the relevant Indonesian officials. Once the Minister has received the application he/she has 3 months to provide an opinion on the application to the President (Article 11). The President must then make a decision to approve or reject the application within 3 months (Article 13). The applicant must take an oath of allegiance to the Indonesian Republic (Article 16), and within 14 days submit his/her "immigration documents" to the immigration authorities (Article 17). The elucidation of the Law notes these documents can include the applicant's passport, visa, entry permit, residence permit or other permits issued by immigration officials.
>
> 7. We note Government Regulations Number 2 of 2007 on Guidelines for Obtaining, Forfeiting, Annulling and Regaining Indonesian Citizenship provide further clarification on the application of Article 9 of Law 12/2006. The Regulations state that "foreigners" may apply for Indonesian citizenship if they fulfil the criteria in Article 9 of Law 12/2006. ("Foreigner" is defined in Article 7 of Law 12/2006 as any person who is not an Indonesian citizen). In addition to the requirements set out in Article 9, the Regulations state that applications must include the applicant's full name, their date and place of birth, gender, marital status, home address, employment and their original citizenship. The following documents must be attached to the application:
>
> a. a certified copy of the applicant's birth certificate or a letter evidencing the applicant's birth;
> b. if the applicant is below 18 years of age, a certified copy of the applicant's marriage certificate, divorce certificate or letter, or death certificate of the applicant's spouse;
> c. a letter from immigration authorities from the area of the applicant's place of residence, confirming the applicant lived in Indonesia for five consecutive years or 10 years intermittently;
> d. a certified copy of the applicant's permanent residency permit;
> e. a letter from a hospital confirming the applicant is of sound mental and physical health;
> f. a letter declaring the applicant can speak the Indonesian language;
> g. a letter declaring the applicant acknowledges the basic principles of Pancasila and the 1945 Constitution;
> h. a letter regarding the applicant's police record;
> i. a letter from a representative of the applicant's country that by acquiring Indonesian citizenship the applicant will not acquire dual citizenship;
> j. a letter from the local authorities in the area where the applicant works, confirming the applicant has employment and a steady income;
> k. proof of payment of citizenship application fees to the State Treasury; and
> l. a passport photo of the applicant.

On the question of what travel documents the applicant would require in order to return to Indonesia in lieu of a passport:

According to Indonesia officials, the applicant may only travel to Indonesia on a passport and therefore advice to DFAT from Indonesia Ministry officials is that the applicant should apply for citizenship and, if successful, travel to Indonesia on an Indonesian passport. As indicated in the response to question 2, advice from Post indicates that the application process can take up to six months to gain citizenship. If successful, it is not clear as to how long it would take for authorities to issue an Indonesian passport:

> 8. We note Law 12/2006 and the accompanying Regulations do not make any provision for persons submitting applications outside of Indonesia Ministry officials advised Post (DIAC) if applicants outside of Indonesia fulfilled the criteria set out in Article 9, they would be considered eligible for Indonesian citizenship, and if successful, could apply for an Indonesian passport through an Indonesian mission overseas. Officials confirmed if a person was denied Indonesian citizenship (and therefore an Indonesian passport), they would also be denied entry to Indonesia unless they were able to travel on a foreign passport.

Despite Indonesian claims that the applicant may only travel to Indonesia on a passport, Indonesian Embassies can provide other travel documents to persons who they believe has the right to land or permanent residence.

63. On the question of the treatment of a person in the applicant's circumstances if he was to return to Indonesia, the Tribunal's country research indicates the legal conditions for Indonesia-born ethnic Chinese people have improved dramatically since the end of the New Order regime of former President Suharto and the anti-Chinese violence that swept Indonesia coinciding with the end of Suharto rule and the Asian Economic Collapse of 1997. The program of *reformasi* begun by Abdurrahman Wahid and continued by his successors has seen dramatic improvements in the rights of Indonesia's Chinese population. Of significant note, the Suharto era ban on the display and broadcast of Chinese languages has been lifted; Chinese New Year has been legalised and declared a national holiday; anti-discrimination laws have been passed; and, perhaps most significantly, a new non-discriminatory citizenship law was introduced in 2006.

64. Until recently, the most serious legal concern facing Indonesia's large Chinese population was the 1958 citizenship law that rendered most of Indonesia's millions of ethnic Chinese without nationality; under the law, only 'indigenous' people were automatically granted citizenship. In July 2006 Indonesia introduced a new citizenship law that jettisoned the indigenous requirement. According to *Inter Press Service*, the new act defines an Indonesian as someone born in the country; "[t]his act has allowed many Chinese-Indonesians belonging to families that have been in this country for generations but were 'stateless', to become full-fledged citizens of the country." [Seneviratne, K. 2007, 'Ethnic Chinese Find New Acceptance', *Inter Press Service* website, 1 March http://ipsnews.net/news.asp?idnews=36785 – Accessed 12 April 2007]

65. *The Jakarta Post* also states that the new law allows ethnically Chinese Indonesians "to hold several key government posts, including the presidency, which were formerly closed to them." One of the key aspects of the law is the jettisoning of the "distinction between 'indigenous' and 'non-indigenous' Indonesians – long cited as discriminatory

by Chinese Indonesians – by redefining 'indigenous Indonesian' to include all citizens who never assume foreign citizenship."[Hera, D. 2006, 'Law provides more inclusive definition of being Indonesian', Action in Solidarity with Asia and the Pacific website, source: *Jakarta Post*, 12 July http://www.asia-pacific-action.org/southeastasia/indonesia/netnews/2006/ind26v10.htm – Accessed 2 October 2006]

66. Despite the 2006 citizenship law reform, there are reports that a number of ethnic Chinese are encountering problems securing Indonesian citizenship. An April 2009 report in *The Jakarta Post* states that "[a]t least 600 residents of South Sumatra of Chinese descent have yet to secure Indonesian citizenship." The article reveals that many applicants for citizenship are being naturalised in citizenship ceremonies, however the problem lies with the government's difficulty collating information on many ethnically Chinese residents.['600 Sumatran Chinese yet to receive citizenship: Official' 2009, *The Jakarta Post*, 7 April] It appears that problems associated with obtaining citizenship mostly relate to providing appropriate evidence to authorities. A 2009 article in *Inside Indonesia* argues that the treatment of Indonesia's ethnic Chinese minority has been tied "to the fate of their fellow Indonesians." The author is suggesting that as the nation has moved further away from the New Order era and *reformasi* has taken effect, so too have legal and social conditions for ethnic Chinese improved; "the speed and extent to which the situation for the ethnic Chinese minority improved legally and politically in the wake of this violent transition is truly remarkable. For more than thirty years discriminatory policies and social conditioning had rendered Chinese outsiders. All of a sudden, the Chinese seemed to be welcomed into the Indonesian nation." The article also cites other reforms, including the lifting of the ban on the display and broadcast of Chinese languages and displays of Chinese identity and culture. The author states that, cumulatively, these reforms have had substantial practical, cultural and psychological benefits for the community. [Purdey, J. 2009 'A common destiny', *Inside Indonesia*, July-September 2009]

67. The US Department of State reported in March 2010 that despite reform, some ethnic Chinese reported that "public servants still discriminated against them when issuing marriage licenses and in other services and often demanded bribes for a citizenship certificate, although such certificates were no longer legally required." Furthermore, a number of other, unspecified discriminatory statutes remain yet to be eliminated.[US Department of State 2010, *Country Reports on Human Rights Practices 2009 – Indonesia*, 11 March 2010.]

68. A 2009 article in *Inside Indonesia* appears to confirm the US Department of State's observations. The article states that "[u]nlike Indonesians of Arab or Indian descent, Chinese Indonesians are required to have a document that proves they are Indonesian citizens. Whenever Chinese Indonesians deal with the bureaucracy, they are obliged to produce this document. It is an integral part of their administrative experiences of birth, marriage and death. They need it to get an identity card, to enrol in an educational institution, to obtain a business license and to get a passport." All other Indonesians simply have to show their ID cards. According to the article, the document is known by the acronym SBKRI and is compulsory for "all Chinese Indonesians of 21 years of age or over, even if they were born in Indonesia to parents who were already Indonesian citizens." The author suggests that the ongoing insistence by Indonesian bureacrats on seeing a SBKRI "is a sign of Indonesia's mistrust of its Chinese citizens."[Effendi, W.

