FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGFA & ORS v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 6*

MIGRATION – Application to review decision of Refugee Review Tribunal – whether Tribunal failed to consider whether applicant child would suffer serious harm constituting persecution in not receiving privileges accorded to only children under Chinese "one child policy" – whether Tribunal failed to consider applicant child's position and apply real chance test – whether no evidence.

Migration Act 1958 (Cth)

Applicant S v Minister for Immigration & Multicultural Affairs (2004) 217 CLR 387
Associated Provincial Picture Houses Ltd v Wednesbury Corp (1948) 1 KB 223
Chan Yee Kim v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379
Chen v Minister for Immigration & Multicultural Affairs (2002) 201 CLR 293
Htun v Minister for Immigration & Multicultural Affairs (2001) 194 ALR 244
Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
NACB v Minister for Immigration & Multicultural Affairs [2003] FCAFC 235
NATC v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 52
Paul v Minister for Immigration & Multicultural Affairs [2001] FCA 1196
Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59
SZBPQ v Minister for Immigration & Multicultural Affairs [2005] FCA 568
SZBQJ v Minister for Immigration & Multicultural Affairs [2005] FCA 143
The Queen v Australian Stevedoring Industry Board and Another Ex parte Melbourne Stevedoring Company Proprietary Limited (1953) 88 CLR 100
VTAO v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 81 ALD 332
VWST v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 286
W404/01A v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 255
WAJQ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 79
WAJW v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 330

Applicants:	SZGFA, SZGFB, SZGFC & SZGFD
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG1135 of 2005
Judgment of:	Barnes FM
Hearing date:	1 November 2006
Delivered at:	Sydney
Delivered on:	27 February 2007

REPRESENTATION

Counsel for the Applicant:	Mr J Atkin
Solicitors for the Applicant:	Messrs Coroneos & Company
Counsel for the Respondents:	Mr C Mantziaris
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) That a writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 30 March 2005.

(2) That a writ of mandamus issue requiring the Refugee Review Tribunal to redetermine the applicants' application according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1135 of 2005

SZGFA, SZGFB, SZGFC & SZGFD
Applicants

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Refugee Review Tribunal (the Tribunal) handed down on 30 March 2005 affirming a decision of a delegate of the first respondent not to grant protection visas to the applicants. The first named applicant is a child who was born in Australia in March 2002. The second and third applicants are his father and mother and the fourth applicant is their elder son. In their June 2004 application for protection visas only the first applicant made specific claims under the Refugees Convention as amended by the Refugees Protocol.

2. The basis for the application was that the first applicant had a well-founded fear of persecution as a second child born outside the one child policy of the People's Republic of China (the PRC) as he would

be likely to suffer legal, social and economic disadvantage amounting to serious harm constituting persecution if he had to return to the PRC. A number of claims were made by the applicants' advisor and the first applicant's mother, in particular in relation to the impact of the one child policy on the first applicant. The second, third and fourth applicants did not make specific claims in their own right.

3. The application was refused by a delegate of the first respondent. The applicants sought review by the Tribunal. The first applicant's parents attended the Tribunal hearing.

Tribunal decision

4. In its reasons for decision the Tribunal outlined the evidence before it. It referred to independent country information in relation to the situation of unregistered children in China and accepted that "black children", in the sense of unregistered children whose birth may or may not violate family planning regulations, constitute a particular social group in China for the purposes of the Refugees Convention. The Tribunal also accepted that the first applicant was his parent's second child born outside the confines of the PRC's "one child" policy.

5. However the Tribunal had regard to advice from the Department of Foreign Affairs and Trade (DFAT) that it was "*not aware of any difficulties arising for people returning from overseas with more than one child"* and *"once births had occurred, that pragmatism would take precedence*". The Tribunal considered it relevant that Shanghai, where the first applicant's parents had lived, had progressively relaxed its family planning laws in response to an extremely low birth rate and an ageing population.

6. The Tribunal addressed the claim of the first applicant's mother that her parents had obtained information from the local family planning office indicating that having a second child was a violation of the 'one child' policy and that whether the child was born in China or overseas the parents would be punished. The Tribunal noted that the example given related to a child born in China and that while the applicant child's mother had stated that she had documentation relating to a child born outside China, no such document was before the Tribunal. It preferred

the advice of DFAT "*to the effect that pragmatism will take precedence in the case of births which have occurred overseas and that people returning from overseas with more than one child will not encounter difficulties.*"

7. The Tribunal then referred to DFAT advice that where a child was born in breach of the provincial family planning regulations the parents were required to pay a "social compensation fee", but that on registration and payment of the fee the child would no longer be regarded as a "black child" or an unregistered child and that all registered children were entitled to access health and educational facilities "*although families with only one child may be entitled to preference in certain respects*."

8. The Tribunal discussed evidence and submissions as to the likely social compensation fee payable in relation to an unauthorised second child. It referred to information that there may be an exemption from the liability on parents to pay the fee in cases of severe financial hardship. It found that even if the fee was payable on the basis contended for by the first applicant's mother (who said she had supporting documentation but did not provide it to the Tribunal), it would only amount to AUD$14,114 at then current exchange rates.

