# REFUGEE APPEAL NO. 2124/94

# RE LYB

# AT AUCKLAND

Before: R.P.G. Haines (Chairman)
A.B. Lawson (Member)

Counsel for the Appellant: Amanda Jack

Appearing for the NZIS: No appearance

Date of Hearing: 9 April 1996

Date of Decision: 30 April 1996

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**DECISION**

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This is an appeal against the decision of the Refugee Status Section of the New Zealand Immigration Service declining the grant of refugee status to the appellant, a citizen of the People's Republic of China.

The appellant arrived in New Zealand on 23 August 1993. Following an interview at Auckland International Airport, she decided to apply for refugee status. Her application was submitted the following day, 24 August 1993. At the same time, a Removal Order was served. The Refugee Status Section interview took place on 23 November 1993. In a decision dated 17 January 1994, the refugee application was declined. The Removal Order was cancelled on 21 October 1994.

Regrettably, the appellant has had to wait two years for the hearing of her appeal.

## INTRODUCTION

This is another refugee application involving China's one child family policy. A full description of that policy is to be found in *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) commencing at page 18. No point will be served by repeating what is said there. For present purposes, it is sufficient to note only the following salient points:

1. The 1980 Marriage Law stipulates that both sexes should be at least two years older than the age for marriage set in the 1950 law. Article 5 of the 1980 Marriage Law provides that no marriage shall be contracted before the man has reached 22 years of age and the woman 20 years of age. However, the 1980 law also recommended that a woman be 24 years of age at the time of her first marriage. In the result, due to Governmental urging, the actual marriage ages for men and women have

tended to be higher than the levels set in 1980: Folsom, Minan & Otto, *Law and Politics in the People's Republic of China in a Nutshell* (1992) 263.

2. The Chinese Government maintains a comprehensive and highly intrusive family planning programme. Individual and family decisions about bearing children are controlled by the State, with sanctions against those who deviate from official guidelines. The Central Government sets an annual nationwide goal for the number of births to be authorised. This is then apportioned among provinces, and further down through prefecture, county, town, and district levels. Ultimately, each work unit (village, factory, or Government office) receives a target figure for births over the next few years. As the allotments are quite small, couples must often wait many years before receiving permission to have a child, even if that child is the couple's first child: *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) 21-22.

3. In some areas, the procedures for birth registration are strict. Rules can specify that those born to mothers who lack a "birth permission certificate" will not be accorded proper household registration [*hokou*]. Without such registration, it can be more difficult and more costly to gain access to schooling, medical services, rations and so on: *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) 24.

4. Permission to have a child is only given to couples who are married. The legal formalities for a marriage are contained in the 1980 Marriage Law and the Marriage Regulations of 1986. The provisions are summarised in Folsom, Minan & Otto, *Law and Politics in the People's Republic of China in a Nutshell* (1992) 261-262:

"Marriage registration is an important mechanism for promoting the interests of the State and of the parties to the marriage. Registering the marriage at the Marriage Registration Office of the locality where either party is domiciled is an indispensable procedure to the issuance of a marriage licence and the establishment of a valid marriage. A marriage licence is issued when the Registration Office finds the proposed marriage to be in conformity with the Marriage Law. In 1988, 9.46 million couples applied for registration of their marriages and 8.99 million couples received approval. Those who did not receive approval were denied for a variety of reasons, such as being underage, some were near' relatives, and others had certain diseases."

On the evidence we have received, it would appear also that persons living in urban areas and who are employed by a large work unit [*danwei*] require the permission of that work unit to marry. For a description of the process see Steven W Mosher, *A Mother's Ordeal: One Woman's Fight Against China's One Child Policy* (1993) 143-149. Once work unit permission is obtained, it is then possible for the Marriage Registration Office to be approached for a marriage licence. Only if such licence is given and the proposed marriage takes place can the wife lawfully bear a child. And then, only if she first receives permission from her work unit to do so. Whether such permission is granted or withheld will depend upon the discretion of the officials in the work unit who control the allocation of the birth quota.

5. De facto relationships appear to be generally described in China as "illegal marriages". Although de facto relationships are illegal, they are nevertheless common. It is estimated that out of the 10 million newly wed every year, about 20% are illegal: Chan Wai-Fong, "Move to Clamp Down on Illegal Marriages" *South China Morning*

*Post* 6 March 1994. This article, based on a report published by the official Xinhua Newsagency, reports a statement by the Civil Affairs Ministry that those living together without registering and others who cheat to get a marriage certificate are to be punished. They will either be ordered to separate, register before a deadline, go through re-education or pay a maximum fine of 200 yuan (HK$178).

Those who are pregnant out of wedlock are required to terminate the pregnancy: Hardee-Cleaveland & Banister, *Family Planning in China: Recent Trends* (May 1988) 82.

As to the status of children of a non-registered marriage, it is said in Folsom, Minan & Otto, *Law and Politics in the People's Republic of China in a Nutshell* (1992) 262 that although children of a void marriage are considered born out of wedlock, such children have the same rights as those born to a valid marriage, including the right to take either their father's or mother's family name. An unregistered marriage does not create, however, the legal right to support, alimony or inheritance. At *op cit* 264 it is stated that the Marriage Law expressly protects illegitimate children, adopted children, and stepchildren. The father of an illegitimate child is required to furnish support until the child is self-sufficient.

