

**0805612 [2008] RRTA 407 (7 November 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0805612  
**DIAC REFERENCE(S):** CLF2008/86024  
**COUNTRY OF REFERENCE:** China (PRC)  
**TRIBUNAL MEMBER:** John Cipolla  
**DATE DECISION SIGNED:** 7 November 2008  
**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of China (PRC) arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

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

### **Definition of 'refugee'**

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

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

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant lodged a protection visa application with the Department of Immigration. The application forms indicate that the applicant was born in China. The applicant was married in China. The applicant is a Chinese citizen. The applicant arrived in Australia as the holder of a Chinese passport. The applicant advised that she had held a previous passport prior to the renewal.
21. In terms of previous addresses in the last few years outside Australia, the applicant advised that she lived in a number of addresses. The applicant claims to have had eight years of education, and the applicant worked in various places, and then was unemployed for about a year.
22. The form B submitted with the primary visa application indicates that the applicant has a family in the People's Republic of China, further to this that the applicant was assisted in the completion of the form by a registered migration agent.
23. The applicant's claims have been typed in to the Form C submitted to the Department of Immigration and those claims are replicated in full.

"On [date], I left China from [place], where is next to [place], following a tour group of [tour operator]; and I arrived in Australia on [date].

I, however, had to leave China only for the reason to escape from persecution by Chinese government.

My parents are farmers in a village in [city] Fujian Province, the People's Republic of China ("PRC"). They have [number] children in total; and I was the eldest one among those children.

In [date], while I worked at [place], I was chased by a young man called [name]. At that time, [the man] was just demobilised from the army and worked at [company name] as [occupation]. His [relative] was a police officer at [place]; and his [relative] worked at [a government office]; and his [relative] ran a [business]; and he also have many friends, who had previously stayed together with him in the army and who worked as police at [place] Public Security Bureau ("PSB") or [place] Provincial Public Department. With such strong official and financial background, [the man] rode roughshod over others and became absolutely lawless; and moreover, he was a typical hot-tempered man, so I was never interested in him.

But [the man] gave me strong pressure. He took advantage of his position as a [occupation] at the [workplace], following me from time to time, and he threatened

that I would not be able to escape from him; and he said that no girl could run away if he took a fancy to her.

On the other side, my parents really wanted me to get married with [the man]; because they liked to lighten huge living burden for raising other children. Also, my [relative], at that time, opened a [product] farm; and he did need some money.

It was owing to the pressure both from [the man] and from my parents that I had to agree to live together with [the man]. But, at that time, I was only [age]; and I was not eligible to get the marriage registered according to relevant law or regulations in China; and thus both [the man] and I were actually in a de facto relationship.

On [date], my [child] was born.

However, living together with [the man] made me suffer a lot. As I mentioned above, he was absolutely lawless and he was a typical hot-tempered man. Especially, after he took over his [relative's] business, he became a playboy and had many girlfriends. Also, he indulged in gambling; and particularly, he beat me many times if I tried to stop him to have affairs with other girls or not to get involved in gambling.

In the night of [date], [the man] lost a lot of money during gambling; and then he vented his anger on me; and consequently, I was beaten heavily and tortured inhumanly by him for a whole night. On the following day, I had to return to my hometown and made my mind to separate from him permanently, because I really could not bear his mistreatment and torture.

I took my [child] with me while I left [the man's] home; and I did not want my [child] to live together with such a person who not only never cared about me but also never looked after the child. I, particularly, had to guarantee my [child] to grow up in a proper and positive circumstance.

But, as I have said above, [the man] was from a family with strong official and financial background. His family, particularly, his [relative], used [their] special contacts with the government and also used the money to bribe the judges at the court. Finally, on [date], the [city's] People's Court ordered that my [child] had been in custody of [the man] from then on. Since then, I have completely lost my custody or guardianship rights for my [child].

I met my current husband, [name], later on; and I got married with [husband] on [date]; and I have [children], with [husband]; and I do have a happy family life with my kind husband.

But, I really could not forget my [oldest child] legally speaking, I still have the access right to my [oldest child], even though the court has given the custody right to [the man] However, since [date], I rarely have had a chance to access my [oldest child], because I have always been blocked by [the man] or his family.

I used to have an idea to appoint [name] who was a solicitor at [business] and who had previously acted on my behalf for the case in [date], to assist me to sue [the man] in order to get me the access right to my [oldest child]. But [solicitor] refused to do so. On the contrary, he advised me not to do anything again because everything would be useless due to [the man's] particularly family background. However, how could I do nothing? It is an unalterable principal that a nature mother must have the access rights to her nature [child].

From [dates] in order to get access to my [oldest child], I have spent [number] years to visit many government agencies, such as [details], and so but, I could not receive any help. Some officials or police had already been bribed by [the man's] family; and some of them have particular contacts with [the man's] family.

As a matter of fact, under the Communist dictatorship, it is definitely impossible for an ordinary people like me, who do not have any particular official background or who do not have strong financial background to receive any protections or to obtain any helps.