9. The Tribunal accepted that the first applicant's parents had lost all of their "*savings*" in an investment in a "*fraudulent venture*" in Australia in 2004, but nonetheless did not accept that they had no assets at all after living in Australia since 1996. Nor did it accept that they would be unable to obtain any employment if they returned to Shanghai, as it found that they both had skills which should enable them to be gainfully employed, that China had a flourishing private sector and that the economy in Shanghai was booming. Further, the Tribunal did not accept the claim that no enterprise would be "*brave enough*" to employ the first applicant's father because he had a second child. It noted information suggesting that a second child was considered "*a status symbol*" in China today and found that, contrary to the submission that parents who had a second child would be severely punished, the evidence produced by the applicants' advisor "*supported the view that a breach of the 'one child' policy can be overcome by paying money in order to obtain a hukou for the child.*"

10. The Tribunal did not accept on the evidence before it that there was a real chance that the first applicant's parents would be unable to pay the "social compensation fee" if they were required to do so in order to obtain a "*hukou*" for the first applicant. It found that:

> *… if the Applicant is registered he will no longer be a member the 'particular social group' referred to as 'black children' and he will have the same access to education and health services as other children (although only children have some privileges). I do not accept, therefore, that there is a real chance that the Applicant will be persecuted for reasons of his membership of the 'particular social group' of 'black children' if he goes back with his parents to their home in Shanghai now or in the reasonably foreseeable future.*

11. In conclusion the Tribunal was not satisfied that the first applicant had a well-founded fear of being persecuted for a Convention reason if he returned to China. Hence the Tribunal found that he was not a person to whom Australia had protection obligations. As his parents and brother did not make specific claims in their own right, the Tribunal concluded that it was not able to find that they were persons to whom Australia had protection obligations or that any of them met the criteria for the grant of a protection visa.

This application

12. The applicants sought review by application filed in this Court on 3 May 2005. They rely on an amended application filed in Court on 1 November 2006.

13. The grounds of the amended application are as follows:

> *1. The decision involved a jurisdictional error.*
>
> *2. The decision maker failed to determine the application for review in accordance with the law.*
>
> *3. The Tribunal fell into judicial error by failing to consider and determine whether the applicants would suffer serious harm in the event of going back to PR China.*
>
> *4. The Tribunal applied general principles to the applicants' position and in doing so erred in not specifically considering the applicant child's position.*

5. The Tribunal found that the applicant child was a "black child" but erred in not considering the position of the child if the child was not registered. In this regard the Tribunal fell into judicial [sic] *error.*

6. In falling to consider the child's position the Tribunal did not apply the 'Real Chance Test'.

7. The Tribunal found that the parents could pay the social compensation fee in respect of the child without evidence of that fact, when in fact the evidence was to the contrary, and in doing so fell into jurisdictional error.

8. The Tribunal in finding that the applicant would be registered on payment of a social compensation fee found that none the less the applicant would suffer discrimination in China without considering whether that discrimination constitutes serious harm.

9. The Tribunal did not look at the case of the applicant children.

10. The applicants are therefore aggrieved by the decision.

14. In oral submissions counsel for the applicants clarified that there were two substantive grounds raised by the amended application. First it was suggested that while the Tribunal had found that the applicant child would be registered on going to China and that there would therefore be no real chance of persecution in the reasonably foreseeable future, in making that finding the Tribunal also found that single children would be given privileges in certain respects. It was contended that the Tribunal had erred in failing to address what those privileges may or may not amount to and in not considering whether the discrimination constituted by the absence of such privileges amounted to persecution.

15. The second substantive ground was said to relate to a lack of evidence. It was acknowledged that there was a dearth of authorities in relation to the manner in which a lack of evidence may give rise to jurisdictional error, but contended that in this case there was *no* evidence in certain respects. In particular, the Tribunal found that the parents would have to pay a social compensation fee to register their child. It accepted that the parents had lost all of their savings in Australia. Nonetheless it found that the parents would be able to afford the social compensation

fee. It was contended that this reasoning process went beyond a lack of logic and that there was no evidence for such a finding.

Whether findings addressed both registered and unregistered status of child

16. As a preliminary point relevant to the first substantive ground, counsel for the applicants addressed a difference of opinion as to the scope of the findings made by the Tribunal. According to the applicants the Tribunal had proceeded on the basis that if the applicant child went to China and his parents paid the social compensation fee he would be registered and there would be "no problems" in the sense of no real chance of persecution in the reasonably foreseeable future. However counsel for the second respondent submitted that the Tribunal had also found that there would be no real chance that the applicant would be persecuted for reasons of his membership of the particular social group of "black children" if he returned from overseas with his parents and remained unregistered. The applicants contended that there was no such finding.