In short, it is the intention of the family planning policy that one child per family be conceived, that the child be conceived in wedlock, and that conception occur only after official permission has been given for the couple to have a child.

The significance of this information lies in the fact that the appellant is an unmarried mother who left China in order to ensure that her child reached full-term. It was her hope that her child would be born in either Canada or the United States. It was her belief that these two countries are sympathetic to Chinese women in her situation. In the event, the appellant arrived in New Zealand on 23 August 1993. Her daughter was born at Auckland on 23 January 1994.

The issue in this case is whether the appellant is a person to whom the provisions of the Refugee Convention apply.

**THE APPELLANT'S CASE**

The appellant is a 33 year old single woman who was born in Guangzhou City, Guangdong province, China. By Chinese standards, she comes from a large family comprising her mother, father, and three brothers. She is the third eldest child.

The appellant's parents were employed in the same work unit at a paper mill situated in Guangzhou City itself. Her mother was in charge of the warehouse, her father was a foreman in the maintenance section. Both parents retired some time ago in the 1980s. They continue, however, to live in accommodation provided by the work unit in a compound or district in which the other residents are also members of the same work unit. They both draw Government superannuation.

The appellant's eldest brother lives and works in Guangzhou City where he manages a state-owned textile company. He is in charge of approximately 40 staff. The second eldest brother is employed at the paper mill as a foreman in the maintenance section.

The youngest brother is a manager of a fashion clothing company situated in Shenzhen.

For her part, after completing high school, the appellant worked at a knitting company from 1980 to 1983. In June 1983, she was transferred to the paper mill where she worked in the laboratory as a tester. She remained at the paper mill until she left in May 1993. The circumstances of her departure will be described shortly. Throughout this period, she lived with her parents who, as mentioned, lived in accommodation supplied by the work unit. Although the family has changed address several times over the years, they have lived at their current address since 1991.

Over the years, the appellant accumulated savings of some 50,000 to 60,000 RMB. The funds were held at a bank in Guangzhou.

From 1985 to 1988, the appellant worked as a travel guide during her spare time. It was in this capacity that, in September 1986, she met a man of similar age from Hong Kong who was visiting China. Over the years a relationship developed. The man would from time to time visit the appellant in China. She, in turn, made one visit to Hong Kong in 1989 for seven to eight days. This man, whom the appellant referred to as her boyfriend, is a truck driver by occupation. Although the couple subsequently developed a relationship of a sexual nature, marriage was not discussed. The appellant accepts that neither she nor her boyfriend took precautions to prevent the appellant becoming pregnant. This was because the appellant had been told by medical staff at the work unit hospital that it was unlikely that she would conceive. However, on 5 April 1993, during a gynaecological examination, the appellant was told that she could take certain steps to increase the chances of becoming pregnant. One step recommended to her was the use of pillows. Following the receipt of this advice, the appellant and her boyfriend continued to have sex. Again, no birth control measures were taken.

At the end of April 1993, the appellant approached the designated official in the work unit with a view to obtaining the official's permission to marry. Neither the appellant nor her boyfriend had at this stage agreed to marry. However, she decided to approach the official because she (the appellant) suspected something might happen as a consequence of the new advice given to her on the procedures for increasing the chance of conception. However, the appellant and the official worked on different shifts. When the appellant visited the factory to speak to the official, the official was invariably busy or not in.

In early May 1993, the appellant fainted while at work. She was taken to the work unit hospital where it was discovered that she was pregnant. Because she was single and because no permission for the birth had been given, she was told that she would have to have an abortion. The appellant once again approached the official to obtain the permission of the work unit for her to marry her boyfriend. Permission was refused on the basis that the appellant and the father of the child were living together while unmarried and because the appellant was already pregnant.

As the appellant did not want to have an abortion, she left the work unit in mid-May 1993 and went to live with a friend called Miss [X] in another part of Guangzhou City.

After approximately three months, the appellant ran out of cash and asked Miss [X] to return to her (the appellant's) parents' home in order to retrieve money which the appellant had left there along with subsidy and discount coupons. Miss [X] did as she was asked but was unable to locate the items. On Sunday 8 August 1993, the appellant took a taxi to her parents' home to look for the items. She arrived at approximately 3pm.

After approximately an hour, the official from the work unit arrived in the company of two male persons from the Family Planning Office. They required the appellant to accompany them in order to undergo an abortion. A struggle ensued between these three people on the one hand, and the appellant and her mother on the other. The struggle continued from the parents' seventh floor apartment, down seven flights of steps to the ground floor. The appellant says that she was assaulted and kicked during the struggle with the result that she was bleeding slightly. On the ground floor, she managed to break away and ran ten or so metres to a taxi which happened to be outside the apartment building. With the three officials in hot pursuit, she reached the taxi and was able to escape, notwithstanding that the officials were shouting to the driver to stop.

The appellant returned to Miss [X]'s home.

In the meantime, the appellant's parents decided that the appellant should immediately leave China. They had seen television programmes from which they had learnt that Canada and the United States treated sympathetically Chinese nationals who, notwithstanding the one child policy, wished to have a child whose birth would otherwise be illegal. Without consulting the appellant, the parents paid 300,000 RMB for the supply of a false passport and related travel documentation for the appellant to travel to North America.

