

0801613 [2008] RRTA 234 (17 June 2008)

DECISION RECORD

RRT CASE NUMBER:	0801613
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Richard Derewlany
DATE DECISION SIGNED:	17 June 2008
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of China (PRC), arrived in Australia on [date] and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas on [date]. The delegate decided to refuse to grant the visas on [date] and notified the applicants of the decision and their review rights by letter dated [date].
3. The delegate refused the visa applications on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal on [date] for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. 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.

11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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

20. The Tribunal has before it the Department's file relating to the applicants. 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.

Protection visa application

21. The first named applicant completed a Part C form 866C in which he submitted his claims to be a refugee. In a statement attached to his visa application he stated that he arrived with his wife in [city A] in [month, year], and they had come to visit their [child] who was a student in Australia. Before coming to Australia the first named applicant was self employed as a [driver] and his wife was a [manual worker]. They had 2 children, and their other child, lived in China. The first named applicant stated that the local government was 'coercing' them in China because they had breached the one child policy. They had to pay a government penalty. Their [child] was born in [year] and there was a time when [his child] could not get Chinese 'citizenship'. [His child] could not be enrolled at primary school and the first named applicant had to pay Yuan [amount] to the 'leader' of his local police station, to get Chinese citizenship for his [child] He could not say anything to the local government about having to bribe a police officer. The authorities used to write 'Pay Pay' in paint on his house wall.
22. The first named applicant stated he did not have enough money to pay the authorities, though the issue of his [child]'s citizenship was resolved. When he paid Yuan [amount] to the local government '[number] years later', they said it was not enough and he had to pay double. He felt he always had to pay different penalties, and he did not understand why this all related to having 2 children.
23. The first named applicant stated in Part B form 866B that he was married to the second named applicant (henceforth referred to as the applicant spouse). The applicant spouse completed a Part D form 866D, making an application as the member of the family unit of the first named applicant.

Application for review

24. The applicants appeared before the Tribunal on [date] to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
25. The first named applicant confirmed that he had lived in [village B], [town C], since his birth, that he completed [number] years of education, and that he married the second named applicant in [month, year]. He stated he was self employed as a driver: from [year] to [year] he drove a [vehicle type], and from [year] to [year] he drove a [vehicle type] His average

monthly income prior to departing China for Australia was RMB [amount]. His wife worked in a [company] but she did not always go to work as she was afraid of being arrested. She earned about RMB [amount] per month.