17. Rather, it was contended for the applicants that in addressing DFAT information to the effect that persons returning from overseas with more than one child would encounter no difficulties, it was clear, read in the context of what followed and other material before the Tribunal, that the Tribunal was considering what would occur once the child was registered and was not making a general finding that whether or not the child was registered there would be no difficulties. Indeed it was said that that there was no consideration of what would happen to the applicant if he was unregistered. In particular, it was submitted that because the Tribunal found that the applicant child would be registered there was no consideration of the concerns raised about a risk of harm and discrimination if the applicant was unregistered. Grounds 3 to 6 in the amended application claim that the Tribunal erred in not considering and determining whether the applicant child would suffer serious harm in China, in not specifically considering the applicant child's position (in particular if he was not registered) and in failing to apply the "real chance" test.

18. Counsel for the first respondent suggested that the applicants' submissions on this issue were based on the premise that the Tribunal had found that upon return to China the parents of the applicant child would have to pay a social compensation fee in order to avoid discrimination. However it was submitted that this was not a correct view of the findings of the Tribunal. First, it was contended that in accepting that "black children" constituted a particular social group in China for the purposes of the Refugees Convention, the Tribunal had accepted that children may be unregistered for reasons other than violation of the family planning regulations or the one child policy. Further, it was said to be implicit in the Tribunal finding that PRC citizens returning from overseas with more than one child would not encounter difficulties, that children who were "returning" in that fashion would be unregistered, as when a child of Chinese nationals was born overseas and "returned" to China it would be an unregistered child.

19. It was submitted that the Tribunal did not find that discrimination flowed from the lack of registration, albeit it later found that if the parents chose to pay the social compensation fee that would seem to be a further guarantee against discrimination. Rather, it was contended that the Tribunal did not accept that there was a real chance that the applicant child would be persecuted for reasons of his membership of a particular social group of "black children" if he went to China with his parents and remained unregistered. It was acknowledged that the Tribunal made a finding that if the applicant child was registered he would no longer be a member of the group referred to as "black children" and would have the same access to education and health services as other children, but contended that the Tribunal had already found that "black children" did not necessarily suffer discrimination.

20. Counsel for the first respondent suggested that the critical issue was whether the Tribunal had considered the two separate states of the child going to China and being unregistered and the child going to China and being registered following payment of the social compensation fee. It was acknowledged that in the findings and reasons part of the decision there was not an express distinction drawn between these two states, but contended that it was clear in the context of the claims that were put before the Tribunal and the evidence (including the country

information) which the Tribunal considered that the Tribunal was feeding through its analysis evidence and claims which went to both states, such that the Court could be satisfied that the Tribunal had considered both of these states. It was said that the Tribunal did not require that the applicant child or his parents pay the social compensation fee and register him or assume that such payment and registration was reasonable or desirable. Hence it was contended that there was no failure to address "the elements or integers of the claim for asylum" (see *Paul v MIMA* [2001] FCA 1196 at [79] and *Htun v MIMA* (2001) 194 ALR 244 at [1], [8] – [12], [41] and [42]).

21. In support of this proposition counsel for the first respondent drew the court's attention to a number of aspects of the evidence before the Tribunal and its findings. It was suggested that it was apparent from the outline of what had occurred in the Tribunal hearing and its references to advice from DFAT, that the Tribunal was considering the state of an unregistered child in China in the issues it raised with the first applicant's parents and addressed. In particular the Tribunal referred to advice from DFAT that different considerations would apply in the case of a child born overseas, that if the child remained unregistered he would be one of millions of children in that situation in China, that there was little meaningful distinction in practice between those who were registered and those who were not, and that unregistered individuals were unlikely to suffer ostracism or ill treatment as a direct consequence of being unregistered. Reference was also made to the country information set out in the Tribunal's reasons for decision in which DFAT indicated:

> *Logically it would follow that a child not registered would not formally 'exist' in terms of officialdom, which should affect access to education, health care and possibly public service sector employment. In practice, however we are not sure that there is a meaningful distinction between those who are registered and those who are not, especially in rural areas. Such a distinction would be unlikely to extend into adulthood. If such a distinction existed, it would be very unlikely to affect employment in the non-government sector or in rural areas.*

22. With that background it was said to be open to the Tribunal to make findings in relation to both states. First, it was contended that in relation to the situation of the child return to China and remaining

unregistered, the Tribunal found that the applicant child was born outside the one child policy. It considered evidence as to the effect of this policy on his entitlement to health, social and educational services, including information before it on the one child policy which suggested that the policy was designed to deter a high birth rate, but that pragmatism would take precedence once birth had occurred, that individuals who were unregistered were unlikely to suffer ostracism or ill treatment as a direct consequence of being unregistered, that there were millions of unregistered children in China and that Shanghai family planning laws had been relaxed. On the basis of this evidence the Tribunal was said to have made a finding based on country information, preferring the advice of DFAT that pragmatism would take precedence in the case of births overseas and "*that people returning from overseas with more than one child will not encounter difficulties*". This was said to be a finding regarding the discrimination that would be faced by an unregistered child, specifically an unregistered child in the position of the applicant born overseas and "returning" to China with his parents. This finding was said to stand independently of any finding regarding discrimination following possible registration, so that it could not said that the Tribunal failed to consider the unregistered status of the child.