These arrangements were made with surprising speed. The incident occurred on the afternoon of Sunday 8 August 1993. On the evening of Tuesday 10 August 1993, the appellant learnt from Miss [X] that she was to leave China and that all travel arrangements had been made. The next morning (Wednesday 11 August 1993) the appellant was taken by Miss [X] to Guangzhou airport where, with the assistance of a "minder", the appellant flew to Hong Kong and eventually arrived in New Zealand on 23 August 1993. At the airport, she was abandoned by her "minder". It was only then that she realised that she had not reached North America.

The appellant says that since her departure from China, she has had no direct contact with any member of her family. There have been only two indirect contacts. First, shortly after the appellant's arrival in New Zealand, she contacted Miss [X] with a request that certain documents be sent to New Zealand. The appellant received from Miss [X] little or no detail of developments in China. We will address this aspect of the case in greater detail shortly. The second contact was earlier this year when an acquaintance of the appellant in New Zealand returned to China during the 1995-1996 Christmas-Lunar New Year period. This acquaintance, Miss [M], was not called as a witness, nor was any statement from her tendered in evidence. The appellant explained that Miss [M] was presently in Australia with her daughter.

The appellant says that in addition to having no direct contact with her parents, she has had no contact whatsoever with her three brothers. Her explanation for having had no contact with her family is that she does not wish to get them into trouble for having contact with her, being a person who has broken the law.

The appellant's boyfriend has, however, visited New Zealand four times since the birth of the child. These visits have been at approximately six monthly intervals.

The appellant told the Authority that she fears that if she returns to China as an unmarried mother, she will be imprisoned for three years and required to undergo re-education. She bases this claim on a case she learnt of in 1983 at the time of taking up employment at the paper mill. She was told that an unmarried mother who conceived a child out of wedlock had been punished in such manner. The appellant, however, knew of no other case in which such punishment had been inflicted. She also said that although the work unit employed 7,000 people, the appellant was the only female employee between 1986 and 1993 who had conceived a child while unmarried. The appellant adduced no evidence to support her claim as to the nature of the punishment (if any) faced by her in China.

As to the Convention reason relied on by the appellant, it was argued on her behalf by her then representatives at first instance that her unauthorised pregnancy would be seen by the state as the manifestation or expression of a political opinion, namely, defiance of the policy of the Chinese Communist Party. Express reliance was placed on the political opinion limb of the Convention. This was, with respect, an unrealistic submission to make on the facts given that there is simply no evidence that a political opinion has been or could be attributed to the appellant by officials in China.

No doubt conscious of this difficulty, newly-instructed counsel on appeal submitted that the appellant was a member of a particular social group defined as:

"... unmarried mothers or expectant mothers who have refused to undergo an abortion.".

**THE ISSUES**

The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a 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."
In the context of this case the four principal issues are:

1. Is the appellant genuinely in fear?

2. Is it a fear of persecution?

3. Is that fear well-founded?

4. Is the persecution he fears persecution for a Convention reason?

In this regard we refer to our decision in *Refugee Appeal No. 1/91 Re TLY and Refugee Appeal No. 2/91 Re LAB* (11 July 1991).

In the same decision this Authority held that in relation to issue (3) the proper test is whether there is a real chance of persecution.

The fact that the appellant has a New Zealand born child is of limited relevance only to the Authority's inquiry.

The appellant's daughter, as a New Zealand citizen, cannot lodge in New Zealand an application for refugee status claiming a well-founded fear of persecution at the hands of the authorities in the People's Republic of China.

The rights of the child under the International Covenant on Civil and Political Rights 1966 and the Convention on the Rights of the Child 1989 also have no direct relevance to the Authority's inquiry in terms of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) by reason of the fact that paragraph 5(3) of the Authority's Terms of Reference expressly preclude the Authority from considering any immigration matters relating to an appellant's case or from considering whether, in respect of claimants who are not refugees within the meaning of Article 1A(2) of the Convention, there exist any humanitarian or other circumstances which could lead to the grant of a residence or other permit to remain in New Zealand.

The real significance of the child lies in the appellant's claim that she (the appellant) will face additional difficulties in China on account of her daughter. These issues will be dealt with in the section of this decision which addresses the issue whether the appellant's fear of persecution is well-founded.

**ASSESSMENT OF THE APPELLANT'S CASE**

Before the four issues can be addressed, an assessment must be made of the appellant's credibility.

**CREDIBILITY**

The hearing of this appeal commenced at 10.55am and concluded at 5.25pm. The appellant was the only witness. The Authority paid close attention to the appellant's demeanor and has made allowance for the fact that she gave her evidence through an interpreter. The conclusion the Authority has come to is that she is an intelligent woman who, for reasons of her own, has not given a truthful account of the circumstances which led her to leave China in August 1993 with the purpose of ensuring that her child was born in another country. In the result, we cannot accept any part of her case other than the fact that she did leave China at a time when she was pregnant, and that subsequent to her arrival in New Zealand her daughter was born at Auckland on 23 January 1994.