2009, 'Never Indonesian enough: State discrimination against the Chinese is a form of cultural violence', *Inside Indonesia*, 12 January] *The Jakarta Post* also reported that, despite legal changes, bureaucrats are still forcing Chinese-Indonesians to show citizenship certificates (SBKRIs) "when applying for identity cards, passports and other official documents." [Simamora, A.P. 2008, 'Ethnic Chinese still face hurdles to get ID cards: Survey', *The Jakarta Post*, 15 December]

69. Given the legal reform undertaken by Indonesia, it appears that remaining discriminatory practices may be due either to corruption (officials seeking bribes), or persistent prejudice. A February 2009 article in *The Jakarta Post* reports that President Yudhoyono has "called on all state officials to improve their services to the country's Confucian and Chinese-Indonesian communities, saying all discriminatory acts against minorities must be put to an end." ['Chinese Indonesians recognize improvement' 2009, *The Jakarta Post*, 2 February] In 2008 the Indonesian Assembly passed an anti-discrimination act that sets a minimum jail term for discriminatory acts. ['Bill against racial discrimination passed' 2008, *The Jakarta Post*, 29 October http://www.thejakartapost.com/news/2008/10/29/bill-against-racial-discrimination-passed.html – Accessed 3 November 2008]

70. Despite persistent low level discrimination, a number of senior members of the Chinese community have expressed satisfaction with the level of progress achieved in the past decade. A December 2009 article in the *South China Morning Post* on the use of Chinese languages quotes an 83 year old man from Medan; "It's like spring time for the Chinese language in Indonesia, where everything is blooming anew." The article states that the number and circulation of Chinese language newspapers in Indonesia has flourished "since Abdurrahman Wahid lifted Indonesia's ban on Chinese-language media and cultural expression." The lifting of the Chinese language ban has also encouraged more young ethnic Chinese in Indonesia to begin learning Mandarin. ['Chinese-language newspapers said flourishing in Indonesia' 2009, *South China Morning Post*, 16 December] A 2006 article in *The Economis*t suggests that Mandarin is becoming popular among both ethnic Chinese and other Indonesians. It also suggests that the flourishing of the language extends beyond print and into television and radio. ['The happy Chinese' 2006, *The Economist*, 2 February http://www.economist.com/world/asia/displaystory.cfm?story_id=E1_VQSGNTG]

71. Chinese New Year celebrations are also now publicly celebrated. A recent *Inside Indonesia* article states that "presidents, ministers, governors and other senior officials regularly attend Chinese cultural events and watch traditional Chinese performances such as the such as barongsai (dragon dance)." Perhaps even more remarkable, states the author, is the fact that in October 2008, "the Indonesian Army's 63rd anniversary was celebrated with a dragon dance performed by the Wirabuana Military Command, which oversees military affairs in South Sulawesi, at Karebosi Square in Makassar…Not long ago it would have been unimaginable that the military would incorporate a Chinese cultural display into its sacred nationalist rituals." [Purdey, J. 2009 'A common destiny', *Inside Indonesia*, July-September]

People's Republic of China

72. On the question of the Right of Return to the PRC, there are provisions in both the constitution and the nationality law of the People's Republic of China that allow ethnic

Chinese born abroad to acquire Chinese nationality. Article 5 of the *Nationality Law of the People's Republic of China* states the following:

> Any person born abroad whose parents are both Chinese nationals and one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality. [Nationality *Law of the People's Republic of China* (Adopted at the Third Session of the Fifth National People's Congress, promulgated by Order No.8 of the Chairman of the Standing Committee of the National People's Congress on and effective as of September 10, 1980), China.org.cn website http://www.china.org.cn/english/LivinginChina/184710.htm – Accessed 24 March 2010]

73. If the applicant's parents remained Chinese nationals then article 5 would theoretically entitle the applicant to Chinese nationality, providing he had not been granted citizenship of any other country. Article 5 appears to provide a right of return to all stateless ethnic Chinese whose parents were Chinese nationals.

74. Article 7 of the Nationality Law of the People's Republic of China states that:

> Foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who meet one of the following conditions may be naturalised upon approval of their applications:
>
> 1. they are near relatives of Chinese nationals;
>
> 2. they have settled in China; or
>
> 3. they have other legitimate reasons.
>
> [Source: DIAC Country Information Service 2010, *Country Information Report No. 10/14 – China: Rights of non-resident Chinese nationals and the residence application process*, (sourced from DFAT advice of 22 March 2010), 22 March]

Article 7 of the Law therefore reinforces the view that the applicant would be entitled to apply for Chinese citizenship and the view that he is likely to obtain residency.

75. Article 50 of the Constitution of the People's Republic of China states the following:

> The People's Republic of China protects the legitimate rights and interests of Chinese nationals residing abroad and protects the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad. [*Constitution of the People's Republic of China* (adopted December 4, 1982)]

While Article 50 does not specify precisely what constitutes the lawful rights and interests of family members of Chinese nationals residing abroad, it could be interpreted as constitutional protection of the applicant's rights to PRC nationality under articles 5 and 7 of the *Nationality Law of the People's Republic of China*.

76. On the question of the treatment of a person in the applicant's circumstances if he was to return to the PRC, country information on this point indicates that ethnic Chinese who were born and live in the diaspora are known in China as Huáyì. Once treated with suspicion by the Chinese Communist Party (CCP), the millions of Huáyì are now viewed by the PRC government as an invaluable resource potentially providing local knowledge, networks and foreign direct investment. Highly educated Chinese in specific professions who are living and working abroad are provided with a variety of

incentives to return to China, including exemptions from Hukou rules; however, these incentives appear to be primarily aimed at overseas Chinese born in the PRC (Huaqiao or Haigui). What is less clear is the experience of Huáyì who have settled in the PRC; there are no available statistics on Huáyì migration to the PRC, nor does there appear to be published accounts. Non-professional Huáyì may experience household registration (Hukou) issues, and consequently problems with access to certain services. Some Huáyì appear to experience linguistic and other cultural barriers

77. Although it is thought that, historically, many Huáyì have migrated to the PRC, little statistical information or stories of their experiences have been published. Once viewed as hanjian (traitors to China), attitudes to the Huáyì have changed significantly since the Open Door policy was introduced in 1978. According to Hélène Le Bail and Wei Shen, in the Mao era, "overseas Chinese were considered as members of the bourgeois and capitalist class. Chinese returning from abroad or the families of emigrants were frequently targets of repression."[Le Bail, H. & Wei, S. 2008, *The Return of the "Brains" to China: What are the Social, Economic, and Political Impacts?,* Centre Asie, November, pp 4-5]

78. There is a special visa category for professional ethnic Chinese who have either never had or who no longer hold Chinese citizenship. Since 2004 there has also been a permanent residence visa (sometimes referred to as China's green card), however a 2008 report states that it is "designed for investors, highly qualified workers, professors and their families" and that the "criteria to obtain the permit are relatively strict. An investor must have been investing in the Chinese market for a minimum of three years. An employee must have been living in China for three years and earn a good salary" However, the permit does allow its holder to settle anywhere inside China (Hukou exemption). [Le Bail, H. & Wei, S. 2008, *The Return of the "Brains" to China: What are the Social, Economic, and Political Impacts?,* Centre Asie, November, p 22]. The fact that such visas exist may suggest that the PRC primarily wants to encourage the migration of highly skilled professional Chinese and that the nationality rights under articles 5 & 7 of the *Nationality Law of the People's Republic of China* are not easy to access.

79. A 2005 study on how the government of the PRC views the diaspora suggests that in the post-Mao Open era, the PRC government views the Huáyì as an enormous resource for foreign direct investment, business networking, cultural connections with foreign states, and as a source of professional skills.[Barabantseva, E. 2005, *Trans-nationalising Chineseness: Overseas Chinese Policies of the PRC's Central Government,* Deutsche Gesellschaft für Asienkunde website, July http://www.asienkunde.de/content/zeitschrift_asien/archiv/pdf/Barabantseva96.pdf – Accessed 25 March 2010] The paper does not, however, examine the treatment of Huáyì who settled permanently in the PRC. No sources have been located that examine attitudes of average Chinese citizens towards the Huáyì. The *China Daily* has reported that there is significant resentment towards the Haigui due to their level of privileges. [Rong, J. 2007, 'The turning tide of overseas Chinese', *China Daily*, 30 May http://www.chinadaily.com.cn/china/2007-05/30/content_883647.htm – Accessed 23 March 2010]

80. As stated previously, highly skilled professionals are given 'green passage', which includes not being subject to Hukou (household registration) regulations. For other migrants, Hukou registration can cause substantial problems. Without Hukou

registration in a person's place of residence, services such as health, education and housing may be very difficult to access and research indicates that Hukou rules are still rigorously applied in many provinces, and in particular in the large, wealthy cities in the coastal provinces. Acquisition of Hukou registration requires not only that a person be born in the Hukou region, but also that one's parents were also registered in the region. Given that both the applicant and his parents were born before the creation of the People's Republic of China, and that the applicant was born overseas, it is unclear which Hukou the applicant would be permitted to register in, if he was to gain PRC nationality.