Reasoning

23. In considering whether the Tribunal had to, and if so did address the position of the applicant child if he was not registered, it is relevant to have regard to the whole of the Tribunal reasons for decision, including the context in which it preferred the advice of DFAT "*to the effect that pragmatism will take precedence in the case of births which have occurred overseas and that people returning from overseas with more than one child will not encounter difficulties*". The Tribunal's lengthy summary of what occurred in the Tribunal hearing is also of assistance given its subsequent reference in the findings and reasons part of its decision to what had been said in the hearing.

24. First, it is not disputed that the Tribunal correctly directed itself as to the test to be applied (including the requirement of serious harm in s.91R of the *Migration Act 1958* (Cth)) and the relevance of the 'real chance' test in determining whether a fear is well-founded. Further, it

is clear that the Tribunal addressed the position of the child if he was registered (subject to what is said below in relation to privileges accorded to only children).

25. The findings and reasons part of the Tribunal decision commences with an acceptance by the Tribunal that a "black child" is an unregistered child whose birth may or may not violate family planning regulations and that black children constitute a particular social group in China for the purposes of the Refugee Convention. The Tribunal referred to 2003 country information (CX73769) in support of this finding. As set out earlier in the decision, this information also stated that because they were not listed on their parents' household registration documents (*hukou*) unregistered children *"will face administrative difficulties in accessing government services, for example, health care and education for which possession of a valid* hukou *is a prerequisite"*.

26. The Tribunal then stated:

> *I accept that the Applicant is his parents' second child, born outside the confines of the 'one child' policy. However, as I put to the Applicant's parents in the course of the hearing before me, the Australian Department of Foreign Affairs and Trade has advised that it is not aware of any difficulties arising for people returning from overseas with more than one child. The Department said that the objective eof all the family planning policy and regulations was to deter, to the extent possible, a high birth-rate. It said that, once births had occurred, its impression was that pragmatism would take precedence (DFAT Country Information Report No.554/00, dated 3 November 2000, CX46100). As I noted, I consider it relevant in this context that Shanghai has progressively relaxed its family planning laws in response to an extremely low birth-rate and an ageing population. In 2002 it widened the categories of people allowed to have more than one child and in 2004 it abolished the four year waiting period between a first and second child ('China: Ageing Shanghai amends family planning legislation',* Asia News*, 21 May 2004, CX95537).*

27. In accepting that the applicant was his parents' second child born outside the confines of the "one child" policy, the Tribunal demonstrated that it understood that there could be a distinction between an unregistered or "black child" and a child who had been born outside the "one child" policy in violation of family planning

regulations. It then addressed the relevance of the fact that the applicant child had been born outside the one child policy. In that context it referred to the fact that, as it had put to the first applicant's parents in the course of the hearing, DFAT had advised "*that it is not aware of any difficulties arising for people returning from overseas with more than one child*". The DFAT advice did not define what "difficulties" were in issue. However this is unsurprising given that the advice was that the Department was not aware of "**any**" difficulties arising for such people.

28. The Tribunal then referred to the Department's view that the objective of the Chinese family planning policy and regulations was to deter, to the extent possible, a high birth rate, but also that "*once births had occurred, its impression was that pragmatism would take precedence*". When the Tribunal's consideration of DFAT advice is read in context, it is apparent that the information was treated by the Tribunal as a suggestion that pragmatism about the fact of a birth in breach of the "one child" policy would prevail in China once such birth had occurred. The Tribunal then referred to relaxation of the Shanghai family planning laws in relation to people who were allowed to have more than one child and when they were allowed to do so.

29. Consistent with the fact that it was addressing issues arising from the fact that the child had been born outside the one child policy, the Tribunal went on to discuss the claims of the first applicant's mother about punishment of parents who violated the one child policy by having a second child. I am satisfied that the preference the Tribunal expressed for the DFAT advice to the effect that pragmatism would take precedence in the cases of birth overseas and that people returning from overseas with more than one child will not encounter difficulties, was addressing the issue of whether there would be any adverse consequences (in particular whether the parents would be "punished" as claimed by the mother) arising from the accepted fact that the applicant child had been born outside the "one child policy". The issue of whether there would be any difficulties for the parents (and hence implications for the child) because the child had been born outside the one child policy was relevant to the ultimate issue of whether the first applicant had a well-founded fear of persecution based not only on the

fact that he was an unregistered or black child but also because he had been born outside the one child policy.

30. However, while issues about unregistered children were canvassed in the Tribunal hearing, it is notable that nowhere in the findings and reasons part of the Tribunal decision did the Tribunal expressly address those parts of the country information before it that related to the situation of a child who remained unregistered. Instead the Tribunal went on to address the advice of DFAT that where a child *"is born in breach of the provincial family planning regulations"* the parents are required to pay a social compensation fee and that *"on registration and payment of this fee the child will no longer be regarded as a 'black child' or an unregistered child"*. It then noted advice that parents might be exempt from paying this fee in cases of severe financial hardship.