In arriving at this credibility assessment, we have taken into account the following:

1. First, the appellant told the Authority that she did not know of or understand the terms of the one child policy. This we find difficult to believe. It is to be remembered that at the time of these events, the appellant was 30 years of age. As a mature and intelligent woman who worked in a large state work unit, her claimed ignorance of the family planning requirements was surprising, to say the least. The policy is comprehensive and highly intrusive, it relies on heavy doses of education and propaganda (augmented by severe psychological pressure on those who resist), and the disciplinary measures are designed to have a substantial economic impact. See, for example, *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) 22. In these circumstances, it was surprising that the appellant and her boyfriend took no precautions whatever during sexual intercourse following the advice given in April 1993 that she could increase the chance of her becoming pregnant. We agree with counsel that the failure of the appellant to adopt birth control measures during sex while unmarried was foolish, but does not of itself indicate an absence of credibility. However, we note that the appellant herself said that she became "suspicious" that the new advice could lead to her becoming pregnant, and so she approached the work unit for permission to marry. The strange thing is that she took these steps notwithstanding that she had not discussed marriage with her boyfriend. The highest the appellant could put her case in this regard was that the boyfriend had "jokingly" (her word) suggested during intercourse that if the appellant became pregnant, they would get married. As neither of them thought that pregnancy was a possibility, his statement was not taken seriously by either party. It is odd, to say the least, that at a time when she believed that it was not possible for her to become pregnant, and at a time when there had been no serious discussion with her boyfriend about marriage, that the appellant sought from the work unit permission to marry. Furthermore, when the appellant was asked how she could realistically expect her boyfriend to agree to marry given that he lived in Hong Kong and she on the other side of the border,she said that she had not given the matter any consideration. However, she acknowledged that, in retrospect, she would have wanted to live in Hong Kong.

Second, she said she was surprised to find, after the discovery that she was pregnant, that she had been refused permission both to marry and to have a child. She feigned ignorance of what by all accounts are notoriously known facts in China, namely, that to establish a family one requires first the permission of the work unit and second the permission of the state. If the couple then wish to havea first child, permission to have that child must be obtained before conception. If permission is not obtained before conception an abortion must take place. The appellant said that it was her belief that as an unmarried woman it was possible to reverse the process. That is, she could first become pregnant, then obtain permission to marry, and then have the birth allocated to her from the work unit quota. Given the unremitting nature of the birth control propaganda to which reference has been made, it is unrealistic for her to claim that she was ignorant of the basic features of the policy.

In this context, the appellant's exaggerated claims tell against her. If it were true that she faced three years' imprisonment and re-education for conceiving a child out of wedlock, and if she was as fearful as claimed of these consequences, one would have expected her to have approached the issue of birth control with a degree of

seriousness that is entirely absent from the casual, if not indifferent, attitude which emerges from her appeal evidence.

2. There are difficulties surrounding the appellant's explanation for her return to her parents' home on Sunday 10 August 1993. She says she went to retrieve cash she had left there when she first went into hiding. She had sent Miss [X] to look for the money but Miss [X] had not been able to find it. Yet, she had other, safer, alternatives. First, she could have asked her parents to lend her a modest sum against the security of her sizeable savings. Miss [X] could have conveyed the money. The appellant, however, said that this had not occurred to her as she has never borrowed money in her life and felt that she could not ask her mother "to keep giving [her] money for ever". This, however, was not the point. The emergency was of a temporary nature only. Second, the appellant had the option of withdrawing the money directly from her bank account. She said that this was not possible because the bank was situated near the paper mill and she was at risk of being recognised by people moving about the main street or in the bank. Asked why she had not asked her family to draw out the money on her behalf, the appellant stated that this procedure required the production of the appellant's identity card. In effect, the appellant was saying that withdrawals required her personal attendance at the bank. She was therefore reminded that she had earlier given evidence that subsequent to her arrival in New Zealand, her parents had drawn some of the money out of her (the appellant's) bank account. The appellant was notably evasive at this juncture of her evidence. She then introduced, for the first time, evidence that when she went into hiding at Miss [X]'s home, she had left her identity card at her parents' address. Anticipating that the next question would be directed to the issue as to why the parents had not then used the identity card to withdraw the money on her behalf, she said that the card must have been misplaced and could not be found either by Miss [X] or by her parents.

While each of these particular elements on their own may not be improbable, their accumulation in such short order can and does lead the Authority to the view that the appellant's account is not credible. In this regard, the appellant conceded that within a few days of her going into hiding, she had communicated with her boyfriend in Hong Kong via Miss [X], but at no time during the subsequent three month period did it occur to her to ask her boyfriend to send her money. She said, once again, that she had never asked anyone for money. It seemed to the Authority that the appellant realised that having explained her return to her parents' home on the basis that she needed money, she had to say whatever was necessary to "demonstrate" that she was unable to access money from any other source and that she had no option but to return home notwithstanding the risk. Hence the improbable claim that neither Miss [X] nor her parents could find the money hidden at the parents' home, that neither she nor her parents could access the bank account, and that she would not entertain the possibility of borrowing money from her parents or her boyfriend.