In order to have a chance to see my [oldest child], I had to wait for the outside of [the man's] home or my [oldest child's] school for a long time. But, it is very hard for me to genuinely see my [child] because [the man] or his [relative] always escorted my [child] together with some of their bodyguards. If I tried to approach [child] then I would be beaten by the bodyguards or [the man] himself. I sometimes had to kneel in front of them with tears in order to have a chance to see my [child].

On [date] it was Chinese New Year, according to Chinese tradition. I went to [the man's] home asking to see my [oldest child] in order to give my [child] some money and some gift according to the Chinese traditional culture. However, I was immediately refused by [the man] and his family. They not only beat me heavily but also threw the money and the gift down to the ground. I was very upset and I cried and shouted loudly in front of [the man's] home. Finally, I was arrested by the police who had been called by [the man], and then I was detained in a dark room at [place] Station.

From [dates], I was detained for [number] days; and [the man's relative] personally took responsible for my case. In order to force me to confess so called anti-government activities, [the man's relative] and those police abused their power as the police at the police station to torture me with various inhuman methods ... I eventually had to sign on a statement prepared by [the man's relative] uncle to confess my "anti-government" movement; and in the meantime, my husband had to pay RMB[amount] yuan as penalty.

After that I continually suffered from persecution because I had been treated as a person who have had anti-government movement even if it is clearly that I have wrongly been treated. I have frequently been questioned by the police from [place] Police Station, and I have publicly been insulted even in the street; and I have not allowed to approach [the man's] home; and especially I have not be allowed to see my [oldest child] again! Owing to huge pressure of [the man's] family, I was dismissed by my employer [company name ] in [date]; and I have become unemployed from then on.

Moreover, my husband also became a victim of persecution. [The man] or his bodyguards frequently went to my husband and gave him troubles. Also, they approached my neighbours, ensuring them that I was a dangerous person with strong anti-government ideologies and that I am a dirty woman with dirty personalities which have made it impossible for me to have any normal living.

In such a situation I have decided to go overseas. I have a good friend who worked at [company] and I then asked my friend to organise my trip to the overseas.

I, however, did not give up my struggles. In order to express my strong political opinions against the corrupt Communist dictatorship, I secretly distributed pamphlets in which I call ordinary people who had been subjected to various persecutorial

mistreatment or serious discriminations under the corrupt Communist dictatorship like me, to unite together and fight against the Communist dictatorship; and particularly to overthrow such a corrupt, inhuman and dirty system.

In the meantime, I organised some of people, who had similar sufferings like me, to distribute those materials for me; particularly during the period of National Conference of People's Congress in Beijing.

[Date], I took some friends to go to Beijing where we had distributed some of pamphlets against the Communist dictatorship during the period of the National Conference of People's Congress. Unfortunately, [some] my friends were arrested in Beijing in [date].

I had already left Beijing by that time but obviously, I was in danger. Not long after that I went to [place] and then left China with help of my friends. I cannot return to China because I have already become the target of the PRC authorities owing to my political activities against the Communist dictatorship. As a matter of fact my families, including my husband and parents, as well as my siblings, have already been subjected to investigation by the PSB.”

24. The Department of Immigration organised to interview the applicant. The Department was assisted by an accredited interpreter.

The applicant was interviewed on [date], and the details of her custody dispute with her ex-husband were discussed. The applicant presented a document which appeared to be a [place] People's Court Civil Case Court Verdict granting the dissolution of their defacto relationship, and granting custody to [name], the child's father, who was made responsible for the child's maintenance fees himself. In discussing this document I noted that the documents did not describe the applicant's access rights to her child, the client stated that it was true that the document did not mention her access rights, but the client stated 'it did not mention that I didn't have access rights.' I also noted that the document allowed her to appeal the decision within 15 days, and asked if the applicant submitted an appeal application regarding her access rights. The applicant stated that she did not submit an appeal against the access rights. but she has tried to visit the child.

I explained to the applicant that in regard to access to her child it seemed that it was a purely domestic matter. It seemed that there is a legal framework and laws to ask for access to her child. The applicant stated that she had visited many agencies but they were either bribed or related to them. The applicant was asked what evidence she had to show that the family of her ex-husband influenced the decisions of these agencies. After some discussion, the applicant agreed that she did not have any evidence, but insisted that the decisions were because of the influence of the family of her ex-husband.

The applicant was asked if she had approached any authorities in China regarding gaining access to the child, and the client named a number of agencies including [details deleted]. I asked the applicant if she had any documents to show she has approached these agencies, to which she replied that she is currently asking China for documents. I asked what documents she was getting, to which she answered that *she* needed to ask her agent. On further questioning it became clear that the applicant had not requested any such documents and was not sure what documents her family could collect. I warned the applicant that I found her answer to be misleading.

