

0805331 [2009] RRTA 347 (30 April 2009)

DECISION RECORD

RRT CASE NUMBER: 0805331

DIAC REFERENCE(S): CLF2008/99542

COUNTRY OF REFERENCE: PRC

TRIBUNAL MEMBER: Tim Connellan

DATE: 30 April 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2) of the Migration Act being a person to whom Australia has protection obligations under the Refugees Convention.

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 a young child was born in Australia on [date of birth deleted in accordance with s.431(2) of the Migration Act 1994 as it may identify the applicant] On her behalf, her mother, applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] June 2008 in which application it is claimed the applicant is stateless. The delegate decided to refuse to grant the visa [in] July 2008 and notified the applicant of the decision and her review rights by letter [on the same day].
3. The delegate refused the visa application on the basis that the applicant did not have a genuine fear of harm and there was not a real chance of persecution should she return to China. The delegate therefore found that the applicant's fear of persecution as defined under the Refugees Convention was not well founded. The delegate therefore found that the applicant was not a person to whom Australia had protection obligations for the grant of a protection visa.
4. The applicant applied to the Tribunal [in] August 2008 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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

Definition of 'refugee'

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

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

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

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

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

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

Background Chronology

[dates deleted: s.431(2)]

Feb 2001	-	Mother arrived in Aus - 676 (Tourist Short Stay) visa from PRC, 36 weeks pregnant and with her 8 y.o. son
Feb 2001	-	Review Applicant’s 2 nd child born
Mar 2001	-	Mother lodged XA visa application for herself
May 2001	-	Mothers XA visa refused
Jun 2001	-	RRT application
Jul 2001	-	Father arrived in Aus – 676 visa from PRC
Aug 2001	-	Father lodged XA visa application
Nov 2001	-	Fathers XA visa refused
Dec 2001	-	RRT application
Feb 2002	-	Mother diagnosed with [illness]
Apr 2003	-	RRT refuses further XA visa for mother and father.
May 2003	-	417 request lodged
Apr 2005	-	685 (Medical Treatment – 1 year) visa granted
May 2006	-	Review Applicant born
Mar 2007	-	48B request (Ministerial intervention for 2 nd XA application)
Apr 2007	-	Advised 48B request denied
Sep 2007	-	Peter McCallum report – [re mother’s improved health] (annual review)
Jun 2008	-	This XA application
BVE granted	-	4/06, 7/06, 11/06 & 2/07

20. The protection visa application was accompanied by a statutory declaration made by the applicant's mother in her capacity as guardian of the applicant who is a two-year-old

child and therefore lacks the capacity to make her own claims. (CLF2008/99542, ff 33-52) the statutory declaration outlines the background and basis for her claims, which can be summarised as follows:

- The applicant's mother was born in Guangdong province in PRC on [date of birth deleted: s.431(2)].
 - At the conclusion of high school she studied for three years to be a [professional] before working in a hospital.
 - She later studied business administration and completed an MBA.
 - In December 1990 she married and their first son was born on [date of birth deleted: s.431(2)].
 - In 2000 she became aware of an unplanned pregnancy. As a Christian she is opposed to abortion and decided to keep the child. In February 2001 she came to Australia where she gave birth to her second son on [date of birth deleted: s.431(2)].
 - Her third child, the applicant, [name deleted: s.431(2)] was born at [a hospital in Australia] on [date of birth deleted: s.431(2)] As the third child in her family, she was also born in contravention of the PRC's 'One child policy'
 - If the applicant is forced to go to China, there is a real risk she will suffer persecution and discrimination because she is classified as a 'black child' having been born in contravention of China's 'one child policy'.
 - Black children are unable to access basic rights commonly available to children who are not black children such as child care, schooling or medical services. As she gets older, she will be unable to attend university or get work. She will face very harsh discrimination, be unable to gain household registration, have no right to education, health care, work in the public sector or receive government benefits. Without such registration, a person is unable to survive.
 - For a child born overseas outside the 'one child policy', the child's parents have to pay a fine to have the child registered on the household registration system. The fine in Guangdong for a child born overseas is 150,000RMB.
 - Because the applicant's mother had tried unsuccessfully to register her birth at the Chinese consulate, the applicant is effectively stateless.
 - The applicant has been blessed in the Mormon Church and will be baptised when she is eight years old.
 - The mother will be persecuted for her religious beliefs and political opinion should she return to China which will negatively impact the life of the applicant.
21. The applicant was initially invited to attend the hearing [in] October 2008. At the applicant's request the hearing was postponed and rescheduled for [later in the month].
22. [In] October 2008, by fax, the Tribunal received a submission from the applicants migration agent which included:

- Statutory declarations from [the] mother of the review applicant, an uncle of the review applicant and the grandmother of the review applicant.
 - Reports from [a] psychologist dated [date deleted: s.431(2)] March 2008 and [date deleted: s.431(2)] October 2008.
23. The applicant appeared before the Tribunal [in] October 2008 to give evidence and present arguments. The Tribunal also received oral evidence from [Person 1] and [Person 2]. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.
 24. At the start of the hearing, a number of documents were presented, including:
 - a medical certificate that [the applicant's father] was unable to contribute to the hearing, and
 - a letter of support from [a] cousin of [the applicant's mother].
 25. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
 26. The applicant was born in Australia on [date of birth deleted: s.431(2)]. Her mother and father are both Chinese nationals. Both parents arrived in Australia on subclass 676 (Tourist Short stay) visas in 2001 and are currently on Bridging visas.
 27. At the hearing the applicant was represented by her mother [name deleted: s.431(2)].
 28. [The applicant's mother] told the Tribunal she had graduated from high school in 1981. From 1983 to 1985 she studied Health and Hygiene following which she worked in a hospital in 1987/8 and then worked in a bank from 1988 to 2000. While she was working in the bank she completed a three year Diploma of Finance at the Guangzhou [name] College and a two-year Masters in Industrial and Commercial Management in 1997/98 at the Guangzhou [name] University and the Macau [name] University. She also completed a Master of Business Administration doing her thesis in Macau in 1998 shortly before graduation.
 29. She told the Tribunal that as a student, she would visit her grandmother in Guangzhou every summer holiday. She said *"It happened that my two cousins also came from Hong Kong and one of the boy cousins [name deleted: s.431(2)] started preaching the gospel to me and so in December 1981 I was baptised with a drop of water on the forehead in Guangzhou, that was done by [my cousin]"*. The Tribunal asked her to confirm that her baptism was performed by her cousin and she confirmed he had baptised her by putting a drop of water on her forehead. She said her cousin was a shepherd in the church.
 30. When later in the hearing the Tribunal asked who had performed her baptism, she told the Tribunal she had been baptised by people from Hong Kong and her cousin was there to do the preparation *"there was a very old person there to do the drop of water on my forehead for the baptism"*. When the Tribunal brought to her attention that she had previously said the baptism had been performed by her cousin [name deleted: s.431(2)], she said he had been there and helped to prepare her for the baptism.

