FEDERAL COURT OF AUSTRALIA

VTAO v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCA 927

MIGRATION – application for refugee status – fear of persecution by reason of membership of a particular social group – whether parents of children born in contravention of China's one-child family planning laws ("black children"), or the "black children" whose birth resulted in the parents' contravention, are members of a particular social group – whether the consequences of contravening the laws constitute persecution of the parents or their child – whether the Refugee Review Tribunal constructively failed to exercise its jurisdiction – consideration of the duty of the Refugee Review Tribunal in respect of concessions made by the representative of an applicant

Migration Act 1958 (Cth) ss 36(1), 36(2), 65(1) and 91R

Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 – applied

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 – applied

W404/01A of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 255 – cited

NACB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 235 – cited

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 – distinguished

Chan v Canada (Minister of Employment and Immigration) [1995] 3 SCR 593 – cited

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 – considered

Applicant S v Minister for Immigration and Multicultural Affairs (2004) 206 ALR 242 – applied

Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 – considered

Ex parte Hebburn Ltd; Re Kearsley Shire Council (1947) 47 SR (NSW) 416 – cited

Stead v State Government Insurance Commission (1986) 161 CLR 141 – cited

Minister for Immigration and Multicultural Affairs v Al Shamry (2001) 110 FCR 27 – cited

Cheung v Canada (Minister of Employment and Immigration) [1993] 2 FC 314 - cited

Minister for Immigration and Multicultural Affairs v Wang (2003) 196 ALR 385 – cited

Bushell v Repatriation Commission (1992) 175 CLR 408 – considered

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 – considered

Minister for Immigration & Multicultural & Indigenous Affairs v VFAY [2003] FCAFC 191 – cited

Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) 107 FCR 184 – cited

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441 – cited

WABZ v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 687 – cited

Tuite v Administrative Appeals Tribunal (1993) 40 FCR 483 - considered

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 – cited

Khan v Minister for Immigration & Multicultural Affairs [2000] FCA 1478 – cited

Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 – cited

SCAT v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 76 ALD 625 – cited

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 – cited

Scargill v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 129 FCR 259 – applied

VTAO, VTAP and VTAQ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

V899 OF 2003

MERKEL J

19 JULY 2004

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 899 OF 2003

BETWEEN:	VTAO FIRST APPLICANT VTAP SECOND APPLICANT VTAQ THIRD APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MERKEL J
DATE OF ORDER:	19 JULY 2004
WHERE MADE:	MELBOURNE

THE COURT DECLARES THAT:

1. The decision of the Refugee Review Tribunal made on 29 July 2003 is invalid.

AND ORDERS THAT:

2. A writ of certiorari issue quashing and setting aside the said decision.

3. The matter be remitted to a differently constituted Refugee Review Tribunal to be determined in accordance with law.

4. The respondent pay the applicants' costs of and incidental to the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V 899 OF 2003

BETWEEN:	VTAO FIRST APPLICANT VTAP

	SECOND APPLICANT VTAQ THIRD APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	MERKEL J
DATE:	19 JULY 2004
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

Introduction

1 The present application raises important questions concerning the application of the *Convention Relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* ("the Convention") to parents of children born in contravention of China's family planning laws (which implement China's one-child policy) and to the children whose birth resulted in their parents contravening the laws. If the parents or their children are members of a "particular social group" then they would be entitled to a protection visa if the Minister or the Refugee Review Tribunal ("the RRT") is satisfied that they have a well-founded fear of persecution by reason of their membership of that social group: see ss 36(1), 36(2), 65(1) and 91R of the *Migration Act 1958* (Cth) ("the Act") and Art 1A(2) of the Convention.