31. After discussion of issues relating to the parents' ability to pay such a fee (including the employment prospects of the parents and in this context, the first applicant's father's claim that no-one would employ him because he had a second child), the Tribunal observed that even the evidence produced by the applicants' representatives *"supports the view that a breach of the 'one child policy' can be overcome by paying money in order to obtain a* hukou *for the child."*

32. The Tribunal then found, as set out above:

> *I do not accept on the evidence before me that there is a real chance that the Applicant's parents will be unable to pay the "social compensation fee" if they are required to do so in order to obtain a* hukou *for the Applicant. I find that if the Applicant is registered he will no longer be a member the 'particular social group' referred to as 'black children' and he will have the same access to education and health services as other children (although only children have some privileges). I do not accept, therefore, that there is a real chance that the Applicant will be persecuted for reasons of his membership of the "particular social group" of "black children" if he goes back with his parents to their home in Shanghai now or in the reasonably foreseeable future.*

33. In other words the Tribunal addressed the fact that the applicant was both unregistered (a "black child") at the time of the decision and the

fact that he had been born outside the one child policy. It is implicit in its findings that it recognised that if the child went to China he may do so as an unregistered child. However, the Tribunal found not only that where a child was born in breach of the family planning regulations, on registration and payment of a social compensation fee the child would no longer be regarded as a "black child" or an unregistered child, but also that it did not accept that there was a real chance that the first applicant's parents would be unable to pay the social compensation fee if they were required to do so in order to obtain a "*hukou*" for the first applicant. It was on this basis that the Tribunal found that "if" the first applicant was registered he would no longer be a member of the particular social group referred to as black children and would have the same access to education and health services as other children (although only children have some privileges).

34. It is clear that the Tribunal was of the view that the fact that the child was born outside the one child policy would not of itself cause difficulties **for his parents**, that he could nonetheless be registered and that he would be registered and that this would overcome the consequences of a breach of the one child policy for the child, in that he would no longer be "a black child" and would have the same access to education and health services as other children.

35. As suggested in *SZBQJ v MIMA* [2005] FCA 143 at [16] per Tamberlin J, in assessing the applicant child's position against the statutory criteria for a protection visa it was relevant for the Tribunal to have regard to whether there was a real chance of serious harm having regard to the applicant child's own particular circumstances, including the ability and willingness of his parents to pay any penalties imposed (in this case a social compensation fee) in order to obtain registration. The Tribunal specifically considered the applicant child's position. It proceeded on the basis that the child's parents would seek registration to obtain a *hukou* for the child and would be willing to pay any social compensation fee required to avoid discrimination or other consequences that the child might otherwise suffer as a black or unregistered. This was a reasonable assumption or inference given their evidence. While the first applicant's parents took issue with their ability to pay such a fee there was no suggestion that they would not be prepared to pay any such fee if able to do so. The Tribunal also found

that there was no real chance that they would not be able to pay a fee if required to do so to obtain a *hukou* for the first applicant.

36. In these circumstances, the Tribunal's finding that there was not a real chance that the first applicant's parents would be unable to pay the social compensation fee if required to do so (that is, if not exempted from liability to pay the fee) was such as to lead it to the conclusion that there was no real chance of the first applicant suffering the consequences of being a black child and hence being persecuted for reasons of being a black child. It was on this basis that the Tribunal found that the first applicant did not have a well-founded fear of persecution as a member of the particular social group of "black" or unregistered children. (See *SZBPQ v MIMA* [2005] FCA 568 at [25] – [26] per Hely J and *VTAO v MIMIA* (2004) 81 ALD 332 at [63] – [64] per Merkel J).

37. The Tribunal did not address the possibility that the child would remain unregistered by a finding that there would be "no problems" for an unregistered child, in the sense of no real chance that the applicant would be persecuted if he remained unregistered. As in *SZBPQ v MIMA* the Tribunal addressed the question of whether the applicant child would suffer harm constituting persecution as a consequence of his status (at the time of the decision) as an unregistered child born outside the confines of the one child policy. One aspect of that issue was whether the Tribunal was satisfied that the applicant child would be able to be registered. As Hely J suggested in *SZBPQ* at [30] "*whether the* [applicant] *faces a real chance of persecution by reason of his position as a 'black child' involves an assessment of all relevant facts, rather than of some only of those facts*". (Also see *VDAU v Minister for Immigration & Multicultural Affairs* [2003] FCA 363 at [35] and [2004] FCAFC 32). This is not a case in which the Tribunal found that the first applicant's parents were either unwilling or unable to pay the social compensation fee (see *SZBPQ* at [28]). It did not "require" the parents to pay the fee.

38. In adopting such reasoning the Tribunal understood and applied the "real chance" test. It did not accept that there was a real chance that the applicant would be persecuted for reasons of his membership of the particular social group of "black children" because it did not accept

that there was a real chance that he would not be registered. This was because it did not accept that his parents would be unable, and they did not claim to be unwilling, to obtain registration and to pay a fee if required to do so to obtain a *hukou* for the child. In that context the Tribunal was clearly of the view that the fact that the child had been born in breach of the one child policy (and was unregistered for this reason) could be overcome by paying money in order to obtain a *hukou* for the child. Hence the Tribunal did not have to address the issue of whether the applicant would suffer or risk suffering serious harm constituting persecution in China by reason of remaining a black or unregistered child. Albeit for reasons other than those suggested for the first respondent and subject to what is said below, no jurisdictional error has been established in relation to this aspect of the Tribunal decision.