31. [The applicant's mother] told the Tribunal that following her baptism she had started going to meetings where people read the Bible, sang hymns and prayed. She said she attended gatherings on and off until 1988.
32. [The applicant's mother] told the Tribunal that from 1988 to 2000 church services were held at her home when they did bible studies, read correspondence and sung hymns. She said meetings at her home were popular because she had a piano. She said the Bible studies were led by a male person.
33. The Tribunal asked why, if she had conducted meetings in her home for 12 years where there was piano playing and hymn singing, there had been no interference from the authorities. She told the Tribunal that it was only after arriving in Australia that she realised that her activities were illegal, she believed she had been persecuted not for her religious beliefs but because of her second pregnancy.
34. When asked why, if the authorities had not taken action in the 12 years when she conducted the meetings, she would be afraid of any action now should she return to China. She told the Tribunal that it was because she had been blacklisted by the PSB when they clamped down on activities after China was granted the Beijing Olympics and they wanted her for her anti-government activities since she had come to Australia.
35. When asked why [the applicant] would face persecution if she returned to China, she replied because she has a mother who has been blacklisted and has engaged in anti-government demonstrations in Australia.
36. In response to a question by the Tribunal as to whether her husband was a member of this Christian community, she replied "*No, he was actually very against it, and when he saw we were having a gathering he left the house as soon as the gathering started.*"
37. Later in the hearing, [the applicant's mother] told the Tribunal that her husband had been baptised as a Mormon in December 2001 and now sometimes went to church. She said he would claim he was a Christian.
38. [The applicant's mother] told the Tribunal she had arrived in Australia [in] February 2001 in an advanced stage of pregnancy with her second child to which she gave birth on [date of birth deleted: s.431(2)].
39. She stated she had come to Australia because she was discriminated against and faced persecution because her second pregnancy was in contravention of China's one child policy. She claimed she was pursued by the authorities who sought to terminate the pregnancy and submit her to sterilisation. As a Christian she was opposed to abortion.
40. She believed that a child born in contravention of China's one child policy would face discrimination and persecution. She claimed that as a "black child" her 2nd child, an older sibling of the applicant, would be denied basic rights including childcare, schooling, medical services, household registration and employment opportunities as she grew older and that the applicant, [name deleted: s.431(2)], her third child, would face the same discrimination and persecution should she return to China.

41. [The applicant's mother] told the Tribunal that a fine of 150,000 RMB was payable for each child born overseas in contravention of the one child policy. She said she knew this because she had seen a document.
42. [The applicant's mother] told the Tribunal that [the applicant] had been blessed in the Mormon Church, was being raised as Christian and taught to pray and would be baptised at the age of eight.
43. She told the Tribunal that having been born in Australia, the applicant was effectively stateless as the birth had not been registered with the Chinese government and she and her husband were no longer registered in China.
44. She claimed the review applicant would suffer persecution as a result of her Christian faith and the Christian beliefs of her mother.
45. [The applicant's mother] told the Tribunal she was married in December 1990.
46. She told the Tribunal that when her second pregnancy became obvious, she was persecuted by the family planning people and had to leave her home.
47. On two separate occasions the Tribunal asked [the applicant's mother] why she had not been arrested before leaving China. On the first occasion, she replied that she did not know why she had been allowed to leave. When later asked the same question she replied, "*at the time I was running away from them, running everywhere, I do not think they could find me.*"
48. [The applicant's mother] said she had fled China and come to Australia in February 2001.
49. She told the Tribunal that [in] October 2002 the Chinese Public Security Bureau (PSB) had come with a warrant and broken into her home and taken a computer, letters and religious documents. She said they had taken the computer because it contained the names of other underground church members. The Tribunal asked [the applicant's mother] why the authorities would continue to pursue her if the raid had provided the evidence they were seeking. She replied they are now pursuing her for participating in demonstrations since she came to Australia.
50. When asked why the PSB would have raided her property 20 months after she had left for Australia, she told the Tribunal that in 2002 Beijing had won the bid for the 2008 Olympics and the authorities had started to crack down on underground religious groups.
51. She told the Tribunal she had been "blacklisted" in China in 2002. When asked why she had been blacklisted she said it was because of her membership of an underground Christian church and the fact that she had participated in anti-government demonstrations in Australia. When asked how she knew she had been blacklisted, she said she had been told by her cousin and because of an incident at the consulate.
52. [The applicant's mother] told the Tribunal that when she had gone to the Chinese consulate in [Australia] to extend her passport in 2003, they discovered she had applied for a protection visa. When the Tribunal asked how the Consulate could have known of her application for a protection visa, she said she was required to leave her passport

with the Consulate for a few days during which time they had made the discovery as “they are very smart and they knew as soon as they have looked at the passport.” The Tribunal noted that her passport extension was granted until 2008.