I asked the applicant about divorce in China I asked if young woman divorces and has it child, is it difficult for her to re-marry. The applicant stated that the court takes that into account when dividing the custody. The applicant *further* stated that, if a young woman is willing to take responsibility the court will make a favourable decision to the woman. I ask the applicant if what she was saying was that if a young woman is willing to take custody of the child, the courts will generally give her custody. The applicant replied that that was the normal practice, and she was fighting for custody and hoping that the child was with her, and the father does not look after the child well. I noted that in her case the courts granted custody to the father, and that the applicant had 15 days to contest the decision of the court, but the applicant did not contest it.

The applicant was asked when she remarried, and she replied on [date]. I asked how long had she known her current husband prior to their marriage, and she replied that she had known him for [period of time].

The applicant was asked why she had now come to Australia to ask for protection, to which she replied that many incidents happened, so she had to flee. I asked her to explain her statement. She said the first incident was on [date], when she bought presents and [items] and visited her ex-husband's family's house, to give them to her [oldest child], and they did not allow her in. I asked the applicant if, from [year to year], the family ever let her in to visit her [oldest child]. At first the applicant replied that since the verdict in [year] she rarely had a chance to visit her [child]. She never visited his family. I asked if it was correct that she never visited her [oldest child] in that period. The applicant replied that the last time she visited her [child] was in [date]. The applicant agreed that for [a number of ] years she never saw her child.

The applicant was asked what persecution she feared in China She indicated that she was alleged to be an anti-government element because of one incident, when she tried to visit her child on [date] with gifts and [items]. I asked that considering she had not seen her child in [number] years, and that they had a confrontational relationship, did she really expect them to let her see the child on that day, to which she replied that they never let her see the child. The applicant explained that she cried and screamed, and so thought they had lost face so they called the police who arrested her. The applicant stated that she was arrested and taken to [place] police station and held there. At interview the applicant claimed she was tortured and sexually abused in an effort to make her sign a confession of antigovernment tendencies. At this point in the interview the applicant was offered an opportunity to consider if she wanted to continue discussing this matter with me, or if she would be more comfortable discussing this with a female officer. The applicant elected to continue with the interview.

The applicant stated that after her release she was questioned by the local police, she was dismissed from her job, and her neighbours were told she was of bad character. Everyone, apart from her husband looked at her differently. She was asked what happened after that. and she said her husband encouraged her to travel overseas and not to come back. He was afraid that [the man] would set her up again. The applicant was asked if that was also what she was afraid of, she said that, yes she was scared, so she found someone who could help her with the application.

The applicant was reminded that in her application she stated that she had strong political opinions. She said that she believed the government officers are related to [the man], and the authorities should be overturned. She was asked what she meant by 'overturned', to which she indicated that she wanted to participate in anti-



government movements and distribute pamphlets to representatives. I noted that these actions seemed very distant from her original need, which was to obtain access to her child, and the applicant claimed from this incident she was able to see through the CCP corruption.

The applicant claimed that she wanted to join hands with all the victims hoping to overturn the tyranny of government. She formed a group with [number] people including herself. The applicant was asked how she came in contact with those people, and she claimed that this happened through friends. It was noted that her explanation did not seem to be realistic; to have anti-government feelings is a very clandestine thing in China. The applicant replied that that is why they did it in secret. I explained that I still did not understand how she would find these people. The applicant stated that she could not confront the government face to face, so all she could do was distribute matter.

The applicant explained how she and the group distributed pamphlets and travelled to Beijing during the People's Congress.

### **Reasons**

Whilst Country information indicates that petitioners and activists in China continued to face harassment, detention, and incarceration, I am not satisfied that the applicant has substantiated a claim of well founded fear of persecution for the following reasons:

- In general, I did not find the applicant to be a witness of truth. While I found that some elements of her written and oral testimony may be genuine, I formed the view that other elements were exaggerated, omitted or fabricated in the belief that it would enhance the success of her application.
- The applicant characterised her custody dispute as a fight against the Communist bureaucracy, however I have formed the view that it is a purely domestic matter and the applicant has had access to the Chinese legal system. Based on Country Information and the applicant's own experiences, I find that there is an adequate legal framework and processes in China to determine access to her child, without significant prejudice to the applicant as a woman, or for any other Convention reason. Although corruption does occur in China, I am not satisfied with the truth of the applicant's description of events, and that access to her child was denied to her due to the influence of the family of her ex-husband on the decisions of various Chinese agencies. It is clear from the applicant's own testimony that she did not pursue her legal rights at the time of the divorce, for her own reasons. In regard to the legal rights of women in the applicant's situation, *The UK Home Office. Country Information Report - China*. June 2008, states:

*On 28 April 2003, the Standing Committee Of the NPC voted to amend the Marriage Law. In addition to making bigamy a criminal offence punishable by two years imprisonment it made the following pronouncement on divorce, "In divorce cases, property division should be determined under contract by both parties. Should they fail, the people's court will make decisions in favor of the offspring and the female." The official People's Daily newspaper reported these amendments on the same day. As reported by the same source on 19 August 2003, "Couples will receive divorce certificates at once if they both agree to get divorced and settle amicably their property, any debts and care of any children, the new rules say. "...*