2 The applicants claim to be citizens of the People's Republic of China. The first and second applicants ("the applicant parents") arrived in Australia in 1998. The third applicant ("the applicant child"), who was born in Australia on 17 April 2002, is the third child of the applicant parents. On 22 March 2002 the applicant parents applied for protection visas and on 4 July 2002 the first applicant applied for a protection visa on behalf of her son. The applicant parents claim to have a well-founded fear of persecution if they return to China by reason of their membership of a particular social group, namely persons

who have contravened China's family planning laws by having had more than one child. The first applicant claimed, on behalf of her son, that he faces a real chance of persecution by reason of his membership of a particular social group, being "black children", which she described as children born in contravention of China's family planning regulations. A delegate of the respondent ("the Minister") refused the applications for protection visas and the applicant parents and their son applied to the RRT for the review of that decision. The RRT affirmed the decision of the delegate.

3 The applicants have sought writs of prohibition, certiorari and mandamus in relation to the decision of the RRT, which found that the applicant parents, who had contravened the family planning laws, and the applicant child, whose birth resulted in the applicant parents' contravention of the laws, did not have a well-founded fear of persecution by reason of membership of any particular social group.

The RRT's decision

4 Before the RRT the applicant parents claimed that, as a result of their two contraventions of China's family planning laws (ie as parents of "black children") they would be subjected to persecution on their return to China. The persecution claimed to be feared included forced sterilisation of the first applicant; liability for payment of a substantial financial penalty (referred to as a "social subsidy fee") which the applicant parents claimed they were unable to pay; and limitations on the applicant parents' ability to find employment. In relation to the applicant child it was claimed that, as a "black child", he would not be able to obtain household registration unless the applicant parents paid the social subsidy fee and that without registration he would be unable to access public health and education services and would be unable to obtain work, particularly in the public sector, when older.

5 The RRT's "findings" which led it to reject the claims of the applicant parents were as follows:

"43. The reasoning of the Court in Applicant A is applicable to the claims of the applicant parents. The only characteristic of the applicant parents which may separate them from other members of Chinese society is the fact of having been penalised, or anticipating penalties, because of their breach of China's family planning regulations, that is to say, the harm suffered is itself the sole defining characteristic of the claimed particular social group. The High Court in its judgement makes it clear that the fact of having suffered persecution does not transform that person into a member of a particular social group, being persons who have suffered that form of persecution. Penalties, such as those imposed for breaching the family planning policy, are laws of general application and do not amount to the imposition of penalties for a Convention reason.

44. Accordingly, I find that neither of the applicant parents face a well-founded fear of persecution by reason of their membership of a particular social group or for

any Convention reason because of their opposition to, or breach of, China's one-child policy."

6 The RRT appeared to accept, although it did not expressly find, that, as a result of the decision of the High Court in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 ("*Chen*"), the applicant child was a member of a particular social group, namely children born in breach of China's family planning policy who did not have household registration (ie "black children"). The RRT's findings, which led it to reject the claims made on behalf of the applicant child, were as follows:

"45. The family planning regulations are not, in my view, discriminatory but are applied equally to all Chinese citizens and are directed at a legitimate purpose, which is to attempt to slow the rate of growth of China's population. The effect of the family planning regulations is to impose a financial burden on the parents of unregistered children when officially registering those children, or to deny unregistered children free access to social services where those services are available…

46. I am not satisfied that the imposition of a fine on parents for breach of the family planning regulations is discriminatory or persecutory to unregistered children as a particular social group. I am not satisfied that the level of financial imposition which results from a breach of the family planning regulations (that is, either the fine or having to pay for education and health services) is so onerous as to threaten the applicant parents' capacity to subsist or to amount to denial of access to basic services such that the third named applicant's capacity to subsist is threatened. In any event, if the fine remains unpaid, the third named applicant is not thereby denied access to basic services which, as the independent information makes clear, are available to anyone who pays for those services.

47. I accept the independent information that fines (which the Chinese authorities refer to as a 'social subsidy fee') are imposed on parents who have children in excess of the number permitted by the family planning regulations, in order for them to register their children and thereby gain access, where available, to free health and education services. The fine is only payable in order to register a child or children born in excess of the family planning regulations and, to that extent, is optional to parents who are prepared to pay for private education and health.