26. The first named applicant stated he had 2 children, and his [child] was in Australia as a student since [month, year]. He understood that after doing a [course name] course, his [child] had been studying [course name], but he was unsure of the name of the [education provider]. The Tribunal asked what fees the first named applicant had to pay for his [child]'s studies. He stated he had paid RMB [amount] and his [child] paid the rest, but he did not know what the total fees were. The Tribunal indicated it seemed unusual that the first named applicant would not know the total costs. He stated that his [child] worked to earn some income at the same time [they] studied. He stated that his second child, was being looked after by his [relatives] in China.
27. The first named applicant stated that he feared returning to China because he had violated the one child policy and the authorities kept arresting him and wanted to force him to undergo a 'ligation'. The Tribunal asked for clarification as to whether he was referring to himself, or his wife when referring to the ligation. He stated he was referring to himself. The Tribunal asked when he was arrested. He stated he could not remember clearly. The Tribunal asked him to clarify when the authorities arrested him. He said he had problems after the birth of his [child] in [month, year]. He was told he violated the one child policy and would have to pay a fine. He stated he was arrested after his [child] was born. He stated the authorities put a person into detention and they could not be released until a fine was paid. Many authorities were involved and he was detained for one day, and released after his [relative] paid a fine as a 'guarantee'. After that he was arrested by other authorities. The Tribunal asked the first named applicant to clarify his statement. He said he was first arrested by the local authorities, and the other authorities were also from the local government; there were several people in charge of the birth control policy and they all had the authority to have people like him arrested. He was arrested a second time in [month, year].
28. His brother paid a fine of RMB [amount], but the first named applicant was told that RMB [amount] was not enough and he should pay RMB [amount]. The Tribunal asked whether the authorities gave a specific amount for the total fine. He stated that he was told RMB [amount] was an initial payment and the total was RMB [amount], but he did not pay the total amount. He had paid RMB [amount] in total, and had refused to pay the rest. The Tribunal asked why he refused to pay and he stated it was because the fine was not reasonable. The Tribunal indicated that it appeared the applicant had refused to pay the fine or fee that was applied generally for persons who had breached the one child policy. The Tribunal referred to independent information regarding the 'social maintenance' or 'compensation' fee imposed on those who breached the one child policy, and its general application. The Tribunal raised the issue that if the law relating to the 'social maintenance fee' was being applied by the authorities in a standard way, then it was difficult to see that this amounted to persecution. The Tribunal raised the issue that if the first named applicant refused to pay the rest of the fee, then any actions by the authorities against him would appear to be because of his refusal to pay, rather than because they had targetted him for a Convention reason.
29. The first named applicant stated he still had to pay the fine and he could not make a living in China because the route he used to drive his [vehicle type] on had been 'taken' by the government. He explained that the government had installed [infrastructure] on the route, which had affected his ability to earn a living. The Tribunal indicated that it appeared this was a matter of the government providing [infrastructure], and did not appear to indicate the

authorities were targeting him for a Convention reason. The Tribunal indicated it appeared difficult to see how this established he had a well founded fear of being persecuted if he returned. The first named applicant indicated he had paid a lot of money for his [child]'s student fees, and his source of income was an issue. The Tribunal indicated it understood the applicant might have to consider other options of employment, but it was difficult to see how this constituted persecution. He told the Tribunal there was no other matter he wished to raise.

30. The Tribunal asked the first named applicant what the authorities did in the [number-number] year period after they advised him he had to pay the social maintenance fee for breaching the one child policy. He stated they kept asking for the fine to be paid. He kept avoiding meetings with the authorities by doing things such as going away. They used to come to his home sometimes, though it was hard to tell how often. Sometimes he used to go away and stay with relatives for a few days. The Tribunal asked whether there were any other consequences. He said the authorities asked his wife to have a tubal ligation, and he then clarified that it was only his wife (and not himself, as earlier stated) who had been asked to undergo a ligation. They asked her to do this in [year], and kept asking over the following [number] year period, but took no further action.
31. The Tribunal asked the first named applicant to explain further the issue of his [child] and [his child's] schooling. He stated [his child] could not enrol at school and he had to bribe the head of the school RMB [amount] for [his child] to be admitted, albeit on the basis that the school would not keep official records of [his child]. His [child] still attends school, though they are not sure where [his child] will be able to enrol after [his child's] primary school is finished.
32. The Tribunal also took evidence from the applicant spouse, who stated that she and her husband did not wish to return to China as they had violated the government's birth control policies, and the authorities kept coming to their home and they could not live a peaceful life in China. She stated her husband had worked as a driver since [year], but now they were subject to persecution because there were [infrastructure] and her husband no longer had any [work]. She also stated that the authorities kept fining her husband but did not issue any receipts. They also damaged the roof of their house and the family had to stay at a friend's house. She stated that if they paid the fine they were entitled to a receipt, but they did not get one; the authorities just took the money and used it themselves.
33. The Tribunal asked what amount they had paid, for which they did not get a receipt. She said they were fined several times and she could not remember the amount clearly, perhaps it was RMB [amount] The Tribunal indicated it appeared unusual she would not remember the amounts. The Tribunal asked when they paid the fines. She stated that because they gave birth to their [child] before they were married, there were fined at that time. They had to pay about RMB [amount] to register their [child] in [year], and they were fined RMB 2-3,000 when their [child] was born. The Tribunal stated that she had indicated that fines of RMB [amount] were imposed a number of times. The applicant spouse stated they were fined several times and it was [amount] RMB. The Tribunal raised its concerns that the applicant spouse did not appear to know whether the fine was one fine or several fines. The applicant spouse was uncertain about this issue, and stated that the fines might total over RMB [amount], and then stated they may have been RMB [amount]. The Tribunal raised its concern that the applicant spouse's evidence on the issue was vague and she did not appear to know what the total fines imposed were. She stated they were fined several times and she could not remember the total amount as it was a long time ago. The Tribunal asked again