*On 25 January 2008 the BBC reported.- "The divorce rate in China has increased by almost 20% over the past year, with .1.-lm couples filing for separation during 2007... Some experts put the rise down to a change in the law which has made divorces easier to obtain. Others say China's one-child policy has produced a generation Of adults focused on their own needs and unable to sustain a relationship... The rising divorce rate is part of a long-term trend. Since China began its market reforms in the late 1970s, the number of people getting a divorce has quadrupled. This has been exacerbated by a change in the law in 2003 allowing couples to divorce in a day. analysts say. Previously, couples needed permission from either their employers or community committees to divorce. "*

*..Marriage Law provides for mediation and administrative penalties in cases of domestic violence.*

Similarly, the *United States Department of State Country Report on human Rights Practices\_for 2007, China, states:*

*.. The constitution states "women enjoy equal rights with men in all spheres of life. " The Law on the Protection of Women's Rights and Interests provides for equality in ownership of property, inheritance rights, and access to education. Policies that once allotted work-unit housing only to the husband have become gender neutral, and a 2005 Supreme Court interpretation emphasized that housing rights are shared equally, even in cases of divorce. The State Council's National Working Committee on Children and Women coordinated women's policy.*

At interview, the applicant was at first evasive about when she had been able to visit her [oldest child], then after some questioning it emerged that she had not seen her [child] for [number] years prior to [date] when she claims she went to the her [oldest child]'s house with gifts and [items], and was eventually arrested. As I have some doubts regarding the reliability of the evidence presented by the applicant, I cannot be confident that this episode occurred as described. Even as describe I find that the applicant's actions were a provocative act, apparently without any legal foundation, and with little consideration on the effect on the child who had not seen [their] mother for [number] years. Even up to the time of her arrest I find that the applicant's description of events to be a personal matter and not Convention-related.

I find it implausible that while in detention, the applicant was forced to sign a confession off anti-government tendencies. The applicant has submitted a document she indicates to be an Administrative Penalty Decision by the Public Security Authority, stating that she was found to *'...spread the Anti-Government words, instigated the anti-Government activities and disturbed the social order and .security order so as to cause extremely serious evil consequences in society'*.

However,

Country information (CX42649) indicates that little evidentiary weight can be placed on any official Chinese document. Any official Chinese document can heeither bought or forged in China Irregular or improper issue of documentation is widespread. I therefore find the incident did not take place as described by the applicant and she was not forced to sign a confession of anti-government tendencies.

I find the applicant's further claims, that after release from detention she developed strong political opinions, and wanted to overturn the Chinese Government by participating in anti-government movements and distribute pamphlets, to be implausible. At interview, at first the applicant did not mention her anti-government attitudes and indicated that after her release her husband encouraged her to go overseas. It was only after I reminded her of her claimed strong political opinions did she explain how she was involved in a group that distributed anti-Government pamphlets. The applicant's explanation of how she met these like-minded people was vague and lacked credibility. I find it implausible that the applicant would be motivated into clandestine political activity aimed at overturning the Communist Party, essentially because of her inability to gain access to her [oldest child]. There is no indication that prior to her detention that the applicant was in any way involved in political or human rights activism, or had any strong views about these matters. It is therefore implausible that the applicant, a person who had no past involvement in political or human rights activism, would so readily commence such an aggressive, clandestine, and reckless course of action. I find her claims of secretly distributing propaganda material to protest against a corrupt government to be superficial and formulaic. I therefore do not accept that applicant organised and distributed propaganda materials, and consequently has now come to the adverse attention of the Chinese authorities.

On the basis of the above information, I am not satisfied that the applicant was of any interest to the Chinese authorities for a Convention-based reason at the time of her departure from China. Nor am I satisfied that there is any evidence to indicate she would be of any interest to the authorities for a Convention-based reason in the reasonably foreseeable future if she were to return.”

25. The Tribunal conducted a hearing and the applicant gave evidence with the assistance of an accredited interpreter. The applicant advised that she was born in the People's Republic of China.
26. The Tribunal asked the applicant whether prior to coming to Australia she had ever worked for a particular type of company in the People's Republic of China, and she advised that she had not.
27. [Information deleted in accordance with s431 of the Migration Act 1958 as this information could identify the applicant].
28. The applicant confirmed that she did come to Australia with the tour group, she advised that there were a lot of people in the tour group. [Details of activities in Australia deleted.]
29. The Tribunal asked the applicant whether she brought any money to Australia with her when she left the People's Republic of China, and she advised that she had a specified sum in her possession. The Tribunal asked how the applicant was supporting herself in Australia, and she advised that she is involved in part time work and that she earns a certain amount per week. She advised that she heard about her migration agent through a Chinese newspaper, and that she has paid for assistance with her application for a visa.
30. The Tribunal asked the applicant whether she had ever travelled outside China prior to her trip to Australia and she advised that she had not. The Tribunal asked the applicant whether the passport that she had tendered at hearing was her first passport, and she advised that it was not, that it was a renewal. The applicant stated that her first passport was issued to her earlier. The Tribunal asked the applicant about how she applied for a renewal of her passport

and she advised that she had to attend the passport office, and that had to be photographed by computer, and then was issued with a new passport at a cost of RMB200.