48. Even if the applicant parents decide to pay the fine and register their children, I do not accept that it is beyond the capacity of the applicant parents to pay the fine. The applicant parents have already established their capacity to save for and to finance an international trip, and a long stay in Australia. Both have successful employment histories. I am not satisfied that a fine imposed on the applicant parents would be so significant an economic hardship that it would threaten the family's capacity to subsist.

49. Further, I am not satisfied that for the third named applicant in the future to be excluded from public sector employment amounts to a denial of his capacity to earn a livelihood of any kind such that it threatens his capacity to subsist, as required by subs.91R(2).

50. I accept the independent information set out above that to the extent that there is any distinction between officially registered and 'black' children (which the information suggests does not exist), such distinction is unlikely to extend to the third named applicant's adulthood, and is very unlikely to affect his access to employment in adulthood in the non-government sector or in rural areas. … There is nothing on the evidence before me to suggest that the applicant parents would be unable to obtain employment again in the private sector, either as owners or employees, or that their children would, unlike their parents, be unable to follow such a course for themselves in their adulthood…

51. I accept the independent information set out above that there is no social stigma attached to 'black children', and certainly no reports of discrimination or abuse serious enough to amount to persecution within the meaning of the Convention and s.91R(2) of the Act. That the other children in the neighbourhood speak of the applicants' second child as having been abandoned does not, on any measure, amount to serious harm, upsetting though it may be to the child herself.

52. The remainder of the claims of hardship made by the applicants, that they will be obliged to pay a large fine for obtaining household registration for the third applicant (and possibly for their second child if she returns to live with them) or be responsible for bearing the costs of the third applicant's (and possibly their second child's) education and health care, and that they will have difficulty obtaining employment, are not relevant to a consideration of the third named applicant's claims other than insofar as those matters, if true, contribute to the family's inability in the future to pay the fine imposed for breach of the family planning policy and I have set out my findings on this above. However, I accept the independent information that unregistered children are not precluded from accessing education and health services by reason of their lack of household registration but merely that their parents must pay for such services, as do many others in China regardless of their registration status. This may well amount to a significant financial imposition but in my opinion it is not so serious as to amount to persecution within the meaning of the Convention and the Act.

53. For the reasons which I have given, I am satisfied that the third named applicant does not face a risk of harm serious enough to amount to persecution within the meaning of the Convention and the Act.

…"

7 The RRT distinguished two decisions of other members of the RRT, which treated the financial burden imposed in respect of breaches of the family planning laws as sufficiently substantial to constitute persecution, and stated that:

"55. … the financial burden which the applicant parents have attracted by reason of their family planning choices, although serious, does not amount to persecution within the meaning of the Convention or of s.91R(2) of the Act."

8 The RRT concluded that, having considered the evidence as a whole, it was satisfied that the applicants were not persons to whom Australia owed protection obligations under the Convention.

The contentions

9 The applicants' contentions before the Court may be summarised as follows:

- the RRT erred in concluding that the applicant parents, in their capacity as parents of "black children", were not capable of being members of a particular social group;

- the RRT erred in concluding that the burdens and harm that fell upon the applicant child as a "black child" did not constitute persecution of that child by reason of his membership of the particular social group of "black children";

- the RRT erred in treating the examples of "serious harm" set out in s 91R(2) of the *Migration Act 1958* (Cth) ("the Act") as laying down the criteria for "serious harm", rather than merely providing examples of such harm.

10 The applicants' counsel contended that each of the errors was a jurisdictional error because it resulted in the RRT identifying a wrong issue; asking a wrong question; or failing to take into account relevant considerations; in a way that affected the exercise of its power: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ("*Yusuf*") at 351 [82].