Hong Kong Special Administrative Region (HKSAR)

81. The law governing permanent residency in HKSAR is contained in the Immigration Ordinance (CAP 115). Section 2A of the Immigration Ordinance is headed *Hong Kong permanent residents enjoy right of abode in Hong Kong* and provides as follows:

> PART IA
>
> RIGHT OF ABODE IN HONG KONG AND RIGHT TO LAND IN HONG KONG
>
> (1) A Hong Kong permanent resident enjoys the right of abode in Hong Kong, that is to say he has, subject to section 2AA(2), the right- (Amended 124 of 1997 s. 3)
>
> (a) to land in Hong Kong;
>
> (b) not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay that is imposed shall have no effect;
>
> (c) not to have a deportation order made against him; and
>
> (d) not to have a removal order made against him.
>
> (2) Notwithstanding subsection (1)(c), no person against whom a deportation order was made prior to 1 July 1987 enjoys the right of abode in Hong Kong unless the deportation order has expired or been revoked.

82. A "Hong Kong permanent resident" in Part 1A means a person who belongs to a class or description of persons specified in Schedule 1 of the Immigration Ordinance. Clause 2 of Schedule 1 of the Immigration Ordinance sets out the categories where a person is regarded as a permanent resident of Hong Kong and states:

> *Permanent resident of the Hong Kong Special Administrative Region*
>
> A person who is within one of the following categories is a permanent resident of the Hong Kong Special Administrative Region-
>
> (a) A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region. (Replaced L.N. 192 of 1999. Amended L.N. 84 of 2002)

(b) A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the Hong Kong Special Administrative Region.

(c) A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b). (Replaced L.N. 192 of 1999)

(d) A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.

(e) A person under 21 years of age born in Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region in category (d) before or after the establishment of the Hong Kong Special Administrative Region if at the time of his birth or at any later time before he attains 21 years of age, one of his parents has the right of abode in Hong Kong.

(f) A person other than those residents in categories (a) to (e), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

83. On the question of the applicant's right to return and reside in the HKSAR, the Nationality Law of the People's Republic of China Adopted at the Third Session of the Fifth National People's Congress, promulgated by Order No. 8 of the Chairman of the Standing Committee of the National People's Congress and effective as of September 10,1980 (source: Immigration Department, Government of Hong Kong http://www.immd.gov.hk/ehtml/topical_3_9.htm accessed 8 March 2010) provides:

Article 1	This law is applicable to the acquisition, loss and restoration of nationality of the People's Republic of China.
Article 2	The People's Republic of China is a unitary multinational state; persons belonging to any of the nationalities in China shall have Chinese nationality.
Article 3	The People's Republic of China does not recognize dual nationality for any Chinese national.
Article 4	Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.
Article 5	Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.
Article	Any person born in China whose parents are stateless or of uncertain nationality and

6 have settled in China shall have Chinese nationality.

Article 7 Foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who meet one of the following conditions may be naturalized upon approval of their applications:

1. they are near relatives of Chinese nationals;
2. they have settled in China; or
3. they have other legitimate reasons.

Article 8 Any person who applies for naturalization as a Chinese national shall acquire Chinese nationality upon approval of his application; a person whose application for naturalization as a Chinese national has been approved shall not retain foreign nationality.

Article 9 Any Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality.

Article 10 Chinese nationals who meet one of the following conditions may renounce Chinese nationality upon approval of their applications:

1. they are near relatives of foreign nationals;
2. they have settled abroad; or
3. they have other legitimate reasons.

Article 11 Any person who applies for renunciation of Chinese nationality shall lose Chinese nationality upon approval of his application.

Article 12 State functionaries and military personnel on active service shall not renounce Chinese nationality.

Article 13 Foreign nationals who once held Chinese nationality may apply for restoration of Chinese nationality if they have legitimate reasons; those whose applications for restoration of Chinese nationality have been approved shall not retain foreign nationality.

Article 14 Persons who wish to acquire, renounce or restore Chinese nationality, with the exception of cases provided for in Article 9, shall go through the formalities of application. Applications of persons under the age of 18 may be filed on their behalf by their parents or other legal representatives.

Article 15 Nationality applications at home shall be handled by the public security bureaus of the municipalities or counties where the applicants reside; nationality applications abroad shall be handled by China's diplomatic representative agencies and consular offices.

Article 16 Applications for naturalization as Chinese nationals and for renunciation or restoration of Chinese nationality are subject to examination and approval by the Ministry of Public Security of the People's Republic of China. The Ministry of Public Security shall issue a certificate to any person whose application has been approved.

Article 17 The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this Law shall remain valid.

Article 18 This Law shall come into force as of the date of its promulgation.

84. The Immigration Department of the Government of HKSAR provides the following guidance on its website:

Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region (Adopted at the Nineteenth Session of the Standing Committee of the Eighth National People's Congress on 15 May 1996)

According to Article 18 of and Annex III to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Nationality Law of the People's Republic of China shall be applied in the Hong Kong Special Administrative Region from 1 July 1997. Taking account of the historical background and the existing circumstances of Hong Kong, the Standing Committee gives the following explanations concerning the implementation in the Hong Kong Special Administrative Region of the Nationality Law of the People's Republic of China -

1. Where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he is a Chinese national.

2. All Hong Kong Chinese compatriots are Chinese nationals, whether or not they are holders of the "British Dependent Territories Citizens passport" or "British Nationals (Overseas) passport". With effect from 1 July 1997, Chinese nationals mentioned above may, for the purpose of travelling to other countries and territories, continue to use the valid travel documents issued by the Government of the United Kingdom. However, they shall not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above mentioned British travel documents.

3. According to the Nationality Law of the People's Republic of China, the British Citizenship acquired by Chinese nationals in Hong Kong through the "British Nationality Selection Scheme" will not be recognised. They are still Chinese nationals and will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China.

4. Chinese nationals of the Hong Kong Special Administrative Region with right of abode in foreign countries may, for the purpose of travelling to other countries and territories, use the relevant documents issued by the foreign governments. However, they will not be entitled to consular protection in the Hong Kong Special Administrative Region and other parts of the People's

Republic of China on account of their holding the above mentioned documents.

5. If there is a change in the nationality of a Chinese national of the Hong Kong Special Administrative Region, he may, with valid documents in support, make a declaration at the authority of the Hong Kong Special Administrative Region responsible for nationality applications.

6. The Government of the Hong Kong Special Administrative Region is authorised to designate its Immigration Department as the authority of the Hong Kong Special Administrative Region responsible for nationality applications. The Immigration Department of the Hong Kong Special Administrative Region shall handle all nationality applications in accordance with the Nationality Law of the People's Republic of China and the foregoing provisions.

85. Also relevant in considering the applicant's rights in respect to HKSAR, Clause 5 of Schedule 1 of the Immigration Ordinance provides:

5. Establishing permanent residence under paragraph 2(f)

(1) For the purposes of paragraph 2(f), the person is required-

(a) to furnish information that the Director may reasonably require to determine whether that person had the right of abode only in Hong Kong immediately before the establishment of the Hong Kong Special Administrative Region; and

(b) to make a declaration that he had the right of abode only in Hong Kong immediately before the establishment of the Hong Kong Special Administrative Region; the declaration for a person under the age of 21 years must be made by one of his parents or by a legal guardian.

(2) If the person claims that he had no right of abode in a place that the Director reasonably believes that he had, the onus of proving that he did not have the right of abode in the place lies on the person.

(3) A person under 21 years of age born in Hong Kong on or after 1 July 1997 to a parent who is a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) at the time of the birth of the person is taken to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) if, but for this subparagraph, the person has no right of abode in any place including Hong Kong.

(4) The person on attaining the age of 21 years ceases to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(f) and may apply to the Director for the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) at any time.

(5) Section 2AAA applies in relation to a person who ceases to have the status of a permanent resident of the Hong Kong Special Administrative Region under this paragraph. (Amended 28 of 1998 s. 2(2)).

86. Clause 6 of Schedule 1 of the Immigration Ordinance is also relevant as it deals with the Transitional Provisions as follows:

6. Transitional

(1) A person who is not of Chinese nationality and who was a permanent resident of Hong Kong before 1 July 1997 is taken to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) and exempt from the requirements under paragraph 3 if-

(a) he was settled in Hong Kong immediately before 1 July 1997;

(b) after he ceased to be settled in Hong Kong immediately before 1 July 1997 he returns to settle in Hong Kong within the period of 18 months commencing on 1 July 1997; or

(c) after he ceased to be settled in Hong Kong immediately before 1 July 1997 he returns to settle in Hong Kong after the period of 18 months commencing on 1 July 1997 but only if he has not been absent from Hong Kong for a continuous period of not less than 36 months.