Privileges accorded to only children

39. The next aspect of the applicants' submissions (said to be the first substantive ground) is the claim that while the Tribunal found that the applicant child would be registered and would no longer be a black child and would "*have the same access to education and to health services as other children (although only children have some privileges)*" it did not identify or discuss what "privileges" would continue to apply to only children and did not examine whether the denial of those privileges amounted to discrimination constituting persecution.

40. Counsel for the applicants observed that there was evidence from DFAT before the Tribunal that while registered children were entitled to access health and educational facilities, families with only one child may be entitled to "preference" in certain respects, but submitted that it was not clear whether the Tribunal reference in its findings to "privileges" available to only children included the preferential treatment referred to in the DFAT report.

41. As set out above, it was contended first that there was no consideration by the Tribunal of what would happen to the applicant child as a child born outside the one child policy if he remained unregistered and no consideration of the concerns raised by the first applicant's parents in

this respect as to a risk of harm and discrimination. However, as set out above, the Tribunal found, in effect, that there was no real chance that the applicant would not be registered.

42. However, it was also contended that the Tribunal had recognised that even if the applicant child became registered there would still be ongoing discrimination, because single children were entitled to certain privileges. It was pointed out that treating people differently could amount to discrimination giving rise to persecution. As stated in *Chen v MIMA* (2002) 201 CLR 293 at [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ:

> *Whether the different treatment of different individuals or groups is appropriate and adapted to achieving some legitimate government object depends on the different treatment involved and, ultimately, whether it offends the standards of civil societies which seek to meet the cause of common humanity. Ordinarily denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involves such a significant departure from the standards of the civilised world as to constitute persecution. And that is so even if the different treatment involved is undertaken for the purpose of achieving some legitimate national objective.*

43. It was contended that the Tribunal had failed to identify the "privileges" accorded to only children (being the discriminatory conduct in issue) and hence failed to consider and address whether such conduct was capable of constituting serious harm amounting to persecution. Hence it was submitted that the Tribunal failed to apply the "real chance" test, insofar as it failed to go on to make a determination as to whether that discrimination amounted to persecution.

44. Counsel for the first respondent contended first that the finding that parents returning from overseas with more than one child would not encounter difficulties addressed the issue of discrimination in the event that the applicant remained unregistered (but see the discussion above). As to the position if the child was registered, it was submitted that the Tribunal had considered whether the applicant child would suffer discrimination in the nature of serious harm if he were registered

following payment of the social compensation fee in the following finding:

> *… even the evidence produced by the Applicant's representatives after the hearing supports the view that a breach of the 'one child' policy can be overcome by paying money in order to obtain a hukou for the applicant… I find that if the applicant is registered he will no longer be a member of the 'particular social group' referred to as 'black children' and he will have same access to education and health services as other children (although only children have some privileges).*

45. It was also contended for the respondent that the Tribunal did not simply apply general principles, but did in fact specifically consider the applicant child's position were he to be unregistered and paid particular attention to the status of the first applicant's parents as PRC nationals returning from aboard with two children and the educational and work experience skills of the first applicant's parents.

46. In relation to the applicants' claim that the Tribunal failed to consider and determine whether the applicant child would face a real chance of persecution and serious harm in the event that he returned to the Peoples Republic of China, it was contended for the first respondent that the Tribunal in fact cited and applied the test in *MIEA v Guo* (1997) 191 CLR 559 and in *Chan Yee Kim v MIEA* (1989) 169 CLR 379. In that respect it was noted that the terms "well-founded" and "fear" require an applicant to have a subjective apprehension of persecution, but an apprehension that is grounded in some objective reality, described as a real chance of persecution, namely a chance that is not remote or insubstantial or a "far fetched possibility" (see *Chan* at 389, 398, 407 and 429.) It was also pointed out that it has been held that a fear is well-founded when there is a real substantial basis for it but not if it is merely assumed or based on mere speculation (see *Guo* at 572.)

Reasoning

47. The claims made for the applicant child in his protection visa application and to the Tribunal included a claim that he had a well-founded fear of persecution as a child born in contravention of the "one child" policy as well as claims based specifically on his lack of

registration. Moreover his parents made claims about possible "obstacles" the child would face "as he advanced through his life" (beyond the question of access to health and educational facilities) such as the right to serve in the military, work in a government job, own property, register for marriage and have a child and also claimed he would be the subject of discrimination. The Tribunal found that the first applicant was his parents' second child and that he had been born outside the confines of the "one child" policy.

48. While the Tribunal addressed the applicant child's claims as a member of the particular social group of "black or unregistered children" in its findings about registration, it also recognised (in the reference to the fact that "*only children have some privileges*") that the applicant was not an only child and that there was a distinction in China between the treatment of registered children who were only children and registered children who were not only children.