31. The Tribunal once again made reference to the memo from the tour group on the Departmental file. The memo indicated that all members of the tour group had been thoroughly vetted by the tour group company, and that their finances had all been checked. The Tribunal asked the interpreter to read paragraphs from this memo to the applicant and invite her comment on its contents.
32. The applicant stated that a friend worked for the company whose employees travelled to Australia as part of an incentive tour group. The applicant stated that she had to provide her passport to her friend that worked at the company and pay a sum of money. She stated that her friend organised for her to form part of the tour group to Australia, and that her husband paid the money, and that the funds included the cost of the air fare to Australia.
33. The Tribunal stated that if it were to ring the company in the PRC, whether they would be able to confirm or otherwise that the applicant was an employee of the organisation. The applicant claimed that they would have no record of her being an employee as she had never worked for the company.
34. The Tribunal noted that the applicant claimed that she worked for another company. The Tribunal noted that the applicant failed to disclose her position and monthly salary. The applicant stated that she was paid a specified amount per month, that she worked for this company for a number of years in one position.
35. The Tribunal asked the applicant to provide the address of the business and she stated the location and the phone number.
36. The Tribunal put the following information to the applicant, the Tribunal noted that the applicant had travelled to Australia as part of a tour group, and that this travel was on the pretext that she was an employee of a particular company. This information was clearly falsified, to effect a migration outcome, and the Tribunal asked the applicant whether she would be willing to provide falsified information to the Department to effect a protection visa outcome. The applicant advised the Tribunal that all of the information she had provided to the Department in her application was true and correct and that she had not provided any falsified information in relation to her claims for protection.
37. The Tribunal asked the applicant to account why she held a real fear of persecution in the People's Republic of China. The applicant advised that she formed a relationship, whilst she was a minor, and that there was a child born of that relationship. She stated that her former de facto partner and his family had strong connections to local PRC Communist Party officials. She described the relationship as abusive and controlling. She advised that after the breakdown of the de facto relationship, her ex-de facto obtained custody of their child, and precluded her from having any access to the child. The applicant claimed that she found this extremely distressing, and that in the intervening years she tried many ways to facilitate access to this child, through official channels that were unsuccessful.
38. The Tribunal asked the applicant what she did in order to try to facilitate access to this child. She advised that she went to a complaint office. She noted that she wanted to obtain access to her child, and the staff of this office told her to return to her home and when they were able to provide any details about her enquiry they would let her know. The applicant contacted

the complaint office after a number of months and was told that she needed to go to the city, and that she would need to lodge a complaint at a government complaint office in that city. The applicant stated that she went to the government complaint office. She prepared a complaint letter around the access issues and gave it to staff of the office. Once again she was told by staff to return home and that they would contact her in due course. The applicant stated that after a long time she went back to this office but there was no solution. A staff member who felt pity for the applicant because of her plight said that it was pointless trying to pursue the access through that organisation.

39. The applicant stated that she then went to the People's Court, and registry staff at the People's Court said that they would have to abide by any official court ruling pertaining to custody and access.
40. The applicant stated that a former classmate of hers suggested that she seek assistance through a local woman's association so the applicant approached a local woman's association to attempt to get assistance in relation to her pursuit of access to her child. The applicant stated that the woman's association advised her that they were only concerned about women who had more than one child, and that they were not able to provide her with any assistance. The applicant then attended the anti-corruption bureau, and to the local prosecution department. They advised her that any litigation pertaining to the access issue would have to be initiated by the Public Security Bureau which would refer it to the anti-corruption bureau and then to the prosecution department for prosecution.
41. The Tribunal asked the applicant what the Public Security Bureau was able to do to assist her, and she advised that they would not intervene because this was not a criminal case.
42. The applicant stated that all the official bodies that she approached for some form of assistance in relation to the obtainment of access to her child, failed to provide her with assistance which left her extremely frustrated and upset.
43. The Tribunal asked the applicant whether she had ever been arrested. She stated that she had been arrested on a specified date. The Tribunal asked the applicant to describe the circumstances around the arrest. The applicant stated that due to the frustration that she felt as a result of the inaction of local government bodies and instrumentalities to assist her in facilitating access to her child she launched a protest outside her former de facto's residence. As a result of her actions, the Public Security Bureau were called and she was arrested and detained for a period. The applicant stated that she had attended her ex-husband's residence to give her child money but was denied access and this is what prompted her to protest outside her ex-husband's house.
44. The Tribunal asked the applicant to describe the circumstances of her detention. The applicant stated that she was subject to extensive interrogation, she was also kept in a small cell, and she was forced to engage in menial work. The applicant stated that one night the light was off in her cell and a male officer entered the cell and that she was subject to a serious assault. At this stage of the hearing the applicant became extremely distressed and the Tribunal offered to stop the hearing until she regained her composure but the applicant wished to proceed with the hearing.
45. The applicant stated that she was detained in a local police station.