(2) A person who is a Chinese citizen and was a Hong Kong permanent resident immediately before 1 July 1997 under this Ordinance as then in force shall, as from 1 July 1997, be a permanent resident of the Hong Kong Special Administrative Region as long as he remains a Chinese citizen. (Replaced 28 of 1998 s. 2(2))

87. Clause 7 of Schedule 1 of the Immigration Ordinance deals with loss of the status as a permanent resident and provides:

7. Loss of the status as a permanent resident

A permanent resident of the Hong Kong Special Administrative Region loses the status of such resident only if-

(a) being a person falling within the category in paragraph 2(d) or (e) has been absent from Hong Kong for a continuous period of not less than 36 months since he ceased to have ordinarily resided in Hong Kong; or

(b) being a person falling within the category in paragraph 2(f), has been absent from Hong Kong for a continuous period of not less than 36 months after he obtained the right of abode in any place other than Hong Kong and has ceased to have ordinarily resided in Hong Kong.

88. Section 2AAA of the Hong Kong Immigration Ordinance provides for a right to land in Hong Kong for former permanent residents and states:

IMMIGRATION ORDINANCE - SECT 2AAA

Right to land in Hong Kong for former permanent residents

Adaptation amendments retroactively made - see 28 of 1998 s. 2(2)

(1) Subject to subsections (2) and (3), any person who-

(a) immediately before 1 July 1997 was a Hong Kong permanent resident under this Ordinance as then in force but did not become a permanent resident of the Hong Kong Special Administrative Region upon the commencement of the Immigration (Amendment) (No. 2) Ordinance 1997 (122 of 1997) shall, immediately upon such commencement;

(b) is a permanent resident of the Hong Kong Special Administrative Region but ceases to be such a permanent resident by virtue of the operation of this Ordinance shall, immediately upon such cessation, have the right-

(i) to land in Hong Kong;

(ii) not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay that is imposed on him shall have no effect; and

(iii) not to have a removal order made against him.

89. On the question of the treatment of returnees to the HKSAR, country information indicates that difficulties may be encountered by returnees, and particularly those who are not fluent speakers of Cantonese, but no information was found to indicate that returnees are subject to adverse treatment by the authorities or denied the protection of the authorities.

90. The United States Department of State's report on human rights practices in Hong Kong for 2008 observed that "persons not fluent and literate in Cantonese faced tremendous challenges in seeking employment and in choice of education", and that government and non-government agencies were involved in programmes to redress some of these problems. The report states:

> Although 95 percent ethnic Chinese, Hong Kong is a multiethnic society with persons from a number of ethnic groups recognized as citizens or legal permanent residents of the SAR.
> ...
>
> While English and Cantonese are the two official languages, persons not fluent and literate in Cantonese faced tremendous challenges in seeking employment and in choice of education. The Constitutional and Mainland Affairs Bureau sponsored a "Cross-Cultural Learning Programme for Non-Chinese Speaking Youth" through grants to NGO service providers. (Source: US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – China*, February, Section 5)

91. Information on the website of the Government of Hong Kong provides the following information regarding language use in Hong Kong:

> Chinese and English are the official languages of Hong Kong. English is widely used in the Government and by the legal, professional and business sectors. Trilingual professionals who speak English, Cantonese and Putonghua play a vital role in the numerous enterprises trading in Hong Kong or doing business with mainland China and Taiwan. (Source: 'Hong Kong – the Facts' (undated), Government of Hong Kong website http://www.gov.hk/en/about/abouthk/facts.htm – Accessed 1 February 2010)

92. An article in Hong Kong's *South China Morning Post* in November 2008 referred to a growing demand from non-Chinese speaking residents, including overseas Chinese and returnees, for a lower-cost alternative to international schools, and that the government's Education Bureau had, in response, provided grants to several local schools to develop programmes to assist students who don't speak Chinese. (Source: Furniss, T. 2008, 'Affordable alternative – Government bureau helps out non-Chinese-speaking students who are turning to the lower-cost local curriculum', *South China Morning Post*, 15 November)

93. The website of the Constitutional Mainland Affairs Bureau of Hong Kong states that it provides "a wealth of services specially catered for new arrivals in Hong Kong" and publishes information about these services in a number of languages, including English. The website itself provides links to information provided by different government departments including general information for new arrivals, registering for an identity card, housing, employment, heath services and social services. (Source: Settling in Hong Kong' (undated), Government of Hong Kong website http://www.gov.hk/en/nonresidents/living/settling.htm – Accessed 2 February 2010)

94. Other sources generally indicate that Hong Kong is considered a desirable place to return to or migrate to. An article dated 28 June 2007 from *Channel NewsAsia* reported that, in the previous decade, the HKSAR had welcomed some 275,000 returnees. According to the article:

> Since Britain returned Hong Kong to China a decade ago, the city has welcomed back some 275,000 Hongkongers who emigrated – that's some 4% of the local population.
> ...
> While Hongkongers are slowly trickling home, British citizens have left in droves, replaced by upwardly mobile ethnic Chinese and South Asians from across Asia.

The article reports that there is a three-year waiting period for mainlanders seeking to reunite with relatives in Hong Kong, and notes that, amongst those who have made the move, "many go through a tough period of adjustment. Living quarters in the crowded city are often cramped, and low-skilled jobs are scarce". (Source: 'Pre-'97 returnees to Hong Kong find city more vibrant after 10 years' 2007, *Channel NewsAsia*, 28 June. (FACTIVA))

95. A relevant question in an application such as this involving HKSAR where an assessment needs to be made on the applicant's naitonality is whether the HKSAR is a 'country' for the purposes of considering nationality. As stated earlier, in *SZFJQ v MIMIA & Anor* [2006] FMCA 671 (Scarlett FM, 27 April 2006) the court held that it is fundamental to the jurisdiction of the Tribunal to make a finding as to nationality and that an applicant's own assertion is not sufficient without proper consideration. At the hearing the applicant challenged whether it was relevant to consider the nationality rules of the HKSAR because he had never lived in HKSAR but rather had lived in the

British Overseas Territory of Hong Kong. He claimed that his country of former habitual residence no longer existed because on 1 July 1997 the British Overseas Territory of Hong Kong ceased to exist and Hong Kong reverted to the sovereignty of the PRC. The applicant's submisison by his representative which was recevied after the hearing and which is referred to earlier in this decision acknowledges the decision of Tamberlin J in the Federal Court in *Tjhe Kwet Koe v Minister of Immigration & Ethnic Affairs & Ors* [1997] FCA 912 (8 September 1997) and that the applicant's argument would appear to be without merit. The Tribunal considered this matter further and notes in particular Tamberlin J's comments in this respect:

> It is clear that Hong Kong was not a *state* or *nation*. At the relevant time Hong Kong did not have an independent capacity to enter into legal relations. It was under the control, direct or indirect, of the United Kingdom.
>
> Nevertheless, Hong Kong at the relevant date had a distinct area with identifiable borders. It had its own immigration laws, and was inhabited by a permanent identifiable community, and therefore in my opinion it was appropriate to treat it as a "country" in accordance with the meaning and purpose of that expression as used in Art 1A of the Convention. In 1965 Hong Kong enjoyed a degree of autonomy in relation to its administration. This lends further support to the submission that it is a "country". In addition, as a matter of everyday usage of language, it is not inappropriate to refer to a person as coming from, belonging to, or returning to Hong Kong. The Territory was not simply a place or area but possessed the foregoing additional elements which make it appropriate to be treated as a country for Convention purposes. [*Koe v Minister for Immigration and Ethnic Affairs and Others* (1997) 78 FCR 289, at 294 & 299]

96. In relation to the present situation in the HKSAR of the People's Republic of China, the US Department of State's report on human rights practices in China, including Hong Kong, for 2009 indicates that the Hong Kong SAR has "a high degree of autonomy except in matters of defense and foreign affairs." Under a "one country, two systems" framework, the Hong Kong SAR administers "its own immigration and entry policies". It is stated in the report that:

> Hong Kong, with a population of approximately seven million, is a Special Administrative Region (SAR) of the People's Republic of China (PRC). The 1984 Sino-British Joint Declaration on the Question of Hong Kong and the SAR's charter, the Basic Law of the SAR (the Basic Law), specify that Hong Kong will enjoy a high degree of autonomy except in matters of defense and foreign affairs. The Fourth Term Legislative Council (LegCo) was elected from a combination of geographic and functional constituencies in September 2008 elections that were generally free and fair. Civilian authorities generally maintained effective control of the security forces.
>
> …The law provides residents freedom of movement, freedom of emigration, and freedom to enter and leave the territory, and the government generally respected these rights in practice, with some prominent exceptions. Under the "one country, two systems" framework, the SAR continued to administer its own immigration and entry policies and made determinations regarding claims under the Convention Against Torture (CAT) independently.