11 Although the applicants' counsel initially claimed that the primary error of the RRT was that it failed to take into account relevant considerations, rather than that it constructively failed to exercise its jurisdiction, the latter issue was raised with counsel for the applicants in the course of the hearing who agreed that it was the more appropriate basis for the applicants' case. No objection was raised by counsel for the Minister for the matter to proceed on that basis.

12 Counsel for the applicants also claimed that the RRT's findings were irrational and illogical but he accepted that that ground was not open before a single judge of the Court in the light of decisions of the Full Court (see for example *W404/01A of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 255 at [35] and *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 235 at [29]).

13 Counsel for the Minister disputed the applicants' submissions and contended that the RRT did not fall into error but, rather, correctly applied the decision of the High Court in *Applicant A v Minister for Immigration and Ethnic*

Affairs (1997) 190 CLR 225 ("*Applicant A*") in rejecting the claims of the applicant parents; and did not err in concluding, as a matter of fact, that the harm that the applicant child might suffer on his return to China did not constitute persecution for the purposes of the Convention or s 91R of the Act.

The issues for the RRT

14 Under the Act a person is entitled to be granted a protection visa if he or she is a person to whom Australia owes protection obligations: see ss 36(2) and 65(1). A person is owed protection obligations if he or she has, inter alia, a well-founded fear of persecution by reason of being a member of a particular social group: see Art 1A(2) of the Convention. However, s 91R of the Act provides that the Act and the Convention only apply to certain types of persecution. Relevantly, the section provides:

"(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) …

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of **serious harm** for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist."

15 The RRT appeared to accept that the applicants were citizens of China who were subject to its family planning laws. It also appeared to accept that they feared they would suffer some harm on their return to China as a result of those laws being breached by the applicant parents. It also appeared to accept that the harm feared by the applicant child was the harm feared by his mother. In those circumstances, in exercising its jurisdiction to determine whether the applicants had a well-founded fear of persecution for a Convention reason, three separate questions were required to be considered by the RRT. The first question was whether the harm feared amounts to persecution that involves "serious harm to the person" and "systematic and discriminatory conduct". The second question was whether the persecution feared is persecution by reason of membership of a particular social group. The third question is whether the fear of persecution by reason of membership of a particular social group is well-founded.

The applicant parents' claims

16 The RRT treated the reasoning in *Applicant A* as precluding the claim of the applicant parents that they are members of a particular social group. It is clear that the RRT reached that view irrespective of whether the particular social group is defined as persons who contravene China's family planning laws or as parents of "black children". As a consequence, the RRT did not address or consider the additional questions of whether the harm feared by the applicant parents amounts to persecution as limited by s 91R of the Act and, if so, whether the fear is well-founded.

17 In *Applicant A* the High Court held that persons who feared persecution by reason of their membership of the group, which was defined as "those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised" (see for example at 268 per McHugh J), were not members of a particular social group. The reason for the conclusion was that such a group cannot be defined solely by a well-founded fear of persecution or, put another way, the uniting characteristic or element of such a group cannot be solely a common fear of persecution. In *Applicant A* the appellants were nationals of China who had their first and only child in Australia. Their claim of having a well-founded fear of persecution by reason of their membership of a particular social group failed because the uniting characteristic or element upon which they relied was opposition to the one-child policy and their fear of persecution if they had a second child on their return to China (see for example at 268 per McHugh J).

18 *Applicant A* appears to have been regarded by many practitioners, and the RRT in the present case, as authority for the proposition that parents who breach China's one-child policy are not capable of constituting a particular social group, as they were perceived to be relying solely upon their fear of persecution as the uniting characteristic or element that defines the particular social group of which they claim to be members. Counsel for the Minister did not cite any case in Australia that had decided that parents who had breached

the policy or the family planning laws or, put another way, parents of “black children” were not capable of constituting a “particular social group” for the purposes of the Convention (cf C*han v Canada (Minister of Employment and Immigration)* [1995] 3 SCR 593). However, he claimed that that must follow from the High Court’s decision in *Applicant A*.