46. The applicant stated that after she was released from detention, she was warned not to be involved in any public mischief or any protest pertaining to her plight to facilitate access to her child. The applicant stated that she was extremely distressed and traumatised after her release from detention, and that she was traumatised by the serious assault that she had experienced whilst in detention. The applicant advised the Tribunal that she was so distressed by what transpired in detention, that she wished to protest about the inhumane treatment that she was subjected to, and bring this to the attention of the authorities. The applicant claimed that she produced some pamphlets which pointed out the difficulties that she had experienced trying to facilitate access to her child, and her experience of corrupt officials, who were supportive of her ex-de facto's family because of their connections to the local Communist Party officials. The applicant stated that she distributed pamphlets both in her province and in Beijing. The applicant stated that she travelled with some friends to Beijing and they distributed pamphlets to coincide with a big event. The applicant stated that as a consequence of this activity some of her friends were arrested in Beijing and that their arrests acted as a catalyst for her to attempt to flee the People's Republic of China as she held a belief that she would be targeted for being involved in anti-government activity.
47. The applicant stated that it was at this time that she and her husband sought some mechanism for her to flee the country, because her safety and freedom was at risk.
48. Submitted to the Department, were translations of original documents relating to an administrative panel decision by the Public Security Authority. The Penalty Notice notes that on a specified date, the applicant, at the front gate of the home of her former de facto created a disturbance and spread anti-government sentiment and that her actions were observed by witnesses and through photographic evidence. As a result, she was subject to a period of detention and a fine.
49. Also provided to the Department was a copy of an original document, pertaining to be summons from the local Public Security Bureau indicating that the applicant had been involved in the distribution of anti-government propaganda materials and pursuant to the criminal procedure law of the People's Republic of China, she was summonsed to appear for interrogation.
50. The applicant brought copies of these original documents to the Refugee Review Tribunal hearing and tendered them in evidence.

## **COUNTRY INFORMATION**

### **What is the situation of those accused of being “counter-revolutionary” or involved in “anti-Government activities” in China?**

51. Independent country research indicates that the term ‘counter-revolutionary’ was typically used to describe people who the Chinese government had deemed ‘enemies of the state’ and the usage of the term within China stems back to the early revolutionary rhetoric of the 1940s. ‘Counter-revolutionary’ typically arises in reports of the Tiananmen Square protests of 1989 as the term used by the government to condemn participants (see for example Chou, J. 2006, ‘Who’s in China’s Prisons?’, *The Weekly Standard*, 24 April –; ‘Tiananmen democracy protester released from prison’ 2006, *Agence France Presse*, 22 September –; for a background of the rhetoric on ‘counter-revolutionaries’ see Havelly, J. (undated), ‘Mao: A Profile’, *MCW News* <http://mwcnews.net/glossary/func,display/page,25/catid,49/Itemid,257/> – Accessed 10 April 2008 –).

Sources indicate that since the late 1990s, the Chinese government has attempted to replace the term ‘counter-revolutionary’ with the new term ‘endangering state security’. In 1999 the Chinese constitution was amended to remove a reference to “counter-revolutionary activities” and replace it with the term “criminal activities that endanger state security”:

Article 28 of the Constitution, which reads: “The state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes criminal activities that endanger public security and disrupt the socialist economy as well as other criminal activities; and it punishes and reforms criminals”, is revised as follows: **“The state maintains public order and suppresses treasonable and other criminal activities that endanger state security; it penalizes criminal activities that endanger public security and disrupt the socialist economy as well as other criminal activities;** and it punishes and reforms criminals.” (People’s Republic of China 1999, ‘Amendment To The Constitution Of The People’s Republic Of China’, Adopted At The Second Session Of The Ninth National People’s Congress, 15 March <http://www.hklii.org/hk/legis/en/ord/2004.txt> – Accessed 10 April 2008 –).

Sources indicate that since 1997, people accused of ‘counter-revolutionary activities’ have been charged under a range of new laws relating to ‘political crimes’ and ‘state secrets’. According to Human Rights Watch, the former 1979 Criminal Code had 12 “main categories of counter-revolutionary crime in fifteen separate articles”. The new 1997 ‘Criminal Code’ applied the term “endangering state security”. It argued that this “state security” law includes crimes of a non-political nature such as assisting “imprisoned dissidents” and involvement in “reactionary sects and secret societies”. Also, the new ‘Criminal Law of the People’s Republic of China’ also has a section concerning ‘counter-revolutionary activities’ under ‘Part 2: Special Provisions – Chapter 1: Crimes of Endangering State Security’ (see ‘People’s Republic of China Criminal Law (March 1997 revised version) – Part II: Special Provisions – Chapter I: Crimes of Endangering State Security’ in Human Rights Watch/Asia 1997, *Human Rights in China – Whose Security? “State Security” in China’s New Criminal Code*, vol. 9, no. 4, April; see also Amnesty International 1998, ‘People’s Republic Of China: Nine Years After Tiananmen, Still A “Counter-Revolutionary Riot”?’ , 2 June <http://www.amnesty.org/en/library/info/ASA17/011/1998> – Accessed 16 April 2008 –; Human Rights Watch/Asia 1997, *Human Rights in China – Whose Security? “State Security” in China’s New Criminal Code*, vol. 9, no. 4, April, pp. 13 –Attachment 32).