what amount they paid, for which they did not get a receipt. She stated again they were fined several times but she could not remember the amount, and then raised again the issue that the authorities damaged their house, and that they suffered because of the [infrastructure], and could not make a living. She stated the house was damaged in [year]; they were not married, and they had to live for [number-number] months at someone else's house. They went to [province D] to work for about [number] year and then returned to their home.

34. The Tribunal then indicated to the first named applicant that it would give particulars of evidence given by his wife that might form the reason or part of the reason for affirming the decision under review. The Tribunal explained that it would outline the information and explain the relevance, and ask the first named applicant whether he wished to respond to it or comment on it. The Tribunal outlined that the applicant spouse told the Tribunal that the family was fined a number of times because of the birth of their [child], and a number of payments were made to officials without receipts being issued. The Tribunal explained that her evidence about the fines was very vague, and it contradicted the picture provided by the first named applicant. The first named applicant's evidence was that the total fine was RMB [amount], and that an initial fine of RMB [amount] was paid. He had told the Tribunal he had paid a total of RMB [amount] but refused to pay the rest, and he had confirmed this to the Tribunal a number of times. The first named applicant's information regarding the fines and his refusal to pay the remaining amount was quite specific and clear, but the applicant spouse's evidence was uncertain and vague. The Tribunal explained that the discrepancies in the evidence raised concerns in the Tribunal's mind as to what was the actual amount of fines or fees paid, and the circumstances in which they were paid. However, the discrepancies were also significant because they might lead the Tribunal to find that the applicant spouse's evidence regarding the payment of fines and the non-issue of receipts was not reliable. It might lead the Tribunal to find that, if it accepted the authorities had imposed a fine on the family, the first named applicant's evidence was more plausible, that is, that he had paid an amount of RMB [amount] but refused to pay the remainder of the fine, and no problems had arisen relating to the issue of receipts. The Tribunal explained that as it had indicated during the course of the hearing, the first named applicant's evidence appeared to indicate that any subsequent problems he may have experienced with the authorities arose from his decision not to pay the fines.
35. The Tribunal also outlined the evidence regarding the payment of a RMB [amount] fine to register the applicants' [child], and the fact that the first named applicant had not raised this issue. The Tribunal indicated that it raised concerns about whether this fine was imposed. The Tribunal also explained that even if it accepted this fine had been imposed, it may not indicate there was a well founded fear of persecution for a Convention reason. The Tribunal explained that the fine would have been imposed as part of the general family planning laws in China. The Tribunal asked whether the first named applicant had any comments he wished to make.
36. The first named applicant stated that it was true he and his wife had been fined when their [child] was born but he did not raise this issue with the Tribunal as it had occurred a long time ago. He stated that in regard to the fines relating to his [child], he used to pay the fines but did not tell his wife the exact amount, and this is why she did not know the exact amount. He just told her the fine was about RMB [amount].
37. The Tribunal asked the first named applicant whether he wished more time to comment on or respond to the information. The first named applicant indicated he did not seek more time to respond to the information given by his wife. He stated he would like to think about the other

issues of concern raised by the Tribunal. The Tribunal explained that the information it had outlined relating to his wife's evidence was part of a process that was different from the issues of concern the Tribunal raised during the hearing about the applicant's own evidence. The applicant stated that he had no further comments.