19 *Applicant A* was not concerned with, and did not decide, whether parents who have breached China’s family planning laws can constitute a particular social group. Rather, it was concerned with whether the fear of the consequences of failing to abide by those laws can, alone, be relied upon as a uniting element or characteristic to define a particular social group. Further, the High Court has not treated *Applicant A* as deciding that parents who breached China’s one-child policy, or that parents of “black children”, are not capable of constituting a particular social group.

20 In the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571 their Honours stated:

“in any event, the claim based, as it is, on **membership of a social group consisting of ‘parents of one child in the PRC’** is answered by the Court’s recent decision in Applicant A v Minister for Immigration and Ethnic Affairs, which held by majority that, for the purposes of the Convention, **such** persons were not a particular social group and that persecutory conduct cannot define ‘a particular social group’ Dawson J said:

> ‘A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention straight quotation ‘completely reverses the statutory definition of Convention refugee in issue’.’” [Emphasis added]

21 *Applicant A* was also considered by the High Court in *Chen* in the context of whether a claim by a child born in breach of the China’s one-child policy (ie a “black child”) can have a well-founded fear of persecution by reason of membership of a particular social group, namely “black children”. In *Chen* the High Court, by a 4-1 majority, held that children born in breach of the policy can constitute a particular social group for the purposes of the Convention. Gleeson CJ, Gaudron, Gummow and Hayne JJ (at 300-301 [16]-[21]) explained why the Full Court of the Federal Court had erred in treating *Applicant A* as precluding “black children” from constituting a particular social group:

“In the present matter, the majority in the Full Court held that ‘the principles explained in Applicant A preclude the identification of a relevant social group for Convention purposes, by recourse to the very laws and policies, being laws and policies directed to the whole population, which create the category of persons concerned’. Thus, in their Honours' view, ‘black children’ could not be identified as a particular social group. R D Nicholson J saw the issue as whether the laws which were likely to result in the appellant's adverse treatment in China were ‘such that [he] could not [be] a member of a particular social group of 'black children’’. Seemingly, in reaching those

conclusions, their Honours were influenced by their understanding of what followed from the observation made by Dawson J in Applicant A with respect to laws and practices of general application.

It was by reference to laws of general application that it was argued in this Court that the majority in the Full Court was correct in holding that, for the purposes of the Convention, the appellant could not be identified as a member of a particular social group. According to the argument, the laws or policies which are likely to result in the appellant's adverse treatment in China are laws of general application and, having regard to what was said by Dawson J in Applicant A, cannot create a social group for the purposes of the Convention.

There are difficulties with the argument that, because of the nature of the laws which will impact on the appellant if returned to China, he is not a member of a social group for the purposes of the Convention. In particular and notwithstanding that China's 'one-child policy' may be reflected in laws of general application which limit the number of children that a couple may have, that does not mean that the laws or practices applied to children born in contravention of that policy are laws or practices of general application. Such children are, even within the sense of the distinction drawn by Dawson J in Applicant A, persecuted for what they are (the circumstances of their parentage, birth and status) and not by reason of anything they themselves have done by engaging in certain behaviour or placing themselves in a particular situation. The sins of their parents, if they be such, are being visited upon the children.

Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group - for example, 'black children', as distinct from children generally - cannot properly be described in that way. Further and notwithstanding what was said by Dawson J in Applicant A, the fact that laws are of general application is more directly relevant to the question of persecution than to the question whether a person is a member of a particular social group.

In Applicant A, McHugh J pointed out that '[w]hether or not conduct constitutes persecution in the Convention sense does not depend on the nature of the conduct [but] ... on whether it discriminates against a person because of race, religion, nationality, political opinion or membership of a social group.' In that context, his Honour also pointed out that 'enforcement of a generally applicable criminal law does not ordinarily constitute persecution.' That is because enforcement of a law of that kind does not ordinarily constitute discrimination.