49. The Tribunal set out as part of the background to the decision, country information to the effect that because unregistered children were not listed on their parents' "*hukou*" they would face administrative difficulties in accessing government services, **for example** health care and education, for which possession of a valid "*hukou*" was a prerequisite. In its findings and reasons it cited DFAT advice that "*all registered children are entitled to access health and educational facilities although families with only one child may be entitled to preference in certain respects"* (referring to Documents CX73769 and CX71821) in referring to material put to the applicant child's parents. The advice quoted in the Tribunal reasons for decision does not specify the nature of the "preference" accorded to families with only one child.

50. However, the ultimate Tribunal finding was that: "… *if the Applicant is registered he will no longer be a member of the 'particular social group' referred to as 'black children' and he will have the same access to education and to health services as other children (although only children have some privileges).*" The Tribunal did not state whether the "privileges" accorded to only children were the same thing as the "preference" in relation to access to health and education facilities accorded to "families" with only one child referred to earlier in the

decision or whether the privileges accorded to only children encompassed some other or wider benefits.

51. Further the Tribunal did not address the issue of whether the conferral of privileges on only children and the fact that the applicant would not receive the "privileges" accorded to only children (even if he became registered) gave rise to a well-founded fear of serious harm constituting persecution for a Convention reason. While the Tribunal expressed the view that breach of the one child policy could be overcome by paying money in order to obtain a *hukou* for the child, it did so in the context of rejecting the applicant father's claim that if parents had a second child they would be severely punished. It is clear that the Tribunal's view was that a child born outside the one child policy could nonetheless obtain registration and hence obtain a *hukou*. However it recognised that certain benefits ("privileges") would only be available to only children.

52. In this context the Tribunal finding that it did not accept that there was a real chance that the applicant would be persecuted *"for reasons of his membership of the 'particular social group' of 'black children' if he goes back with his parents to their home in Shanghai now or in the reasonably foreseeable future"* did not address the ongoing impact on the applicant child of the lack of entitlement to benefits accorded to only children under the one child policy and whether such matters gave rise to a well-founded fear of serious harm constituting persecution for a Convention reason as contended for by the respondent.

53. The fact that privileges may be conferred as a benefit for certain persons under the one child policy does not mean that denial of such benefits could never constitute discrimination constituting serious harm (see *Applicant S v MIMA* (2004) 217 CLR 387 at [38] per Gleeson CJ, Gummow and Kirby JJ).

54. In *Applicant A v MIMA* (1997) 190 CLR 225 at 258 McHugh J stated that whether different treatment of persons amounted to persecution depended on "*whether different treatment is appropriate and adapted to achieving some legitimate object of the country*". This test was adopted by Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen (at [28]) in addressing the issue of persecution and the reasons for persecution. It was in that context that, as set out at [41] above, their

Honours referred to the need to consider the different treatment involved "*and, ultimately, whether it offends the standards of civilised societies which seek to meet the calls of common humanity*." (Chen at [29])

55. As their Honours pointed out at [18], even if a policy such as the "one child policy" is "*reflected in laws of general application which limit the number of children that a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy are laws or practices of general application*."

56. Their Honours also stated (at [21]):

> *To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory.*

57. In this instance in determining whether the applicant had a well-founded fear of persecution for a Convention reason in circumstances where the Tribunal had accepted that there would be different treatment of certain people, it was necessary for the Tribunal to identify the privileges accorded to only children and to address the "impact" of the laws or practices that accorded such privileges and whether such different treatment was "*appropriate and adapted to achieving some legitimate government object*" or whether such different treatment involved "*such a significant departure from the standards of the civilised world as to constitute persecution*" (*Chen* at [29]). As McHugh J recognised in *Applicant A* at 258: "*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*" (although also see s.91R of the Migration Act).

58. It may be that the Tribunal would have considered that the different treatment in issue did not amount to serious harm constituting persecution in s.91R(1)(b). It may be that there would be an issue about whether there was the requisite Convention nexus. It cannot

however be inferred that this is so in the absence of identification and consideration of the impact of the lack of benefits ("privileges") accorded to only children, particularly as the claims made to the Tribunal were not limited to the question of access to health and educational facilities. The Tribunal's error affected the decision. Even if it could be inferred that the Tribunal intended to refer only to the "preference" accorded to families with only one child in "certain respects" in relation to access to health and educational facilities, the Tribunal did not address whether the lack of such preference was such as to constitute discrimination which was serious harm amounting to persecution.

59. The Tribunal fell into error in failing to consider whether denial of the privileges accorded to only children amounted to discrimination which was serious harm constituting persecution within s.91R(1)(b) of the *Migration Act 1958* (Cth) (and hence whether the applicant child faced a real chance of persecution for a Convention reason on this basis) (see *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]). The findings that people returning from overseas with more than one child would not encounter difficulties and that there was not a real chance that the applicant child would be persecuted for reasons of his membership of the particular social group of "black children" did not address the claimed fear of persecution as a result of the operation of the one child policy in its entirety, insofar as it conferred benefits on only children to which the applicant would not be entitled, even if registered. In this respect the Tribunal fell into jurisdictional error as contended for by the applicants. The decision should be set aside and the matter remitted for reconsideration.