However, the Criminal Procedure Law provides for “counter-revolutionary cases and cases endangering state security” to be presided over, in the first instance, by the Intermediate People’s Court. This suggests that ‘counter-revolutionary cases’ may still be heard (People’s Republic of China 1997, ‘Criminal Procedure Law of the People’s Republic of China’, 1 January –).

Several reports over the past twelve months may provide information on the situation of those arrested under the ‘state security’ laws. In May 2007, Human Rights Watch reported:

Hu and Zeng, two of China’s most well-known campaigners for the rights of people living with HIV/AIDS, were placed under house arrest and banned from leaving the country on May 18. During a four-hour interrogation at a Beijing police station, police told Hu that the couple was “**suspected of harming state security**” (Human Rights Watch 2007, ‘China: Activist Couple Accused of Endangering State Security’, 21 May <http://www.hrw.org/english/docs/2007/05/21/china15979.htm> – Accessed 11 April 2008 –

On 10 April 2008, *Yahoo! News* reported on China’s human rights record:

The boulevard of freedoms that Chinese people enjoy may have widened, but it is still lined with precipices. You may be able to criticize the ruling Communist Party over dinner with friends, but airing such views in public – for example on the Internet – can earn you years of prison time.

... Citizens who have slipped off the rocks, and ended up in jail, include land rights activists, practitioners of the banned Falun Gong spiritual movement, tenants protesting eviction from their homes by developers, defense lawyers, and Tibetan Buddhists and Muslim Uighurs demanding more respect for their cultures and religions, members of Christian churches not authorized by the state, and anticorruption campaigners, among others.

**Often they are convicted of endangering state security by inciting subversion or separatism. Mr. Kamm estimates that 4,000 prisoners are serving sentences for such crimes, of which outsiders know the names of only a few hundred** (Ford, P. 2008, 'Amid human rights protests, a look at China's record', *Yahoo! News*, 10 April [http://news.yahoo.com/s/csm/20080410/wl\\_csm/orights\\_1](http://news.yahoo.com/s/csm/20080410/wl_csm/orights_1) – Accessed 11 April 2008 –).

On 23 March 2008, *The Age* reported on the growing number of arrests for “endangering state security”:

**The latest official statistics show the number of arrests for “endangering state security” rose in 2007 to their highest level in eight years.** The figures, released by a senior Chinese law enforcement official on March 10, show the increase in political arrests follows a doubling of such arrests in 2006, according to the Dui Hua Foundation, a non-profit US group that monitors Chinese legal issues.

Quoting figures presented to China's parliament, the National People's Congress, the foundation said Chinese prosecutors had approved “formal” arrests for 2404 individuals on security charges during the five years from 2003 to 2007.

The number of such arrests in 2007 reached 742, the highest since 1999. The Dui Hua Foundation says the charges are primarily aimed at suppressing political dissent (Hyland, T. 2008, 'State of control', *The Age*, 23 March <http://www.theage.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2008/03/22/1205602720580.html> – Accessed 11 April 2008).

Finally, the US Department of State 'Country Reports on Human Rights Practices' for China, 2007, noted:

Over the past several years, Falun Gong members identified by the government as “core leaders” were singled out for particularly harsh treatment. **More than a dozen Falun Gong members were sentenced to prison for the crime of “endangering state security,”** but the great majority of Falun Gong members convicted by the courts since 1999 were sentenced to prison for “organizing or using a sect to undermine the implementation of the law,” a less serious offense. Most practitioners, however, were punished administratively. Some practitioners were sentenced to reeducation-through-labor. Among them, Yuan Yuju and Liang Jinhui, relatives of a Hong Kong journalist working for a television station supportive of Falun Gong, were sentenced to reeducation-through-labor for distributing Falun Gong materials. Some Falun Gong members were sent to “legal education” centers specifically established to “rehabilitate” practitioners who refused to recant their belief voluntarily after their release from reeducation-through-labor camps. Government officials denied the existence of such “legal education” centers. In addition hundreds of Falun Gong practitioners were confined to mental hospitals, according to overseas groups (US Department of State 2008, *Country Reports on Human Rights Practices – 2007 – China*, March 11, section 2.C [www.state.gov/g/drl/rls/hrrpt/2007/100518.htm](http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm) – Accessed 12 March 2008 –).



## **Domestic Violence in PRC**

The US Department of State's *Country Reports on Human Rights Practices 2005* provides the following information on the problem of domestic violence in China:

According to a 2004 survey by the All-China Women's Federation (ACWF), 30 percent of families had experienced domestic violence, and 16 percent of husbands had beaten their wives. The ACWF reported that it received some 300 thousand letters per year complaining about family problems, mostly domestic violence. The actual incidences were believed to be higher because spousal abuse went largely unreported. According to experts, domestic abuse was more common in rural areas than in urban centers (US Department of State 2006, *Country Reports on Human Rights Practices 2005 – China*, 8 March, Section 5 Women).