97. The Hong Kong Special Administrative Region "is not a party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol and has no temporary protection policy." China, however, "is a party to the 1951 Convention relating to the Status of Refugees and its 1967 protocol," although "the law does not provide for the granting of refugee or asylum status." [US Department of State 2010, *Country Reports on Human*

Rights Practices for 2009 – China (includes Tibet, Hong Kong, and Macau), March, Section 2(d) of China section, Introduction & Section 2(d) of Hong Kong section]

98. A document last updated 17 March 2008 on The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website provides information on the Basic Law, including the relationship between the central Chinese authority and the HKSAR. According to the document:

> The Sino-British Joint Declaration on the Question of Hong Kong (The Joint Declaration) was signed between the Chinese and British Governments on 19 December 1984. The Joint Declaration sets out, among other things, the basic policies of the People's Republic of China (PRC) regarding Hong Kong. Under the principle of "One Country, Two Systems", the socialist system and policies shall not be practised in the Hong Kong Special Administrative Region (HKSAR) and Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years. The Joint Declaration provides that these basic policies shall be stipulated in a Basic Law of the HKSAR.
>
> The Basic Law of the Hong Kong Special Administrative Region (The Basic Law) was adopted on 4 April 1990 by the Seventh National People's Congress (NPC) of the PRC. It came into effect on 1 July 1997.
>
> …The Basic Law is the constitutional document for the HKSAR. It enshrines within a legal document the important concepts of "One Country, Two Systems", "a high degree of autonomy" and "Hong Kong People ruling Hong Kong". It also prescribes the various systems to be practised in the HKSAR.

99. Major provisions of the Basic Law "which set out the basic policies of the PRC regarding the HKSAR" include the following:

> The HKSAR has a high degree of autonomy and enjoys executive, legislative and independent judicial power, including that of final adjudication. (BL Article 2)
>
> The executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong. (BL Article 3)
>
> The socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life shall remain unchanged for 50 years. (BL Article 5)
>
> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the legislature of the HKSAR. (BL Article 8)

100. With regard to the relationship between the central Chinese authority and the HKSAR, it is stated that:

> The Central People's Government (CPG) shall be responsible for the defence and the foreign affairs relating to the HKSAR. (BL Articles 13-14)
>
> The CPG authorizes the HKSAR to conduct relevant external affairs on its own. (BL Article 13)
>
> The HKSARG shall be responsible for the maintenance of public order in the Region. (BL Article 14)
>
> National laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law. Laws listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy

> of the HKSAR. The laws listed in Annex III shall be applied locally by way of promulgation or legislation by the HKSAR. (BL Article 18)
>
> No department of the CPG and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the HKSAR administers on its own in accordance with the Basic Law. (BL Article 22)

101. The document indicates that "[t]he Chief Executive of the HKSAR shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the HKSAR with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years. (BL Article 44)" The powers and functions of the Legislative Council of the HKSAR include the power to "enact, amend or repeal laws", to "examine and approve budgets introduced by the government", to "approve taxation and public expenditure", to "raise questions on the work of the government", to "debate any issue concerning public interests" and to "endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court. (BL Article 73)" The Court of Final Appeal of the HKSAR has "[t]he power of final adjudication of the HKSAR". The HKSAR also "remains a free port, a separate customs territory and an international financial centre. Its markets for foreign exchange, gold, securities and futures shall continue. There shall be free flow of capital. (BL Articles 109/112/114/116)"

102. The document includes sections on the protection of rights and freedoms in the HKSAR, education, science, culture, sports, religion, labour and social services, and external affairs. The document also indicates that:

> The power of interpretation of the Basic Law shall be vested in the Standing Committee of the National People's Congress (SCNPC). The SCNPC shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of the autonomy of the HKSAR. The courts of HKSAR may also interpret other provisions of the Basic Law in adjudicating cases. However, if the courts of the HKSAR, in adjudicating cases, need to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the HKSAR, and if such interpretation will affect the judgments on the cases, the courts of the HKSAR shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the SCNPC through the Court of Final Appeal of the HKSAR. (BL Article 158)
>
> The power of amendment of the Basic Law shall be vested in the NPC. No amendment to the Basic Law shall contravene the established basic policies of the PRC regarding Hong Kong. (BL Article 159) ['Some facts about the Basic Law' 2008, The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China website, 17 March http://www.basiclaw.gov.hk/en/facts/index.html – Accessed 18 February 2010].

103. On the distinction between a Right to Land (RTL) in HKSAR and nationality of HKSAR, the Tribunal's research suggests there is a substantial distinction and that the RTL in the HKSAR is not the equivalent to nationality. The RTL does not immediately and automatically allow the holder to possess permanent residence (right of abode), nor does it allow the holder the right to a HKSAR passport. Holders of permanent residency identity cards and passports are also nationals of the People's Republic of China No reference was found where the HKSAR government refer to either the right to land or the right of abode as HKSAR nationality or its equivalent. The right to land in this

respect appears not dissimilar to a working visa, with the added benefit of allowing the holder to reapply for permanent residence after several conditions are met, including residence of seven years.

104. A person formerly in possession of permanent residence in HKSAR retains the RTL. The Immigration Department of the Government of the Hong Kong Special Administrative Region states on its website that "[a] person who ceases to have the status of a permanent resident of the HKSAR will automatically acquire the right to land in Hong Kong in accordance with the law."

105. According to the Immigration Department of the Government of the Hong Kong Special Administrative Region, RTL allows the holder "to enter Hong Kong freely to live, study or work without any restriction." ['Frequently Asked Questions (FAQs) – Right of Abode in HKSAR' 2009, Immigration Department of the Government of the Hong Kong Special Administrative Region website, 27 February http://www.immd.gov.hk/ehtml/faq_roaihksar.htm – Accessed 6 January 2010]

106. This is not, however, the same as permanent residence or citizenship as a RTL holder may be deported and is not entitled to a permanent identity card or a HKSAR passport. These are only granted to persons in possession of the Right of Abode (indicated by possession of a permanent identity card) and in possession of Chinese nationality.

107. A person with RTL in the HKSAR has the right to reapply for permanent residence (right of abode) if the following criteria are met:

- you entered Hong Kong with a valid travel document; immediately before' the date on which you apply for the ROA,
- you have ordinarily resided in Hong Kong for a continuous period of not less than seven years; and
- you have made a declaration and have provided the required information to demonstrate that you have taken Hong Kong as your place of permanent residence;
- and your application to have the status of a permanent resident in the HKSAR has been approved by the Director of Immigration.

  [Source: '*Topical Issues – 7. The position of Non-Chinese citizens*' 2008, Immigration Department of the Government of the Hong Kong Special Administrative Region website, 15 December 2009]

108. Right of Abode (ROA) as distinct from the RTL allows the following:

- to land in the HKSAR;
- to be free from any condition of stay (including a limit of stay) in the HKSAR;
- not to be deported from the HKSAR; and not to be removed from the HKSAR.

  [Source:'*Topical Issues – 1. Right of Abode and other related terms'* 2008, Immigration Department of the Government of the Hong Kong Special

Administrative Region website, 15 December
http://www.immd.gov.hk/ehtml/topical_3_1.htm – Accessed 6 January 2010]

109. Evidence of ROA is a permanent identity card (PIC). A person with RTL applies for ROA once they have met the conditions already outlined (including residence in Hong Kong for at least seven years) by applying for a PIC. The Immigration Department of the Government of the HKSAR website states that "[b]efore you proceed to register for the issue of a PIC, you will need to show that you are eligible for registration under the Registration of Persons Ordinance and Regulations. A person must be in possession of a PIC and be a Chinese national before they can apply for a HKSAR passport:

> You are regarded as a person of Chinese nationality if you are a Hong Kong resident:
> (a) of Chinese descent who was born in Hong Kong or other parts of China; or
> (b) who fulfils the criteria of Chinese nationality in the Nationality Law of the People's Republic of China.
> ['Eligibility for HKSAR Passport' (undated), Hong Kong Special Administrative Region website]

110. The HKSAR government states that persons with right of abode and in possession of a Hong Kong SAR identity card can apply for Chinese nationality, subject to the Nationality Law of the People's Republic of China. In order to qualify for a HKSAR passport one must be both a national of China (PRC citizen), a permanent resident of the HKSAR (ROA); and a holder of a valid Hong Kong permanent identity card. [Source: 'HKSAR Passport' 2010, Hong Kong Special Administrative Region Government website, March, http://www.gov.hk/en/residents/ immigration/traveldoc/ hksarpassport// – Accessed 31 March 2010]. Possession of ROA, a PIC and a HKSAR passport means that the holder is a Chinese national; this it would appear there is no de facto Hong Kong nationality.

Country information provided by the applicant

111. Regarding the following country information which was provided by the applicant, the Tribunal notes:

- in the article (*Guigiao – Returnees as a policy subject in China* by Wang Cambai, The Newsletter, No 50, Spring 2009) refers to the history of the term "Guigiao" and explaining that during the cultural revolution the term was negative or pejorative The article also refers to the change since the economic reform of Deng Xiaping and that Chinese leaders have found that "overseas connections is a good thing…to bridge China with the outside world…" suggesting that the term may now be regarded as positive.