3. One of the reasons given by the appellant for not going to the bank to withdraw money was that there was a possibility of her being recognised there by people from her work unit. It was put to the appellant that she was running an equal, if not higher, risk by returning to a compound or building inhabited by people from her work unit. Her response was that she had not thought of this at the time. The Authority does not believe the appellant. If she believed that she ran the risk of being identified at the

bank, it is stretching the imagination to deny that the possibility of identification at her parents' address did not also occur to her. She had, after all, lived at this address for some two to three years and had worked at the factory for some ten years. The risk of identification must have been very high. The appellant, possibly sensing the Authority's scepticism at her claim, then volunteered that she had caught a taxi to her parents' home and it had stopped "right at the door". This leaves unexplained the risk the appellant ran upon dismounting from the vehicle at ground level and then proceeding to her parents' apartment on the 7th floor. Asked whether she was afraid that the local "street committee" or so-called "granny committee" would not be keeping an eye out for her, the appellant replied that there was no such committee where her parents lived. Given that the appellant lived and worked in a state-run enterprise, the Authority finds it difficult to believe that, quite fortuitously, this pervasive form of social control did not exist in the appellant's community. The appellant also said that there were not many people around the apartments on Sunday afternoons. We simply do not believe the appellant.

4. There then follows the appellant's account of the arrival of three people at her parents' home and the struggle which lasted seven flights of stairs. On the one side were three officials (two male, one female). On the other, there was the appellant and her elderly mother. It seems extraordinary that the officials were sufficiently able to overwhelm the appellant and her mother to get them down seven flights of stairs, yet as soon as the appellant arrived on the ground floor, she miraculously broke away and, just a few steps ahead of the officials, was lucky enough to find an empty taxi ready to whisk her away. The appellant says that it was a pure coincidence that the taxi was there. Asked why the taxi driver had driven off notwithstanding that just a few metres behind the appellant were three officials shouting at both the appellant and the driver to stop, the appellant said that the driver was not from her district. Again, one finds in the appellant's account a fortuitous chain of circumstances which, taken in their cumulative effect, are highly improbable. We find an air of unreality to the appellant's account.

Even the appellant's evidence as to how she paid the taxi driver is improbable. She said that during the struggle she lost her purse and her watch. However, she had luckily placed the money retrieved by her from her parents' address inside a pocket, not her purse and therefore she was able to pay the taxi driver on arrival at her destination.

5. Quite apart from everything else, the appellant's case is that she was able to make good her escape because the officials had arrived at her parents' home either on foot or on bicycle. They had not come in a motor vehicle. The corollary is that three officials arrived at a building complex with a view to taking away, on foot and against her will, a woman who was to be subjected to a forced abortion. The officials knew that the hospital was situated some ten to twenty minutes away by foot. Yet the appellant claims that these officials did not travel in a vehicle. The Authority does not accept that the officials were so stupid or incompetent that they intended walking ten to twenty minutes along public streets while subduing a woman who would almost certainly be struggling and screaming. The appellant's account is, once again, highly improbable.

6. It is also the appellant's case that immediately following this incident, her parents, somewhat elderly and of very modest means, were instantly able to locate a person (or group of persons) who could spirit the appellant out of China. And not only that, who could do so within the space of two days. Equally improbably, the appellant's parents were able to find, without apparent difficulty, the astonishing sum of 300,000 RMB. On top of this, the arrangements were made without the appellant's knowledge. The first that she knew that she was to leave China was the night before her departure. All too conveniently, when asked how her parents were able to raise the money, she said that she simply did not know.

7. This brings us to another feature of the appellant's account. That is, whenever pressed for important detail, she retreated behind a claim that "she did not know". Even in circumstances in which one would have expected a mature and intelligent woman to have made inquiry, the appellant has remained inactive and silent.

For example, she did not at the time make, and has not subsequent to her arrival in New Zealand made, any attempt to contact her parents or her brothers. Therefore she continues down to the present time to claim that she does not know how her parents were able to raise the 300,000 RMB.

She claims that when Miss [X] was taking her to Guangzhou airport, she was given no details about the travel arrangements such as where she was going, with whom she was going, how she was to recognise the individual, where they were to meet, and so on. Only after close questioning by the Authority did the appellant begrudgingly concede that Miss [X] told her that the person they were to meet was male, 1.7 metres in height, and they were to rendezvous at the airport taxi stand. She also said that Miss [X] had told her that the family had paid 300,000 RMB, some of which had to be borrowed. Miss [X] had told her nothing else. The appellant told the Authority that it was possible that her elder brother had more information. She (the appellant) had not approached him for details because she did not want to get him into trouble.

Not only does the appellant claim that Miss [X] was economical with the information provided to her, she also claims that Miss [M] (the person who visited the appellant's parents a few months ago) has reported to her only that the appellant's mother asked Miss [M] to say only that the appellant was not to worry. The Authority challenged the appellant on this point as the appellant had earlier said that her mother had got into trouble for helping her and she was being required to attend meetings at which she was subjected to criticism and had been frequently asked about the appellant's whereabouts. These self-criticisms sessions occurred once every few weeks or once per month. Asked how she knew these details if Miss [M] had told her nothing, the appellant said that she had read all this into the tone of voice used by Miss [M]. She felt that something was going on. The Authority found the appellant's feigned ignorance unconvincing. It was also concerned at the appellant's ability to proffer information when it suited her, but to claim ignorance when this was more convenient.