53. She told the Tribunal that when she went to the Consulate to apply for a passport for her daughter, they alleged she had withheld information from them and had not dealt with them honestly. They asked her to return with her husband and she started to quarrel with them, telling them that when she had come to arrange a passport for her second son they had not required her husband's attendance and they were just seeking to make things difficult for her. When asked why that was a problem, she told the hearing that she had told the Consulate she intended to sell her house in China and they had questioned her as to how she could get an authorisation letter while she was on a bridging visa. She told the Tribunal she owned a house in China which was currently worth AUD\$20-\$30000.
54. The Tribunal asked [the applicant's mother] if the sale of her house would provide proceeds with which she could pay the fines and return to China. She responded “ *I don't think money can solve problems, and my membership of the underground church is a problem that money can't solve*”
55. The Tribunal asked [the applicant's mother] why the applicant would be persecuted for her religion. She replied it was because she, the applicant's mother, had been blacklisted and had participated in anti-government demonstrations since coming to Australia. Her participation had been recorded in the local press and her photo published on the Internet. She claimed that her daughter would be persecuted because of her mother's activities.
56. She told the Tribunal she had ceased practising Falungong after the publicity.
57. She told the Tribunal she no longer had any immediate family in China as her father mother and younger brother were all living in Australia She said if she was not being persecuted, she could have applied for a visa to Australia on the basis of family reunion or she could have applied on the basis of investment migration.
58. The Tribunal suggested that if she was in a position to apply for investment migration, surely she would be a position to pay the fee for a “black child” She replied, not by providing any answer but saying that in recent years tourism had boomed in China and her husband being a young entrepreneur could have been highly successful. She told the Tribunal they were a middle-class family.
59. The Tribunal took evidence via the telephone and from [Person 2] in Spain who told the Tribunal she had been friends with [the applicant's mother] since 1989 and that she and her husband were godparents to one of her children. She said that [the applicant's mother] had phoned to ask if she could help with the birth of her second child. She said her personal circumstances prevented her from being able to help but she had suggested [the applicant's mother] go to Australia.
60. The Tribunal then took evidence via the telephone from [Person 1] by telephone in China who told the Tribunal she and [the applicant's mother's] children had been in the same school. She said the authorities had come to the school and taken [the applicant's

mother] away and beaten her because she had a child in contravention of the ‘one child policy’.

61. At the conclusion of the evidence of [Person 1], [the applicant’s mother] said she had been not prepared to say much because she would have been concerned the phone was tapped.
62. By fax dated [in] December, the Tribunal sent the review applicant an “Invitation to comment on or respond to information in writing” to information the Tribunal considered would, subject to any comments or response made, be the reason or part of the reason for affirming the decision under review.
63. Following a request, the review applicant was granted an extension of time to respond and [in] January 2009, the Tribunal received a 64 page facsimile response from the migration agent which included:
 - Submissions on behalf of the review applicant under the headings:
 - i. Country information in support of the review applicant's claims for refugee status
 - ii. Recent case law involving ‘black children’
 - iii. Notes on persecution under S91R and laws of general application
 - iv. Future risk of persecution
 - v. Credibility
 - A statutory declaration from [the applicant’s mother], mother of the review applicant in which she responded to the issues raised in the Invitation [in] December 2008.
 - Statutory Declarations from [the] maternal grandmother of the review applicant and [the] husband the cousin of the review applicant's mother
 - Graduation certificates and documents relating to [the applicant’s mother’s] academic achievements
 - Copies of the relevant laws and press articles
64. [In] January 2009, the Tribunal received by facsimile a copy of “Rates and Social Child-Raising Fee for the Pengjiang District” (1.3.2006 – 28.2.2007), Pengjiang District Population and Family Planning Commission.

FINDINGS AND REASONS

65. In assessing the claims made by an applicant the Tribunal will need to make findings of fact in relation to those claims and this will more often than not involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal is sensitive to the difficulties often faced by asylum seekers and considers that the benefit of the doubt should be given to asylum seekers who are generally credible but unable to

substantiate all of their claims. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. See *Randhawa v Milgea* (1994) 52 fcr 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 Ald 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 fcr 547.

66. In *Abebe v The Commonwealth of Australia* (1999) 162 alr 1 at 52 Gummow and Hayne JJ observed:

“the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not for life.”