- In the paper *Home as a Circular Process: A study of the Indonesian Chinese in Hong Kong* by Wang Canbai and Wong Siu-Iun Centre of Asian Studies, University of Hong Kong the Tribunal notes the authors' research and interviews with Indonesian Chinese returnees who made comments that they were not trusted when they returned to China from Indonesia. They state, amongst other things, the returnees had few chances to be promoted in their work and only a very small number could become a party member or joined the army. The paper states that Indonesian Chinese, together with other immigrants from mainland China experienced low receptivity in Hong Kong and were despised and ridiculed as

backward and ignorant and typified by employers as unqualified labour or suitable only for menial jobs;

- In the paper titled *Indonesian Chinese Returnees as Youth* (by Adam Yuet Chau, University of Copenhagen, 2004) the author refers to the establishment of the independent Indonesian nation-state in the late 1940's and how the anti-Chinese sentiments mounted among native Indonesians, which resulted in harsh discriminatory policies against the Chinese. In view of this, and responding to Communist China's call to build the New China, the paper discusses how a few hundred thousand Indonesian Chinese left Indonesia for mainland China in the 1950's and 1960's. It goes on to explain how the early returnees were treated more generously by the government, but later returnees, who were in effect refugees from Indonesia, found China in chaos due to the Cultural revolution and many of these moved on the Hong Kong.

FINDINGS AND REASONS

112. The Tribunal found the applicant to be open and frank in providing evidence to the Tribunal. The Tribunal found that the applicant did not exaggerate or embellish his claims as evidenced by his claim that his fears are of psychological harm and severe economic hardship, and not of physical harm. That is not to say that psychological harm cannot be as serious as physical harm, but merely to say that the applicant did not claim a fear of suffering such harm and thereby inflate his Protection Visa claim overall. The Tribunal notes that the applicant initiated the approach to the Department when he attended the Perth Office of the Department [in] August 2009 for the purposes of settling his visa and residency status. The Tribunal is satisfied that the applicant's evidence is truthful and credible.

113. Regarding the delay in applying for a Protection visa, the Department's file records the applicant telling the Department when asked why he delayed so long in applying for a Protection visa, that he did not know when he came to Australia that he might be considered a refugee. He advised the Department that he recently became aware he might qualify for protection given that he fled Indonesia to Mainland China and then to British Overseas Territory of Hong Kong following purges against Chinese nationals in Indonesia. The Tribunal does not draw adverse inference in this particular case over the applicant's delay in applying for a Protection Visa. The Tribunal in fact commends the applicant for coming forward and reporting himself to the Department, although of course this should have been done some 25 years ago.

114. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70).

Country of Reference - Statelessness

115. The first issue for the Tribunal is to determine the applicant's country of nationality, if he has one. The applicant claims to be stateless, however, the Tribunal must satisfy itself on whether this is in fact the case or whether the applicant may have a nationality.

116. The applicant claims to have lost his Indonesian nationality when he left Indonesia in 1967 to reside in China. He told the Tribunal that the authorities ceased his residency permit (SKK form). This is consistent with country information evidence of the discrimination shown towards the ethnic Chinese community in Indonesia at that time (see for example Seneviratne, K. 2007, 'Ethnic Chinese Find New Acceptance', *Inter Press Service* website, 1 March http://ipsnews.net/news.asp?idnews=36785) The applicant also claims that he has never qualified or been issued with a passport by the authorities of Indonesia, China or the British Overseas Territory of Hong Kong.

117. In respect to Indonesia, the Tribunal finds the applicant is not an Indonesia national having regard to Article 1 of *Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia*. The Tribunal finds the applicant does not appear to be qualified to acquire citizenship of Indonesia by the process of naturalization pursuant to *Act No. 3 of 10 April 1946 Concerning Citizens and Residents of Indonesia.* The Tribunal also finds that if the applicant had been an Indonesian national the applicant would have lost Indonesian citizenship by the operation of Article 17(j) or Article 17(k) of the Law No. 62 of 1958, *Law on the Citizenship of the Republic of Indonesia 1958*.

118. The Tribunal finds that the process of regaining citizenship of Indonesia through the naturalization process specified in Article 9 of the current Indonesian law (*Law of the Republic of Indonesia No. 12 on Citizenship of the Republic of Indonesia 2006*) may not be satisfied by the applicant because he is not employed nor has a steady job as required by subclause (g) of Article 9 of that law. The Tribunal finds that based on this law it would be far from certain that the applicant would be granted Indonesian citizenship and without that he would not be entitled to an Indonesian passport and without that or without a passport from another country, which the Tribunal finds he does not have, he is unlikely to be permitted entry into Indonesia.

119. In respect of whether the applicant is entitled to nationality of People's Republic of China (PRC), the Tribunal finds that applicant is not a national of the PRC. The Tribunal makes this finding based on the operation of Article 5 of the *Nationality Law of the People's Republic of China*, in the light of the evidence that the applicant's parents, while ethnically Chinese acquired Indonesian nationality as evidenced by copies of Indonesian passports issued to them and held on the Department's file The Tribunal finds that Article 7 of *Nationality Law of the People's Republic of China* would not appear to assist the applicant in securing PRC nationality because he does not appear to satisfy paragraphs 1, 2, or 3 of that Article. For these reasons, the Tribunal finds that the applicant is not presently a Chinese national, nor likely to acquire such nationality if he were to return to the PRC under the present *Nationality Law of the People's Republic of China.*

120. In respect to the HKSAR, the delegate found that the applicant would have a Right to Land in HKSAR and would be able to live, study and work in HKSAR. It appears, that based on this finding, the delegate decided the applicant is a national of HKSAR. The applicant provided a copy of a Certificate of Identity issued to him by the authorities in

the British Overseas Territory of Hong Kong on 1985. For reasons stated in this decision, the Tribunal rejects the delegate's finding on this point and finds the applicant is not a national of HKSAR.

121. The Tribunal however finds that while the applicant does appear to have a Right to Land in HKSAR this does not mean the applicant is a national of HKSAR. Apart from the discussion elsewhere in this decision (see reference to Tamberlin J in the Federal Court in *Tjhe Kwet Koe v Minister of Immigration & Ethnic Affairs & Ors* [1997] FCA 912 (8 September 1997)) on whether HKSAR is a "country" able to grant nationality, the Tribunal finds that possession of right to land does not automatically entitle the holder to a Permanent Identity Card and a HKSAR passport. Nor does it automatically entitle the holder to PRC nationality. The Tribunal finds that a person without any other nationality and in possession of the right to land in the HKSAR remains nationless (i.e. without citizenship). They do, however, have the right to 'freely live, study or work without any restriction' in the HKSAR of the state of the People's Republic of China. *['Frequently Asked Questions (FAQs) – Right of Abode in HKSAR'* 2009, Immigration Department of the Government of the Hong Kong Special Administrative Region website, 27 February http://www.immd.gov.hk/ehtml/faq_roaihksar.htm – Accessed 6 January 2010] The Right to Land in the HKSAR is, however, a pathway to both the Right of Abode and PRC nationality.

122. As the Tribunal has found the applicant is not a national of Indonesia, nor of PRC or of HKSAR, the Tribunal therefore concludes that the applicant does not have a nationality. As the Tribunal finds the applicant does not have a nationality, the Tribunal finds the applicant is stateless.

123. Refugee status will not be accorded to persons merely because they are stateless and unable to return to their country of former habitual residence. In *MIMA v Savvin and Ors* ((2000) 98 FCR 168) the Full Federal Court held that Article 1A(2) of the Convention is to be construed as including the requirement that a stateless person, being outside the country of his or her former habitual residence, have a well-founded fear of being persecuted for a Convention reason.

124. In *SZIPL v MIAC* [2007] FMCA 643 (Raphael FM, 17 May 2007) at [12] the Court held that assessment may only be undertaken in relation to a country of former habitual residence once the decision-maker is satisfied on the basis of the law of the country of claimed nationality that an applicant is stateless. As the Tribunal had determined the applicant is stateless, the Tribunal will therefore assess the applicant's claims against the countries of the applicant's former habitual residence.

Country of former habitual residence

125. For the purposes of Article 1A(2), applicants who have a nationality must be considered in relation to their country or countries of nationality; conversely, applicants who are stateless must be considered in relation to their country or countries of former habitual residence. The drafters of the Convention defined "country of former habitual residence" as "the country in which [the claimant] had resided and where he had suffered or fears he would suffer persecution if he returned" (Source: Report of the First Ad Hoc Committee on Statelessness and Related Problems, 17 February 1950, UN Doc. E/1618, Annex II".

126. Subsection 36(3) of the Migration Act provide that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national However, subsection 36(4) of the Migration Act provides that if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country. Subsection 36(5) of the Migration Act provides that if the non-citizen has a well-founded fear that a country will return the non-citizen to another country; and the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion; then subsection (3) does not apply in relation to the first-mentioned country.