The appellant's reason for not contacting her parents and her brothers was that she did not want to get them into trouble. This is difficult to understand given that her mother had engaged in a prolonged struggle with the three officials on Sunday 10 August 1993. If the appellant's account is true, her mother would already be in trouble and it

would be quite obvious to the officials that she would most likely know of her daughter's present whereabouts. Therefore, for the appellant to write to her mother would not be putting her mother at any greater risk than she already is. Furthermore, there is no reason why the appellant could not have asked someone in New Zealand to write to her parents with the simple inquiry as to their health. Nor is the Authority persuaded by the appellant's claim that she could not ask her brothers for information because they, in turn, would get into trouble. The appellant said that the telephones would be monitored and the mail opened. Given that the appellant is of no interest whatsoever to the state security apparatus, and given that such difficulty as she does face is with the work unit and the family planning authorities, her fear that communications could be monitored borders on the fanciful. When these factors are coupled with the appellant's alleged failure to extract meaningful information from Miss [M] who visited her parents only a few months ago, the Authority has reached the view that the appellant has been less than candid in her evidence. It would seem that the fortuitous absence of Miss [M] from New Zealand at the very time of the appellant's refugee appeal hearing is not an accident. The appellant protested that the Authority should question Miss [M] as the Authority would be able to get much more information from her than the appellant. Yet when pressed on this point, counsel for the appellant did not, at the conclusion of the hearing, seek leave to submit further evidence and, in particular, to call Miss [M].

The Authority also explored with the appellant whether she was able to get information about her parents through her boyfriend who still lives in Hong Kong. The appellant claimed (conveniently) that he had not been back to China since learning that the appellant was pregnant. He is apparently afraid of being arrested by the authorities in China. The appellant was unable to proffer any reason as to why the authorities would arrest her boyfriend other than the fact that he was the father of an illegitimate child. The Authority knows of no evidence that such arrests take place. While there is always the possibility that the boyfriend has given to the appellant the possibility of arrest as an excuse for not returning to China, and while on its own the inability to get information about her family through the boyfriend may not be significant, it is to be noted that every possible avenue through which the appellant could get information about her parents turns out to be closed. The accumulation of improbable excuses and reasons for this state of affairs adds to the fancifulness of the appellant's account.

Overall, we find the central features of the appellant's account inherently improbable. Wef ind the appellant personally to be insincere and evasive. Having carefully considered her evidence, we accept only that she left China when pregnant. Apart from that, we find that she has not given a full and candid account of her case and we reject it in its entirety.

In the result, each of the four issues must be answered in the negative and the appeal is dismissed.

In the alternative, the appeal must fail for the further reason that there is no Convention reason to the feared persecution.

**NO CONVENTION REASON**

The appellant can only be recognised as a refugee if the persecution feared by her is for reason of her race, religion, nationality, membership of a particular social group or political opinion.

As the jurisprudence of this Authority shows, the outcome of the so-called "one child policy" cases depends entirely upon their individual facts. While some claims, on entirely different facts, have succeeded on the political opinion ground (see *Refugee Appeal No. 750/92 Re QYM* (14 June 1994); *Refugee Appeal No. 714/92 Re WGL* (3 August 1994); *Refugee Appeal No. 1253/93 Re LSS* (9 September 1994)), none have succeeded on the social group ground. See *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992); *Refugee Appeal No. 841/92 Re HWD* (16 December 1994); *Refugee Appeal No. 1632/93 Re ZRY* (23 December 1994); *Refugee Appeal No. 794/92 Re WWH* (12 April 1995); *Refugee Appeal No. 1031/93 Re YJ* (14 June 1995); and *Refugee Appeal No. 1444/93 Re DLH* (29 September 1995).

The Convention ground relied upon here is the social group category. It is said that the social group concerned is:

"... unmarried mothers or expectant mothers who have refused to undergo an abortion.".

The claim must fail for a number of reasons:

1. First and foremost, the insuperable obstacle faced by the appellant's social group claim is that there is no evidence whatsoever establishing, or even tending to establish that unmarried mothers or expectant mothers who have refused to undergo an abortion, constitute a particular social group in China. They are most certainly a statistical group. But the word "social" is an essential part of the definition and cannot be ignored as mere surplusage: *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 111 ALR 417, 422 (per Black CJ, French J agreeing); *Ram v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 314, 318 (Burchett, O'Loughlin and Nicholson JJ); *Lo v Minister for Immigration and Ethnic Affairs* (1995) 134 ALR 73, 78-82 (Tamberlin J: FC); *Sanchez-Trujillo v Immigration and Naturalisation Service* 801 F. 2d 1571 (9th Cir. 1986); *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) 23-34.

2. There is the further difficulty that the anticipated persecution must be for reason of membership of the social group. Again, there is a total absence of evidence to establish this essential element. We are of the view that the consequences feared by the appellant are not because she belongs to a particular social group, but because she has broken the family planning law. There is therefore no nexus between her membership of the group and the feared persecution.