The Tribunal must keep in mind that if the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

67. From information on file including a certified copy of the applicant’s Birth Certificate and certified copies of old passports, the Tribunal accepts that the applicant is a two-year-old child born in [Australia] on [date of birth deleted: s.431(2)] and that her parents are both Chinese nationals.
68. From documents on file, the Tribunal accepts that the applicant is the third child in her family with older brothers aged 8 and 16 and therefore accepts that her birth is in contravention of the People’s Republic of China “One Child Policy” and that she is therefore classified as a “Black Child”.
69. It is claimed that as the applicant was born in Australia in contravention of China’s “One Child policy” she is effectively stateless.
70. The nationality law of China clearly defines the status of overseas born Chinese regarding claims to Chinese nationality

Article 5 states:

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 7 states:

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 further states that:

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.

The Nationality Law does not recognise dual nationality (Art. 3) ('Nationality Law of the People's Republic of China' 1980, Immigration Department The Government of the Hong Kong Special Administrative Region website, 10 September
http://www.immd.gov.hk/ehtml/chnnationality_1.htm

71. For these reasons the Tribunal does not accept the claim that the applicant is “stateless” but finds the applicant to have Chinese nationality and has therefore assessed her claims against the Peoples Republic of China.
72. The major consideration for the Tribunal in this review is whether the applicant, the child, [name deleted: s.431(2)] would be entitled to hold a well founded fear of persecution should she go to China.
73. The only grounds on which the Tribunal believes such a fear may be legitimately based, relate to the claims that her mother was recorded protesting against the Chinese government and may therefore have been brought to the attention of the Chinese authorities, which means her daughter, the applicant, may face persecution if left with no alternative but to go with her mother to China.
74. The Tribunal has considered the evidence of the applicant's mother that for a short time while in Australia she became a Falungong practitioner and that during that time she engaged in a protest against the Chinese government outside the Chinese embassy in Melbourne. She claimed that during that incident she placed a protest placard on the applicant's pram which resulted in her being photographed by the media and the photograph was subsequently on the Internet.
75. The Tribunal doubts the veracity of this evidence, however in consideration of the “what if I'm wrong” test, is prepared to grant the applicant's mother the benefit of the doubt and accept that these things did happen.
76. Having accepted that these events took place, the Tribunal believes that the mother engaged in these activities solely for the purpose of strengthening the refugee claims for herself and her family. Section 91R(3) of the Act provides that “*any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention*”.
77. Had the mother being the applicant in this case, her behaviour and the consequences would not have been taken into account in making a decision, however the applicant is the child, not the mother, and therefore cannot be penalised because of the behaviour of another party, in this case her mother.
78. The Tribunal finds that the activities of the mother in protesting against the Chinese government may have brought her to the attention of the Chinese authorities as a

Falungong practitioner who has engaged in anti-government activities in Australia As a result of this notoriety, the Tribunal accepts there is a real chance the applicant's mother may face persecution and incarceration should she return to China now or in the foreseeable future. Such persecution would be carried out by Chinese authorities meaning protection from the State would be unavailable. Such an outcome would result in either the applicant also suffering incarceration or being separated from her mother.

79. The Tribunal finds the applicant faces a real chance of persecution as a member of the social group comprising children of persecuted dissidents.
80. In *Chan v MIEA* it was recognized that persecution has traditionally taken a variety of forms of social, political and economic discrimination. Justice McHugh in *applicant A & Anor v MIEA & Anor*, observed that
- Persecution for a Convention reason may take an infinite variety of forms from death or torture to the deprivation of opportunities to compete on equal terms with other members of the relevant society. Whether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct. It depends on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.
81. It is also a well-established that it is not necessary that the conduct complained of should be directed against a person as an individual. Harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group which is subjected to such harassment, can amount to persecution if done for a Convention reason.
82. The Tribunal finds that should the applicant suffer persecution as a result of her mother's incarceration, it would be for the essential and significant reason of her religious and political views and therefore Convention based.
83. In light of the above, the Tribunal has no alternative but to remit the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

CONCLUSIONS

84. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2) of the Migration Act being a person to whom Australia has protection obligations under the Refugees Convention.

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. prrt44