No evidence issue

60. The last substantive issue raised for the applicants relates to the fact that the Tribunal is said to have seemed to accept that payment of a social compensation fee would be required, but also that the first applicant's parents had lost all their savings. It was contended that not only was it apparently contradictory for the Tribunal to find that it did not accept that the parents had no assets at all, but also that there was no evidence in support of such a finding. It was submitted that the finding that the parents could pay the social compensation fee was a

finding critical to the ultimate finding of the Tribunal and that there was no evidence before the Tribunal as to the parents' means and assets other than in relation to the loss of all their savings.

61. On this basis it was contended that the finding that the parents would be able to pay the social compensation fee (if that was how the finding was to be construed) lacked logic and was arrived at without evidence and was an unreasonable exercise of the fact-finding power constituting a jurisdictional error on the basis of principles considered in *MIMA v S20/2002* (2003) 198 ALR 59 at [73], [138] and [173] as a decision not authorised by the Migration Act. It was acknowledged that *S20/2002* involved the interpretation of grounds under the former s.476 of the *Migration Act 1958* (Cth), in particular the ground that the decision involved an exercise of power that was so unreasonable that no reasonable person could have exercised the power and that the majority in *Applicant S20/2002* did not find that the decision was so illogical or irrational in basis that it could found the basis for judicial review. However it was submitted that it was nonetheless accepted (see McHugh and Gummow JJ at [73]) that such illogicality or irrationality could give rise to a jurisdictional error in circumstances where the power or the duty to grant or refuse a protection visa would not arise because the conditions for its exercise did not exist in law (consistent with the approach taken in *The Queen v Australian Stevedoring Industry Board and Another Ex parte Melbourne Stevedoring Company Proprietary Limited* (1953) 88 CLR 100.)

62. Counsel for the applicant accepted that in principle *Wednesbury* unreasonableness was not a ground for review, but contended generally that "no evidence" was a basis for finding jurisdictional error.

63. It was contended for the first respondent that *Applicant S20/2002* did not deal with a "no evidence" ground of review and that while there was authority such as *Australian Broadcasting Tribunal v Bond* (1990) 70 CLR 321 at 356 in relation to this issue, as long as it could be shown that there was some basis for the making of the decision and that the inference or inferences upon which the decision was based were reasonably open to the Tribunal, then the "no evidence" ground would fail (see *Bond* at 356).

64. As submitted for the respondent, in this instance the Tribunal had before it evidence and claims about the employment history, residence and employment prospects of the parents and the amount of payment that would be required for a social compensation fee. On that basis it was reasonably open to the Tribunal to find that the parents could make this payment. The Tribunal did not simply find that the first applicant's parents had lost all their money but nonetheless could pay the fee. Rather, while it accepted that the parents had lost all their "savings" it did not accept they had no "assets" at all after living in Australia since 1996. Nor, contrary to their claims, did it accept that neither parent would be able to obtain employment if they returned to Shanghai, in light of their employment skills, the flourishing private sector in China and the fact that the economy in Shanghai was booming. The Tribunal also addressed, but rejected, the applicant father's claims that no enterprise would be "brave enough" to employ him because he had a second child. It was in light of all of that evidence that the Tribunal did not accept that there was a real chance that the applicant child's parents would be unable to pay the social compensation fee (which it calculated to be between AUD$5,000 and $14,000) if they were required to do so in order to obtain a "*hukou*" for him.

65. It cannot be said that this was a case in which there was "no evidence". This is not a case in which it can be said that there is an "*absence of any foundation in fact for the fulfilment of the conditions upon which in point of law the existence of the power* [vested in the Tribunal] *depends*" (see *The Queen v Australian Stevedoring Industry Board & Anor* at 120 per Dixon CJ, Williams, Webb and Fullagar JJ).

66. Further, it has not been established that any want of logic in the Tribunal's reasoning of itself would constitute an error of law. Even if the High Court in *Applicant S20/2002* did not exclude the possibility that such a ground might exist (see McHugh and Gummow JJ at [35] – [37], [52], [73] – [74] and Kirby J at [142] – [146]), since that time six differently constituted benches of the Full Court of the Federal Court had ruled that *'want of logic'* does not constitute an error of law (see *NACB v MIMA* [2003] FCAFC 235 at [30]; *W404/01A v MIMIA* [2003] FCAFC 255 at [35]; *NATC v MIMIA* [2004] FCAFC 52 at [25]; *VWST v MIMIA* [2004] FCAFC 286 at [16] – [18]; *WAJW v MIMIA* [2004]

FCAFC 330 at [31] – [32] and *WAJQ v MIMIA* [2005] FCAFC 79 at [22]).

67. However as the Tribunal fell into jurisdictional error on one of the bases contended for by the applicants the matter should be remitted to the Tribunal for reconsideration in accordance with the law.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 26 February 2007