127. Therefore, the operation of sections 36(3) to 36(5) of the Migration Act, makes it necessary to consider whether the applicant has access to protection in another country in which he or she does not have a well-founded fear of persecution, including other countries of former habitual residence as well as third countries that are not countries of former habitual residence.

128. The Tribunal considered the applicant's claims in relation to the countries he has resided in before arriving in Australia in 1985. The Tribunal accepts the applicant's claims that he was born in Indonesia in [year deleted: s.431(1)] and resided there until 1967 when he moved to China. The Tribunal accepts that Indonesia is a country of former habitual residence for the applicant. The Tribunal accepts the evidence that the applicant lived in China from 1967 until 1971 when he moved to the British Overseas Territory on Hong Kong. The Tribunal finds that China is a country of former habitual residence for the applicant. The Tribunal accepts the applicant lived in the British Overseas Territory of Hong Kong from 1971 until 1985, even though he was absent for substantial periods of time within this period while he was working as a merchant seaman. The Tribunal therefore finds that the British Overseas Territory of Hong Kong, and also the Kong Kong Special Administrative Region, for reasons discussed in the following paragraph in this decision, to be countries of former habitual residence for the applicant. The Tribunal will therefore assess the applicant's claims against each of the four countries of former habitual residence.

129. The Tribunal acknowledges the applicant's original claim that the British Overseas Territory of Hong Kong now longer exists by virtue of its reversion in 1997 to the People's Republic of China as HKSAR. The Tribunal acknowledges the applicant representatives submission that such an argument would appear to be without merit based on the decision by Tamberlin J in the Federal Court in *Tjhe Kwet Koe v Minister of Immigration & Ethnic Affairs & Ors* [1997] FCA 912 (8 September 1997). The Tribunal adds that Tamberlin J considered that to approach the term "country" in a narrow technical way would undermine the humanitarian purpose of the Convention by excluding some persons from its protection without any sound reason in principle for so doing. His Honour stated that it should not be concluded that an applicant has no recourse under the Convention simply because his or her "country" of former habitual residence happens to be a colony or other entity that is not an independent sovereign state.(78 FCR 289, at 296.) He held that the word "country" in the phrase "country of nationality" is used to denote a country capable of granting nationality but in the phrase

"country of former habitual residence" it is used to denote a country which need not have this capability. He concluded that although Hong Kong did not have an independent capacity to enter into legal relations, it was appropriate to treat it as a "country" for the purposes of Article 1A(2) of the Convention, as it had a distinct area with identifiable borders, its own immigration laws, and a permanent identifiable community.(78 FCR 289, at 298-9.) The Tribunal therefore finds that British Overseas Territory of Hong Kong and HKSAR are countries of former habitual residence for the purposes of determining this application for review.

Applicant's claims

130. As stated previously, the applicant entered Australia in October 1985 on a Hong Kong Certificate of Identity on a [class deleted: s.431(2)] Visitor visa valid for a stay of two weeks. He remained in Australia after the expiry of the visa and has not left Australia since his arrival. He claims he was born in [City A], East Java, Indonesia. He claims he is of Han Chinese ethnicity and has never married. He claims that both his mother and father were born in China and that they are both deceased. He writes that their citizenship or nationality was "Stateless". He claims that he departed Indonesia in 1967 due to anti-Chinese riots and unrest there. He says he went to PRC to study. He claims his Indonesian residency permit was seized on departure as ethnic Chinese returning to the PRC were considered Communist sympathisers. The applicant claims that when he arrived in the PRC he was not permitted to study because those with overseas connections were not trusted, so in 1971 he left and went to live in Hong Kong. He obtained residency in Hong Kong because he was unable to return to Indonesia. He claims he had no right to a Chinese or Hong Kong passport and was issued with a Hong Kong Certificate of Identity, which he used as a travel document. He has never been issued with a passport and says he is stateless. He states that he worked as a merchant seaman from 1973 to 1985 and was on leave in Hong Kong when he travelled to Australia for a holiday in 1985. He fears he may suffer discrimination and hardship if he returns to the PRC as he was not born there and speaks Mandarin and Cantonese with a heavy Indonesian accent. He says the Chinese Government does not accept overseas born Chinese and they are discriminated against and have difficulty finding work. He says if he returns to the PRC he will face "discrimination and hardship" and the authorities will not protect him because they are prepared to tolerate the discrimination of minority groups. He claims he will face similar hardship and discrimination if he returns to HKSAR.

Assessment of Protection Claims against countries of former habitual residence

HKBOT

131. The applicant has claimed that one of his countries of former habitual residence was the British Overseas Territory of Hong Kong. While the Tribunal accepts that HKBOT was a 'country' for the purposes of assessing former habitual residence at the time the applicant resided there, the Tribunal is satisfied, on the basis of Hong Kong's reversion to Chinese sovereignty in 1997, that HKBOT, as a Country, no longer exists. Accordingly, the Tribunal is satisfied that the applicant's in-ability to return there is not Convention related, but is instead a result of HKBOT as a country ceasing to exist.

HKSAR

132. The applicant claims he will experience discrimination in the form of difficulty in getting a job and difficulty in settling into life in HKSAR. He also claims that he may not be entitled to obtain a passport from the HKSAR and that this may prevent him travelling in the future. The applicant claims that he fears he will suffer psychological harm and not necessarily physical harm if he were to return to HKSAR. The Tribunal accepts that psychological harm may, depending on it seriousness, amount to persecution if it is inflicted for one of the Convention grounds. For the reasons set out in the following paragraphs, the Tribunal is not satisfied that there is a real chance of persecution consisting of serious harm, now or in the foreseeable future, if he were to return to HKSAR.

133. The Tribunal finds that while there is some country information suggesting returnees may face "tremendous challenges" (as found by the US State Department's report on human rights practises in HKSAR for 2008), however, the Tribunal finds that such difficulties and challenges do not amount to persecution. Further, the Tribunal finds the applicant's claims of language difficulties does not amount to persecution and notes also that country information extracted above suggests that Chinese and English are the official languages of HKSAR (see 'Hong Kong – the Facts' (undated), Government of Hong Kong website http://www.gov.hk/en/about/abouthk/facts.htm – Accessed 1 February 2010)

134. The applicant claims he will face discrimination and that people may laugh at him and that it would be difficult to live back in HKSAR. The Tribunal accepts that such claims may be true and are supported by the country information extracted above, (for example the US State Department's report on human rights practises in HKSAR for 2008) however, the Tribunal does not accept that such treatment, without more, constitutes serious harm amount to persecution. The Tribunal accepts the applicant's evidence discussed at the hearing regarding his fear of discrimination rather than serious harm, and accepts the applicant's submission contained in the submission received by the Tribunal [in] January 2010 stating that the applicant accepts that the discrimination he fears does not meet the definition of "serious harm" contained in section 91R of the *Migration Act* 1958.

135. The Tribunal had regard to the applicant's claim that he was relying on an immigration amnesty in 1988 and in 2000 and that when these did not occur for him coupled with the passage of the years, he claims to have forgotten his immigration status in Australia was unlawful. The Tribunal rejects the applicant's reasons for his failure to resolve his immigration status. While his explanation might assist in understanding how something like this could be left for almost 25 years, the onus remained on the applicant to comply with his original visa or to do something about it if he could not comply. Notwithstanding, the Tribunal does not draw adverse inference from the delay in this particular case, however, as set out in the following paragraphs, the Tribunal finds that there is not a "real chance" that the applicant will face serious harm if he returns to HKSAR now or in the foreseeable future.

People's Republic of China

136. From the country information extracted above regarding the treatment of ethnic Chinese returning to the People's Republic of China, the Tribunal finds that the applicant would experience difficulty in adjusting as he claims he would, however, the

Tribunal does not find that the difficulty would amount to serious harm amounting to persecution.

137. The applicant claimed that the government of the day in China imposed restrictions on peoples movements; that there was much fighting and anarchy in the streets and, as a result of the Cultural Revolution, he was unable to study his chosen course; people with overseas connections were targeted, he experienced discrimination as a returnee to China; and he was forced to witness an execution as part of the 'class re-education' The Tribunal accepts all these claims contributed to a lesser or greater degree to a difficult or even to a most difficult period for the applicant in China. However, the Tribunal accepts the applicant's evidence that he escaped these experiences, and China, and went to the British Overseas Territory of Hong Kong in 1971. The Tribunal accepts the country evidence extracted above that suggests the situation in the People's Republic of China has improved considerably since the days of the Cultural Revolution and therefore finds that the applicant's fear of returning to China based on these experiences is not well-founded.

Indonesia

138. Country information referred to above in this decision suggests that the treatment of ethnic Chinse in Indonesia has been characterised by a significant improvement through the *reformasi*. The Tribunal finds that while the applicant would doubtless experience significant disruption and even difficulties in adapting to a different life in Indonesia, the Tribunal is not satisfied that such difficulties amount to persecution for a Convention reason.