Independent evidence

38. The US Department of State (USDOS) Country Reports on Human Rights Practices 2007 – China reports on the illegality of children born out of wedlock and the imposition of social compensation fines, and states:

In order to delay childbearing, the law sets the minimum marriage age for women at 20 years and for men at 22 years. It continued to be illegal in almost all provinces for a single woman to have a child. Social compensation fees were levied on unwed mothers (US Department of State 2008, Country Reports on Human Rights Practices 2007 – China, March, Section 1.f)

39. The Department of Foreign Affairs and Trade has reported on the implementation of the one child policy in Fujian:

The Family Planning Law in Fujian is regulated by a mixture of national, provincial and local laws and rules. Enforcement is by local authorities and evidence suggests that some local governments enforce family planning rules more vigorously than others. This has created a patchwork of different rules and enforcement across the province. Family planning rules are more strictly enforced in the larger cities such as Xiamen and Fuzhou, than in the poorer countryside. The rules are also more strictly enforced in areas where state-owned industry is stronger, such as the steel making city of Sanming, than in the mountainous or coastal fishing areas. In general, however, Fujian has one of the least coercive family planning regimes in China. In rural areas of Fujian more than half of all families have more than one child. The number of one child families is greater in the larger cities. However, even here, multiple child families are not unknown (Department of Foreign Affairs and Trade 2004, DFAT Report 287 – RRT Information Request: CHN16609, 22 April)

40. The Fujian population and family planning regulations provide the following information on the social compensation fee:

Article 39 Anyone who violates this Regulation by one of the acts listed below shall be ordered to pay the corresponding number of times of the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the previous year when the child is born in violation of this regulation as social compensation fee by family planning administrative department of the county or by township people's government or urban neighborhood office appointed by such administrative department:

(1) A social compensation of zero point six to one time shall be imposed on those who give birth to a child ahead of the schedule;

(2) A social compensation of two to three times shall be imposed on those who give birth to the first additional child. A social compensation of four to six times shall be imposed on those who give birth to the second additional child. A much more heavy social compensation fee shall be imposed on those who give birth to the third or more additional child.

(3) A social compensation of four to six times shall be imposed on those who give birth to a child born out of an extramarital affair. A much more heavy social

compensation fee shall be imposed on those who give birth to the second child born out of an extramarital affair. If the actual annual income of the parties concerned exceeds the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the previous year, the actual income shall be used as the base to calculate the number of the social compensation fees. The decision in writing to impose social compensation fee shall be made by the family planning administrative department of the county. Such department may appoint the people's government of township or town or the urban neighborhood office to make such decisions (Population and Family Planning Regulation of Fujian Province, Adopted by the 33rd Meeting of the Standing Committee of the Ninth Provincial People's Congress on 26 July 2002, UNHCR website).

41. A 2004 US State Department report states that, according to advice from the Fujian Provincial Family Planning Committee, couples who are unable to pay the social compensation fee in one payment may pay in instalments. The report states that:

According to the FPFPC, [Fujian Provincial Family Planning Committee] social compensation fees are based on per capita disposable income levels for rural households and per capita net income for urban households (the 'baseline'). The exact figure is based on country-level statistics, so the baseline varies throughout the province. For households with incomes significantly greater than the relevant income baselines, the local family planning commission can increase the social compensation fees. Social compensation fees range from the baseline or less for an unmarried couple that has a child to greater than size times the baseline for couples with four children or more and are determined by the local family planning committee in the city or country where the couple resides. In 2003, urban per capita net income in Changle City and Lianjiang County was approximately 10,050 renminbi (about \$1,210) and rural disposable per capita income was approximately 4,401 renminbi (about \$530). However, one woman with five children from Changle, Fujian, told U.S. officials in Guangzhou that she was fined a flat 50 renminbi (about \$60) for each child after her first child born without a special circumstance birth permit.