To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination. As a general rule, however, a law of general application is not discriminatory. **And Applicant A held that, merely because some people disagree with a law of that kind and fear the consequences of their failure to abide by**

that law, they do not, on that account, constitute a social group for the purposes of the Convention." [Emphasis added]

22 It is clear from their Honours' analysis that *Applicant A* is not to be taken as deciding that the harm that is likely to be suffered by a group of persons by reason of their having contravened a law of general application cannot be relied upon as a factor, among others, that might identify those persons as, or cause them to become, a particular social group. Rather, *Applicant A* merely decided that the fear of harm resulting from a failure to abide by such a law cannot be relied upon alone as the defining or uniting characteristic of a particular social group. Further, as was pointed out by their Honours (in *Chen*) the fact that the law is one of general application is more relevant to whether the harm feared as a result of breaching the law constitutes persecution than it is to whether persons that have breached the law constitute a particular social group.

23 Kirby J stated at 317-318 ([73]-[74]):

"Applying to these proceedings the analysis of Lord Hoffmann in Shah's Case, the 'reasons of' the well-founded fear on the part of a person such as the appellant is, it is true, in one sense, the laws and policies of the PRC targeted at people such as the appellant's parents. The laws and policies were designed to coerce the parents into conforming to the population control policies of the State. Such laws were avowedly adopted by the PRC to restrain the explosive growth of population of that country with its serious consequences for China and the world. Combined with the poor economic circumstances of the appellant's parents, such laws, and the practices adopted to enforce them, clearly deprive the parents of the ability to afford to pay for education, health care and other privileges that would otherwise be provided by the State to a lawful child. The way the PRC's laws and policies are enforced, according to the findings of the Tribunal, includes the targeting of children such as the appellant, categorised as 'hei haizi', as well as the parents. In a discriminatory way, such children are denied many of the basic needs of children. This is done although they personally are innocent of any wrongdoing. They suffer. Their suffering is the other side of the coin of the laws and programmes addressed to their parents. It was much the same in former times under our legal system in respect of laws on illegitimate children or 'bastards'. They suffered, and were shamed, in order to promote a policy of marriage of their parents over which, at their birth and in their childhood, the children concerned had no control whatsoever. In today's world, depending on the evidence, this could amount to persecution.

Given the objects of the Convention and of Australian law providing it local effect, the persecution of the child is 'for reasons of' its membership of the particular social group of 'black children'. The persecution is designed to punish the parents for their infractions of the law and to discourage potential parents from breaking that law. But it is done by discriminating against innocent children who are popularly described as 'black children'. This is done for what may be conceived of as the higher State purpose of population control. But it is persecution nevertheless, as the Tribunal found. In the context, it is for reasons of the fact that the children are members of the particular social group, defined not by anything such children have done but by their parents' 'wrongdoing'."

24 In both the joint judgment and that of Kirby J the point was made that the child had done no wrong and the visiting of the parents' "sins" upon the child can plainly be discriminatory against, and persecutory of, the child, *albeit* that this allegedly occurs through a law of general application. While that factor distinguishes the situation of the children from that of their parents it does not follow that the parents cannot constitute a particular social group. As was explained in *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 206 ALR 242 ("*Applicant S*") that depends on a combination of legal and social factors, rather than on whether the harm the parents fear, and are likely to suffer, arises as a result of their breach of laws of general application.

25 In *Applicant S*, in the course of concluding that able-bodied young men liable to be forcibly recruited by the Taliban in Afghanistan can constitute a particular social group for the purposes of the Convention, Gleeson CJ, Gummow and Kirby JJ (at 247-248 [22]-[23]) again considered the observations of McHugh and Dawson JJ in *Applicant A*. Their Honours stated that:

"… a 'particular social group' must be identifiable by a characteristic or attribute common to all members of the group, but that characteristic cannot be the fear of persecution itself. This proposition can be split into two parts. The first part amounts to a general principle that there must be a common characteristic or attribute and the second part can be characterised as a limitation on the general principle. The limitation was explained by McHugh J as follows:

> '[P]ersons who seek to fall within the definition of 'refugee' in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the 'particular social group' of which they claim membership. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution.'