Put another way, the consequences feared by the appellant arise because of what she has done, and not because of who she is. See *Canada (Attorney-General) v Ward* (1993) 2 SCR 689, 638, 745 (Can:SC) and *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 130 ALR 48 (FC:FC); *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995) 23-34. The recent decision of the Supreme Court of Canada in *Chan v Canada (Minister of Employment and Immigration)* (1995) 128 DLR (4th) 213 (Can:SC) is of little assistance as the majority judgment delivered by Major J

expressly left open the question whether the decision in *Cheung v Canada (Minister of Employment and Immigration)* (1993) 102 DLR (4th) 214 (FC:CA) was rightly decided. Furthermore, notwithstanding the opportunity to do so, the majority refrained from endorsing the necessarily obiter comments made by La Forest J in the dissenting judgment at 248 expanding upon what he said in *Ward* concerning the is/does distinction.

3. Added to these difficulties is the problem that the group propounded by the appellant is a group defined by the anticipated persecution. See *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28, 37, 38 (CA). There it was held that the concept of a "particular social group" must have been intended to apply to social groups which exist independently of persecution. Otherwise, the limited scope of the Convention would be defeated: there would be a social group, and so a right to asylum, whenever a number of persons feared persecution for a reason common to them.

4. Reliance was placed on a decision of the Canadian Refugee Determination Division *CRDD V91-00998* November 15, 1991; *Reflex* Issue 11 p 100 (July 1992). In that case, refugee status was granted to an unmarried mother who feared persecution of her illegitimate child who was still in China at the time of the refugee hearing. The decision is therefore distinguishable on the facts. More fundamentally, however, the reasoning process is flawed. In particular, it was held that the child was a member of a particular social group, namely "illegitimate children in Guangdong". It is by no means certain that this conclusion is correct given the wide if not meaningless formulation of the group and also given the subsequent decision of the Canadian Supreme Court in *Canada (Attorney-General) v Ward* (1993) 2 SCR 689 (Can: SC) on the interpretation of the social group category. Nor would the decision accord with New Zealand's social group jurisprudence as discussed in *Refugee Appeal No. 3/91 Re ZWD* (20 October 1992) and *Refugee Appeal No. 1312/93 Re GJ* (30 August 1995).

Even if these difficulties could be overcome, the country conditions on which the Refugee Determination Division based its decision in 1991 are now at least five to six years out of date. In the intervening period, there have been changes in Guangdong province of a kind which could not then have been anticipated.

The Canadian decision also held that the mother, while not fearing direct persecution, feared persecution of her child. More recently, however, the Federal Court of Canada has rejected the concept of indirect persecution. Persecution of a claimant's family member does not constitute persecution of a claimant: *Casetellanos v Canada (Solicitor General)* [1995] 2 FC 190 (FC:TD); *Pour- Shariati v Canada (Minister of Employment and Immigration)* [1995] 1 FC 767 (FC:TD); *Rafizade v Canada (Minister of Citizenship and Immigration)* (1995) 30 Imm LR (2d) 261 (FC:TD). In these circumstances, *CRDD V91-00998* is of marginal relevance to the present case.

In the further alternative, the appeal must fail for the reason that the appellant's fear of persecution is not well-founded.

**FEAR OF PERSECUTION NOT WELL-FOUNDED**

The burden carried by a refugee claimant is to adduce evidence which establishes, on the balance of probabilities, that the alleged fear of persecution is objectively well-founded: *Refugee Appeal No. 523/92 Re RS* (17 March 1995) 23. See also *Chan v Canada (Minister of Employment and Immigration)* (1995) 128 DLR (4th) 213, 268 Can:SC).

We are of the view that the appellant's fear of persecution by imprisonment is not well-founded. We can find no evidence to justify the appellant's claim that, upon return to China, she will be imprisoned.

In counsel's memorandum, it was stated, in the alternative, that if the appellant were forced to return to China, she would not leave her New Zealand born daughter in this country. It was submitted that the daughter would face difficulties of a severity amounting to persecution, because without a household registration (*hokou*), the daughter would not be regarded as a Chinese citizen and would also been seen as an illegitimate child. It would follow that she would not be entitled to education and welfare benefits. As a result of her daughter's suffering, the appellant would suffer too. In particular, she would be unable to return to her position at the work unit, would be unable to uplift her personal file (*dangan*), and would therefore face difficulties finding other *Government* employment (emphasis added). It was also said that the appellant would face strong disapproval of other Chinese people and would be ostracised and ridiculed. It was submitted that the cumulative effect of such treatment would amount to persecution.

However, no evidence was adduced in support of these claims and, for this reason, the Authority drew the appellant's attention to a considerable body of contrary evidence. The article by Chan Wai-Fong, "Move to Clamp Down on Illegal Marriages" *South China Morning Post* 6 March 1994 makes it clear that illegal marriages (including cohabitation) are common in China. It is estimated that out of the 10 million newly-wed every year, about 20% are illegal. The measures introduced to combat this problem are reported to be that the couple must either separate, register before a deadline, go through re-education or pay a maximum fine of 200 yuan (HK$178). These measures could hardly be described as severe and cannot properly be described as persecutorial in nature. The common occurrence of illegal marriages also tells against the appellant's claim that she fears disapproval and ridicule.