139. The applicant claims he will experience discrimination in the form of difficulty in getting a job and difficulty in settling into life in HKSAR. He also claims that he may not be entitled to obtain a passport from the HKSAR and that this may prevent him travelling in the future.

140. The applicant claims that he fears he will suffer psychological harm and not necessarily physical harm if he were to return to HKSAR. The Tribunal accepts that psychological harm may, depending on it seriousness, amount to persecution if it is inflicted for one of the Convention grounds.

141. The Tribunal considered the applicant's claims as to the harm he fears and considered it in the light of s.91R(1) of the Act which provides 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 Tribunal had regard to the country information available to it and extracted above which includes information that suggests that there are significant "services specially catered for new arrivals in Hong Kong" (Source: Settling in Hong Kong' (undated), Government of Hong Kong website http://www.gov.hk/en/nonresidents/living/settling.htm – Accessed 2 February 2010). On the other hand, the informaiton also suggests that a person in the applicant's positon would face some difficulty in relocating back to HKSAR. Overall, the Tribuanl considered found that there not a 'real chance' (per *Chan v MIEA* (1989) 169 CLR 379

per Mason CJ at 389, Toohey J at 406-7, Dawson J at 396-8, McHugh J at 428-9) that the applicant would not be denied the capacity to subsist or that he would face 'serious harm' as contemplated by s.91R of the Act

142. The applicant claims that he feared persecution when he left Indonesia in 1967, and when he left China in 1971. Such claims raise the question of whether a past fear of persecution where an applicant is *unable* to return to a country of former habitual residence is sufficient to satisify the requirement of a well founded fear of persecution. The Tribunal had regard to the decision in *Savvin v MIMA* (1999) 166 ALR 348 at [61]-[62], where Dowsett J suggested that such an approach was inconsistent with the approach adopted by the High Court in *Chan v MIEA* (1989) 169 CLR 379. His Honour considered that the test was not whether an applicant had the relevant well-founded fear at two different points in time. It was whether the applicant was outside the country of nationality owing to a *present*, well-founded fear of persecution for a Convention reason; and unable, or owing to such present, well-founded fear, unwilling to avail him or herself of the protection of that country. The relevant date at which to assess an applicant's claims to refugee status is the time that the decision is made, and not the time the applicant left his or her country or the time that the application is lodged *MIEA & Anor v Singh* (1997) 78 FCR 288. Accordingly, the Tribunal finds the applicant's past fear of persecution, although possible well-founded at that time, does not presently establish his present position as a refugee.

143. The applicant told the Tribunal that he believes that he is likely to face difficulties in finding work in HKSAR or the PRC or Indonesia at his age. The Tribunal accepts that he was employed as a merchant seaman in Hong Kong from 1973-1985, and that 24 years have passed since then and it is likely that he will face difficulties to find employment in that line of work. The Tribunal further considered whether the applicant's claim based on his age might give rise to the existence of a particular social group for the purposes of a ground for persecution under the Convention and the Migration Act. Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of "particular social group" in this way:

> First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand. [*Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ]

The High Court has emphasised the relevance of cultural, social, religious and legal factors or norms in a particular society in determining whether a posited group is a particular social group in the society. In *Khawar*, for example, McHugh & Gummow JJ stated:

> The membership of the potential social groups which have been mentioned earlier in these reasons would *reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society* and upon their particular situation in family and other domestic relationships. The alleged systemic

> failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.(emphasis added) [*MIMA v Khawar* (2002) 210 CLR 1 at 28 [83]; see also at 44 [130] per Kirby J.]

144. In light of the guidance in the decisions referred to in the preceding paragraph, the Tribunal found that in the circumstances of this case, persons in HKSAR or the PRC or in Indonesia who share the characteristic of having difficulty finding work because of their age could be capable of constituting a particular social group for the purposes of the Convention. The Tribunal finds that such a group may be identifiable by a characteristic or attribute common to all members of the group, and that characteristic may be that they are over a certain age, even though the precise age is problematic to determine. The Tribunal also accepts the characteristic or attribute common to all members of a group of aged people having difficulty finding work may not be merely the shared fear of persecution. However, in considering subsection 91R(1) of the *Migration Act 1958*, the Tribunal finds that the essential and significant reason why persons in such a particular social group might be denied employment or face great difficulty in finding employment would not be because of membership of the particular social group. Rather, the applicant might face difficulty in finding work because of his individual characteristics, namely his age and possibly the lack of relevant work experience or lack of relevant current skills or qualifications, and not because of his membership of the particular social group.

State Protection

145. As stated earlier in this decision, while the Tribunal accepts that the applicant's return to anyone of the three remaining countries of former habitual residence would be disruptive and difficult for the applicant, the Tribunal accepts the country information referred to above (for example in respect of Indonesia see Seneviratne, K. 2007, 'Ethnic Chinese Find New Acceptance', *Inter Press Service* website, 1 March http://ipsnews.net/news.asp?idnews=36785 – Accessed 12 April 2007, in respect of PRC see Le Bail, H. & Wei, S. 2008, *The Return of the "Brains" to China: What are the Social, Economic, and Political Impacts?,* Centre Asie, November, p 22 and in respect of HKSAR see Settling in Hong Kong' (undated), Government of Hong Kong website http://www.gov.hk/en/nonresidents/living/settling.htm – Accessed 2 February 2010) suggests that returnees to HKSAR, or to the People's Republic of China or to Indonesia are not subject to adverse treatment by the authorities or denied protection by the authorities in those countries.

Internal Relocation

146. As the Tribunal has found that the applicant does not face a real chance of serious harm as defined by section 91R of the Act based on the applicant's three remaining countries of former habitual residence, it is not necessary for the Tribunal to consider whether internal relocation would be reasonable for him in the circumstances.

Third country protection

147. Apart from the applicant's claims that he has lived in Indonesia, China and HKBOT which the Tribunal accepts, as discussed above together with HKSAR are the applicant's countries of former habitual residence, the applicant makes not claim, and the Tribunal found no evidence that the applicant has a presently enforceable right to

third country protection. The Tribunal is therefore satisfied that the applicant does not have access to third country protection.

Ministerial intervention considerations

148. Under s.417 of the Act, the Minister has the power to substitute a decision for a decision of the Tribunal that is more favourable to the applicant. Having regard to the Minister's guidelines relating to the exercise of this power, the Tribunal considers that this case should be referred to the Department to be brought to the Minister's attention. The case might be regarded to involve exceptional and compassionate circumstances for the following reasons:

- There is evidence to suggest that the applicant has been subjected to harassment and denial of basic rights available to residents and nationals or Indonesia, China and Hong Kong when he lived in those countries. The evidence suggests that he might have been assessed as a refugee at that the relevant times had he made an application for refugee status. Since then the circumstances have changed in the relevant countries, however the applicant retains the memories of that discrimination and threats to him and it would in the Tribunal's view be harsh to force him to return to any of those places after more than 24 years absence.

- The applicant arrived in Australia in 1985 and has not been outside the country since then. Since his arrival in Australia his parents have deceased in Indonesia;

- He has resided in Australia for 24 years and there is nothing to suggest he has been in trouble with the law in this country. Further, he has provided evidence that he has been paying income tax in Australia. Further, the applicant has not been eligible to claim any Medicare or Centrelink benefits in Australia in the 24 years of residence;

- The applicant will suffer significant discrimination, although not persecution, if he was to return to one of the three countries of his former habitual residence at his age. Although HKSAR is the country of his most recent habitual residence, he was not born there and it is not home for him. The Tribunal accepts that the applicant would be readily identified because of his limited knowledge of Cantonese and the fact that he speaks with a heavy accent;

- The applicant is likely to face difficulties in finding work in HKSAR or the PRC or Indonesia at his age. While it is true that he was employed as a merchant seaman in Hong Kong from 1973-1985, 24 years have passed since then and the Tribunal finds that the applicant's age and lack of relevant recent work experience would make it most difficult for him to find reemployment in that line of work. Although the applicant has modest financial resources by way of some savings and some shares, the Tribunal believes he would still suffer substantial disruption, dislocation and hardship if he returns to a country of his former habitual residence

- The applicant has integrated into the Australian community. Although he is currently unemployed, he has worked for the majority of the time he has been in Australia and is in good health. The evidence indicates that the applicant has been a law-abiding person (other than in respect to his visa status) and that he would continue to be law-abiding.

CONCLUSIONS

149. 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.

150. For the reasons given above, the Tribunal considers this case should be referred to the Department for it to bring the application to the Minster's attention for consideration for possible Ministerial intervention under s.417 of the Act by way of a substituted decision that is more favourable to the applicant.

DECISION

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

152. The Tribunal considers that this case should be referred to the Department to be brought to the Minister's attention for possible Ministerial intervention under section 417 of the Migration Act

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

Sealing Officer's I.D. *AGIBSO*