Reports state that there is no national law specifically on domestic violence in China. The Marriage Law and the Law on the Protection of Women's Rights both mention domestic violence. However, definition deficiencies, problems with implementation and lower penalties hinder their effectiveness.

### **FINDINGS AND REASONS**

52. The applicant was born in the People's Republic of China. The applicant claims are that she commenced a relationship with a man whose family had connections to local government officials. The applicant was underage at the time that she commenced this relationship, and the child was born of the relationship.
53. The applicant described the relationship with her former de facto as a violent one, and claims that her former de facto was unfaithful to her. The relationship broke down due to the violence and infidelity, and the applicant took their young child with her.
54. The applicant in her claim advises that the ex de facto partner sought orders for custody of their child and was successful with the court awarding custody.
55. The applicant claims that she has been attempting to obtain access to her child and that she had engaged legal advice to pursue access orders. However, the lawyers that the applicant approached were unwilling to provide assistance to her, and she believes that this was due to their fear of initiating an action against a person whose family had strong political ties.
56. The evidence before the Tribunal indicates that the applicant made substantial attempts to get access to her child, and that she spent a number of years approaching a number of government agencies. The applicant stated that she was not able to get any satisfactory assistance from these organisations.
57. The applicant attended the home of her previous de facto in order to visit her child and provide her child with some gifts. The applicant was refused access by her former de facto and his family, the applicant became extremely upset and distressed and as a result the authorities were called and the applicant was taken to the local police station.
58. The applicant was detained for a number of days. The evidence provided to the Department, and to the Tribunal at the hearing indicates that the applicant during those days was subject to both physical and serious assault, and at the hearing, the applicant appeared visibly shaken and distressed at recounting the details of her detention.

59. The applicant was so incensed by the treatment metered out to her by the local Public Security Bureau officials, and was so distressed by the lack of intervention regarding the access issue from local authorities, that she wished to express her political opinions against what she described as the corrupt Communist dictatorship.
60. The applicant was involved in the production of and distribution of anti-communist propaganda, which she distributed in her province and in Beijing.
61. The evidence before the Tribunal indicates that the applicant as a result of these activities has been targeted, as persons involved in anti-government propaganda distribution in Beijing were arrested, a few weeks prior to the applicant's departure from the PRC.
62. The applicant has provided documents which corroborate the adverse profile that she has with local security officials. The applicant has given evidence that indicates that her current husband and family members have been the subject of intervention and investigation at the hands of the Public Security Bureau since her departure from the PRC.
63. Country information which has been cited by the Tribunal indicates that persons, involved in anti-government activities, are targeted by the authorities in the PRC. The applicant has given a coherent and consistent account of her claims at the hearing. The Tribunal accepts that the applicant was subject to arbitrary arrest and detention, and that she has been of interest to the security apparatus in China since that time.
64. As a result of my finding, I am satisfied that there is a real chance of persecution occurring to the applicant in the reasonably foreseeable future if she were to return to the People's Republic of China. I am satisfied that the applicant faces the prospect of persecution in the nature of serious harm on her return to China in accordance with section 91R(n)(b) of the Migration Act. This harm would involve arrest and imprisonment. I am satisfied that the applicant's political opinion is the essential and significant reason for the persecution which she fears, as required by paragraph 91R(n)(a) of the Act. I further consider that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R (n)(c) it is deliberate or intentional and involves selective harm for a Convention reason.
65. The focus of the Convention definition is not upon the protection of the country of nationality which might be able to provide in some particular region, but upon a more general notion of protection by the country. The international community is not under an obligation to provide protection outside the borders of the country of nationality if real protection can be found within those borders. Therefore, even if the applicant has a well founded fear of persecution, the Convention does not provide protection if they would nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country. See the case of *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs (1994) 52 FCR 437 per Black CJ at 440-1*.
66. However, this principle only applies to people who can genuinely access domestic protection and for whom the reality of protection is meaningful.
67. In this case, I have considered whether relocation is a reasonable option. The country information suggests that persons who have voiced strong oppositional policy or opinion in relation to the government of the People's Republic of China are targeted throughout China. Therefore I find that in this case, relocation is not a reasonable option for the applicant.

68. I have considered whether the applicant has a legally enforceable right to enter and reside in any other country, other than PRC as required by section 36 of the Act. I am satisfied that the applicant does not have a legally enforceable right to enter and reside in any other country other than the PRC. Therefore, I am satisfied on the evidence before that the applicant has a well founded fear of persecution for a Convention based reason and accordingly I am satisfied that the applicant is a refugee.

**DECISION**

69. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies the provisions of section 36(2)(A) of the Migration Act. Namely, that she is a person to whom Australia has protection obligations under the Refugees Convention.

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

Sealing Officer's I.D. prrt44