As to the appellant's fear of being unable to obtain Government employment, she appears to overlook the rapid growth of the free enterprise system in China, particularly in Guangdong province. This Authority has, in a number of cases, remarked upon the fact that state control in this province over individuals' job and residential mobility is withering. See, for example, *Refugee Appeal No. 691/92 Re LJX* (17 May 1994) 13. This assessment has been recently confirmed by the article "The Private Life of a Chinese" *The Economist*, September 16, 1995, 33-34 which points out that in Guangdong fewer than half the workers are employed by the state. In fact, nationwide it is estimated by the Government that by the year 2000, 70 million of China's working population of 800 million will be privately or self-employed. As a result, the control formerly exercised by the Central Government via the danwei or work unit is rapidly diminishing. See further *Refugee Appeal No. 691/92 Re LJX* (17 May 1994) 15. To similar effect, see the Department of State *Country Reports on Human Rights Practices for 1994: China* (February 1995), 555, 564. The Authority

recognises that China's serious unemployment problem will present the appellant with difficulties. On the other hand, as noted in *Refugee Appeal No. 732/92 Re CZZ* (5 August 1992) 17, it is quite clear that the phenomenal economic growth in Guangdong province has opened up many employment opportunities in the private sphere, as evidenced by the fact that almost a third of state workers have second jobs. New employment opportunities have sprung up all over the province which has a critical need for labour. In *Refugee Appeal No. 732/92 Re CZZ* a female refugee applicant from Guangzhou who had been expelled in her last year of high school and who had made no real effort to re-enrol at another educational school, and who had shown passivity in finding employment over an extended period of time, was denied refugee status. The Authority remarked at page 18:

"Addressing now the situation that the appellant would face were she to return to China, the Authority is of the view that as she would be returning to a province sometimes described as the cradle of China's open door policy, and in the light of the enormous economic growth occurring in that province, she would have many opportunities to secure employment. It may not be employment to her liking or remunerative to the level she might desire. However, on the facts, these economic considerations fall outside the parameters of the Refugee Convention. Even if we are wrong in this regard, these factors would amount to no more than a low level infringement of her human rights and are more properly described as discriminatory rather than persecutory."

The article "The Private Life of a Chinese" *The Economist*, September 16, 1995, 33-35 also notes that the *hokou* or home registration system is breaking down. It is estimated that some 70 million Chinese live outside their home registration and the penalty for hiring unregistered workers is in practice winked at because of the need for low-cost labour in China. See further, Lena H Sun, "The Dragon Within Begins to Stir" *Guardian Weekly* October 30, 1994, 15. In an article by Cheung, Po-Ling, "Rules Eased for City Job Seekers" *South China Morning Post* Thursday December 8, 1994, it is stated that the household registration system is being updated and that the new policy, which came into effect in January 1995, aims to ease the restrictions for job seekers in cities. This does not mean to say, however, that unregistered children will not continue to face difficulty accessing health and education benefits. While it is reasonably clear that such children will not be eligible for state subsidised benefits, the appellant has adduced no evidence to suggest that in the new free enterprise system embraced so thoroughly in Guangdong province, such benefits cannot be accessed by paying for them. Indeed, the article "The Private Life of a Chinese" *The Economist*, September 16, 1995, 33-35 notes that so-called "free medicine" is approaching its demise(1):

"The end of free medicine is more advanced. China's health services now recover close to 90% of their costs. Where fees are not charged, bribes often are. In the past, if a state worker needed treatment, the hospital simply sent the bill to his factory. Today state firms deduct part of the fee from a worker's pay. Some insist on medical insurance, provided by state companies."

In the result, even if the appellant finds employment in a state-owned company, she is likely not to receive "free" medical care.

Counsel realistically accepted in both her opening and closing submissions that the appellant's understanding of present conditions in Guangzhou did not very much accord with published information.

The Authority has concluded that the most that the evidence establishes is that she will be unable to resume work at the paper mill. She will most likely have to find employment in the private sector. This does not impose any great burden on her given the country information referred to. For the reasons given in *Refugee Appeal No. 32/92 Re CZZ* (5 August 1994), the appellant will have many employment opportunities available to her. While she and her child may not be able to access state accommodation, health and education, these services are available in Guangzhou from the private sector. The appellant enjoys the support of her family. While the appellant will face difficulty and discrimination, none of the measures, whether taken singly or cumulatively, come anywhere near to establishing persecution. It should be remembered that not every breach, nor even every serious breach of a human right will constitute persecution. Recent New Zealand case law is collected in *Refugee Appeal No. 2039/93 Re MN* (12 February 1996) 16.

**CONCLUSION**

In summary, our conclusions are as follows:

1. As the appellant is not accepted as a credible witness, we do not accept that on any central issue of her case she has given a truthful account of the facts. All four of the issues are accordingly answered in the negative.

2. In the alternative, even if we are wrong in this assessment, the claim must fail in any event as the harm feared by the appellant is not connected with or related to any one of the five Convention reasons.

3. In the further alternative, the harm feared by the appellant is not of sufficient gravity to constitute persecution.

For these reasons, we find that the appellant is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. The appeal is dismissed.

"R P G Haines"

.....
[Chairman]

(1) See further Rahul Jacob, "Medical emergency" *Time* April 15, 1996, 48. This article was not available at the time of the hearing and has not been taken into account in the preparation of this decision.