According to the FPFPC, couples unable to pay the fee immediately are allowed to pay in instalments. Local family committees have the power to sue families that refuse to pay the requisite fees, but they cannot garnish wages. The FPFPC asserts that parents cannot be sterilized if they are unable to refuse to pay the fee (US Department of State 2004, China: Profile of Asylum Claims and Country Conditions, June, Political Asylum Research and Documentation website, paras.122-123 http://www.pards.org/paccc/China_Jun_2004.doc – Accessed 2 November 2005).

42. The USDOS Country Report on Human Rights Practices 2007 – China states that families who have two children face pressure to have one person sterilized. However, the report seems to suggest that it is women that are pressured into sterilization:

The country's population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures such as the threat of job loss or demotion and social compensation fees. Psychological and economic pressures were common. Those who violated the child limit policy by having an unapproved child or helping another to do so faced disciplinary measures such as job loss or demotion, loss of promotion opportunity, expulsion from the party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of property. In the case of families that already had two children, one parent was often pressured to undergo sterilization. The penalties sometimes left women with little practical choice

but to undergo abortion or sterilization (US Department of State 2008, Country Reports on Human Rights Practices 2007 – China, 11 March, Section 1.f).

FINDINGS AND REASONS

43. The Tribunal is satisfied on the basis of the copies of their passports submitted with the protection visa application that the applicants are citizens of China (PRC). The Tribunal accepts that the first and the second named applicant are married to each other, and henceforth refers to the second named applicant as the applicant spouse.
44. The Tribunal finds that the first named applicant filled in Part C of form 866 indicating he wished to submit his own claims to be a refugee. The applicant spouse completed Part D of form 866 as a member of the first named applicant's family unit. The applicant spouse has not completed a Part C of form 866. The Tribunal considers, however, that the first named applicant's Part C application also makes implied claims on behalf of the applicant spouse. The Tribunal will therefore assess the first named applicant's claims, and also consider the implied claims on behalf of the applicant spouse.
45. The Tribunal accepts that the applicants have 2 children, a [child] born in [year] who is a student in Australia, and a [child] born in [month, year]. The Tribunal accepts the evidence that the applicants were married in [year].
46. The Tribunal finds on the basis of the independent evidence that China's family planning policies are reflected in laws of general application that aim to restrict childbearing to married couples, and to limit the number of children that a couple may have. The laws provide an official sanction of a fine or 'social maintenance fee' for violating the one child policy, as well as the policy that couples should be married before they have children.
47. The Tribunal accepts that the applicants' [child] was born in [year], before they were married, in contravention of China's family planning regulations. The Tribunal also accepts that the applicants, by having a second child in [year], also breached China's one child policy.
48. The Tribunal has considered whether the evidence gives rise to claims of persecution for reason of membership of a particular social group.
49. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A*'s case and also in *Applicant S*. In *Applicant S* (2004) 217 CLR 387 Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
50. Whether a supposed group is a "particular social group" in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular

social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

51. The Tribunal considers that the first named applicant and the applicant spouse could be members of a particular social group, such as, *parent in China who has breached family planning regulations* or *parent in China who has breached the one child policy*. These groups are recognizable within Chinese society. The common attribute is not the shared fear of persecution.
52. The Tribunal accepts that the applicants were required to pay a social maintenance fee in order to register their [child] after [their child's] birth in [year]. The Tribunal accepts the evidence that this fee was RMB [amount], and that it may have constituted a significant sum for the applicants at the time. Although the first named applicant did not raise this issue in his evidence (it was raised by the applicant spouse), the Tribunal accepts the first named applicant's reasons that he did not raise it as it occurred so long ago. The evidence is that the amount was paid. The evidence also is that the applicants were able to continue working; the first named applicant confirmed that he was self-employed as a driver from [year] until he left China in [year]. The Tribunal therefore does not accept that the imposition of the social maintenance fee in respect of their [child] created circumstances that threatened the applicants' capacity to subsist or otherwise constituted serious harm to the applicants.
53. The Tribunal has considered the applicant spouse's claim that the authorities damaged part of their house after their [child] was born, and they had to stay at a friend's house. The applicant spouse's evidence on the matter was vague. The independent information indicates, however, that family planning policies are enforced with varying degrees of vigour, and property damage as a means of punishment for violation of the policies is not unknown. The Tribunal therefore accepts the applicants may have experienced additional problems from the authorities at this time, as a result of which they sustained some damage to their house. The evidence indicates, however, that this was an isolated incident. The evidence is that the applicants went to work in [province D] for about a year, and then returned to their home. The applicants have not claimed that they experienced ongoing problems as a result of their [child]'s birth out of wedlock, and as indicated above, the first named applicant stated he had not raised any issue about his [child] as it had occurred so long ago. The Tribunal does not accept therefore that the damage they may have sustained to their house around the time of the birth of their [child] constitutes serious harm amounting to persecution.
54. The Tribunal does not accept that the authorities, in imposing the social maintenance fee for the birth of the first named applicant's [child], targeted the first named applicant for a Convention reason. The Tribunal finds that the authorities imposed the fee in accordance with the official sanctions under generally applied laws for couples who had children out of wedlock. Given the evidence that there were no ongoing consequences relating to the birth of their [child], the Tribunal finds that the first named applicant's breach of family planning laws in [year] does not give rise to any well founded fear of being persecuted for a Convention reason in the reasonably foreseeable future if he returns to China.
55. The Tribunal accepts that the authorities imposed a social maintenance fee on the applicants for violating the one child policy when their [child] was born in [month, year]. The Tribunal finds there are discrepancies in the evidence given by the first named applicant and the applicant spouse regarding the amount of social maintenance fee paid and the circumstances of the payments. The first named applicant's evidence to the Tribunal specifically indicated that the total fee or fine was RMB [amount], and that he paid a total of RMB [amount], but

refused to pay the rest as he thought it was unreasonable. The applicant spouse claimed that she and her husband paid fines several times, though she did not know the total amount paid. She also claimed that the payments were not receipted and that corrupt officials thereby used the money for their own gain and continued to demand money from them. The Tribunal accepts the evidence that the first named applicant took responsibility for the payment of the social maintenance fee, and also of the decision to refuse to pay the remaining fee. The Tribunal finds it is highly implausible that the first named applicant would not have raised in his initial evidence to the Tribunal the fact that he made several payments to officials that were not receipted, if this had actually occurred. The Tribunal finds that the applicant spouse's evidence about unreceipted payments to corrupt officials is not reliable and has been provided in an attempt to boost the applicants' claims. The Tribunal consequently gives this evidence no weight. Although the first named applicant commented, when the Tribunal outlined the applicant spouse's evidence on this matter, that he paid several fines in relation to his [child], the Tribunal finds that he has consistently stated that he paid RMB [amount] of the total fee of RMB [amount], but refused to pay the remaining fee because he felt the fees were unreasonable. The Tribunal does not accept that the applicants made several payments towards the social maintenance fee, but that these payments were corruptly sequestered by officials, and that no receipts were issued so that the officials could continue to corruptly demand payments for their own benefit.

56. The first named applicant's evidence is that the consequence of his decision to refuse to pay the remainder of the social maintenance fee was that the authorities continued to ask him over the years to pay the remaining amount. His evidence about how often these requests were made was vague. At the Tribunal hearing he stated they just continued to ask for payments, but took no other action, and it was difficult to tell how often this occurred. In his written statement he also claimed they had taken action such as painting signs on his house that he should pay. The Tribunal accepts that the authorities may have continued to ask the first named applicant to pay the remaining social maintenance fee. The Tribunal does not accept that such requests constituted serious harm amounting to persecution. The Tribunal finds in addition that the authorities' pursuit of the outstanding fee was motivated not by any Convention reason, but by the requirement under the family planning regulations that he pay the relevant social maintenance fee. The Tribunal accepts that the authorities may have resorted to methods such as affixing or making signs or notices at the first named applicant's house in order to pressure him to pay the fee. The Tribunal accepts that such action would constitute low level harassment, but the Tribunal does not accept that it constitutes serious harm amounting to persecution.
57. The Tribunal does not accept, given the findings above, that the authorities applied the policy relating to the social maintenance fee in an unduly harsh or discriminatory manner for a Convention reason.
58. The Tribunal finds that the first named applicant's evidence of being detained is vague and uncertain. He stated the authorities kept arresting him, but stated he could not remember when he was arrested. He then stated he was arrested after his [child] was born in [month, year], and again in [month, year] His evidence about who arrested him was also vague in that he stated he had been arrested by different authorities, but then stated he was arrested by different persons within the local authorities who had power to take action in respect of the family planning laws. The Tribunal thus does not accept that the first named applicant was formally arrested. The Tribunal accepts, however, that he was required to report to the authorities in regard to the breach of the family planning laws, and that this may have been

required on more than one occasion. The Tribunal accepts that the authorities may have demanded the first named applicant make an initial payment of the social maintenance fee, but his own evidence is that this was done with the help of his [relative]. The Tribunal thus does not accept that the circumstance of the initial imposition of the social maintenance fee constitutes serious harm amounting to persecution. The Tribunal also finds that the reason the authorities required the first named applicant to report to them was not because of any Convention reason, but because he was required to pay, in accordance with regulations, a social maintenance fee for breaching the one child policy.

59. The Tribunal finds that the first named applicant has given inconsistent evidence regarding who was asked to undergo 'ligation'. He initially told the Tribunal it was he, but later in the hearing stated he was referring to his wife. The Tribunal finds it is highly implausible that the first named applicant would not be able to recall whether it was he or his wife who was asked to undergo ligation. The Tribunal therefore does not accept that the authorities asked him or his wife to undergo ligation. The Tribunal finds in any case that even if the authorities had asked the first name applicant or his wife to undergo ligation, the evidence is that they took no further action on the matter over an extended period apart from making requests. Given this evidence, and the Tribunal's finding above, the Tribunal does not accept there is any real chance that the authorities will request either the first named applicant or his wife to undergo ligation if they return to China. The Tribunal finds in any case that if they were to do so, it would not be for a Convention reason, but for reasons of the family planning regulations.
60. The first named applicant claimed that his wife worked in a [company] but did not always attend work because she was afraid of being arrested. The Tribunal finds that if the authorities had wanted to detain the applicant spouse, they would have been able to do so even if she were not at her workplace. The Tribunal therefore does not accept that the applicant spouse did not always attend her workplace because of a fear of being arrested.
61. The first named applicant gave evidence at the hearing that he was able to resolve the issue of his [child]'s registration, which he referred to in his written statement as 'citizenship'. In his written statement he claimed he had to pay a bribe to an official to organise this; at the hearing his evidence was that he had to pay money to school officials to enrol his [child] at school, albeit unofficially. The reference to resolving the registration issue appears to be inconsistent with the evidence that he had to pay an official to get his [child] enrolled at school. Nevertheless, the Tribunal accepts as plausible, on the basis that the first named applicant had not paid the social maintenance fee, that he would have had to pay an official some money to have his [child] enrolled at school, and that this enrolment may not have been officially recorded. The Tribunal finds, however, that this circumstance arose because the first named applicant had not paid the relevant social maintenance fee. The Tribunal does not accept that any problems the first named applicant experienced in relation to official enrolment of his [child] for education has been because he has been adversely targetted for a Convention reason. The Tribunal accepts, given that the applicant has not paid the remaining social maintenance fee, that he may continue to experience problems in the future in relation to official enrolment of his [child] in State education facilities. The Tribunal does not accept however that the reason will be because of any Convention reason, but finds rather that it will be because he has refused to pay the outstanding social maintenance fee.
62. The Tribunal therefore does not accept that the first named applicant has suffered serious harm in China amounting to persecution for a Convention reason, as a result of breaching China's family planning regulations (having a child born out of wedlock, and breaching the one child policy).

63. The Tribunal accepts that if the first named applicant returns to China, there is a real chance that the authorities may continue to request payment of the social maintenance fee in respect of his second child. The Tribunal finds that if they do so, they would be doing so on the basis of implementing the regulations in respect of the one child policy, and not for a Convention reason. The Tribunal does not accept that they will target the first named applicant in an unduly harsh manner for payment of the fee, for a Convention reason. The Tribunal also does not accept that the authorities have imputed or will impute the first named applicant as holding a political opinion against the State on the basis of his refusal to pay the outstanding social maintenance fee, or have adversely targetted him or will target him for any other Convention reason on the basis that he has refused to pay the remaining fee.
64. The Tribunal has also considered the claims in respect of the first named applicant's self employment as a driver. The Tribunal accepts that the applicant's business as a [driver] may have been adversely affected by the introduction of [infrastructure] on a route that he operated and from which he derived the majority of his [work]. The Tribunal does not accept however that the evidence establishes that the authorities have introduced the [infrastructure] for other than [planning] reasons. The Tribunal does not accept that they did so in order to target the first named applicant for any Convention reason. The Tribunal accepts that the first named applicant might need to consider other options for employment if he returns to China, and the Tribunal also accepts that it may not be easy to obtain other employment. The Tribunal accepts that the first named applicant may be experiencing financial stress related to the costs he has incurred for his [child]'s study in Australia. There is no indication, however, that he would be prevented by the authorities from obtaining other employment or establishing other business activities in China for a Convention reason. The Tribunal therefore does not accept that the adverse effects of the [infrastructure] on the first named applicant's [driving] business, and the likelihood that he would need to seek other employment if he returns to China, gives rise to a well founded fear of being persecuted if he returns to China now or the reasonably foreseeable future.
65. The Tribunal does not accept, given the findings above, that the first named applicant will be prevented from obtaining employment for a Convention reason, and will thus be prevented for a Convention reason from paying the outstanding social maintenance fee, if he returns to China.
66. Given these findings, the Tribunal does not accept that the first named applicant holds a well founded fear of being persecuted for a Convention reason if he returns to China now or in the foreseeable future, whether that arises from membership of a particular social group (such as parent in China who has breached family planning regulations, or the one child policy), or actual or imputed political opinion, or any other Convention reason. Having considered the claims individually and cumulatively, the Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The first named applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
67. The Tribunal finds that the first named applicant's claims on behalf of his spouse extend directly from his own, that is, they arise from the circumstances that both are parents of a child born out of wedlock (in contravention of family planning regulations), and of a second child (in contravention of the one child policy). Given the Tribunal's findings above in respect of the first named applicant and his circumstances described in relation to himself and to himself and his wife as a couple, the Tribunal does not accept that the applicant spouse holds a well founded fear of being persecuted for a Convention reason if she returns to China

now or in the foreseeable future. It follows that the Tribunal is not satisfied that the applicant spouse is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant spouse does not satisfy the criterion set out in s.36(2)(a) of the Act for a protection visa.

68. Although the Tribunal accepts that the applicant spouse is the spouse of the first named applicant, she is not the spouse of a non-citizen to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that the applicant spouse (the second named applicant) does not satisfy the alternative criterion of s.36(2)(b).
69. Therefore the applicants do not satisfy the criteria set out in s.36(2) for a protection visa.

DECISION

70. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

<p>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 <i>Migration Act</i> 1958.</p> <p>Sealing Officers ID: PRRTIR</p>