The apparent circularity in the emphasised passage was further considered by Dawson J:

> 'There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution. A group thus defined does not have anything in common save fear of persecution, and allowing such a group to constitute a particular social group for the purposes of the Convention 'completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa)'.'

It is worth noting that the limitation later was accepted and applied by the House of Lords in R v Immigration Appeal Tribunal; Ex parte Shah [[1999] 2 AC 629 at 639-640 per Lord Steyn, 656 per Lord Hope, 662 per Lord Millett (dissenting)].

In Applicant A, after expressing the general principle and limitation, McHugh J went on:

> 'Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.'" [Emphasis in original]

26 After referring to other observations of McHugh J in *Applicant A*, their Honours observed at 249-250 ([25]-[27]):

"Two propositions are to be taken from McHugh J's remarks. First, in some circumstances it is possible for a particular social group to be created by the persecutory conduct such that it can no longer be said that the group is 'defined' by the persecutory conduct. His Honour expressed this in a temporal sense. Secondly, given that the actions of the persecutors may identify or even create the group, what may be critical in most, and perhaps all, cases is the perception of the group by others ('external perceptions'). This is further explained by the example that if the group is perceived by the community in the relevant country as a particular social group, then usually, but not always, the particular social group can be taken to have been created.

By contrast, Brennan CJ (dissenting as to the outcome) and Dawson J appear to express a similar principle by construing the phrase 'particular social group'. After construing a 'particular group' as a group identifiable by any characteristic common to the members of the group (that is, the general principle referred to above), Brennan CJ said:

> '[A] 'social group' is a group the members of which possess some characteristic which distinguishes them from society at large'.

In the same vein, Dawson J stated:

> 'The word 'particular' in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must

> unite them, making those who share it a cognisable group within their society.'

Kirby J made a similar point in Applicant A by pointing out that the text, its history and the many 'groups' recognised as falling within the Convention in this and other countries denied any suggestion that there must be 'an associational participation or even consciousness of such group membership'.

Putting these statements together with the second proposition stated by McHugh J, it is apparent that his Honour was adopting no different approach to the Convention definition to that adopted by Brennan CJ and Dawson J, albeit expressing it in other terms. His Honour was expanding on the requirement that the existence of a particular social group requires that the group be distinguished or set apart from society at large. One way in which this may be determined is by examining whether the society in question perceives there to be such a group. Thus, perceptions held by the community may amount to evidence that a social group is a cognisable group within the community. The general principle is not that the group must be recognised or perceived within the society, but rather that the group must be distinguished from the rest of the society." [Emphasis in original]

27 Their Honours then discussed *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, in which the High Court held by a 4-1 majority that married women in Pakistan can constitute a social group, and observed at 250 [30]:

"On first blush, the claimed particular social group in Khawar appears to be defined solely by reference to the persecutory conduct (that is, the failure of the Pakistani authorities to enforce the criminal law). However, a majority of the Court (Gleeson CJ, McHugh, Gummow and Kirby JJ; Callinan J dissenting) concluded that it would be open to the Tribunal to find that the first respondent was a member of a particular social group. After acknowledging the limitation accepted by the majority of the Court in Applicant A, McHugh and Gummow JJ emphasised the operation of cultural, social, religious and legal factors, rather than any perceptions held by the community, as determining that married Pakistani women were a group that was distinguished or set apart from the rest of the community. Their Honours said:

> 'Those considerations [ie, the limitation] do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.'" [Emphasis in original]

28 At 251-252 ([31]-[36]) their Honours returned to the "left-handed men" example of McHugh J in *Applicant A*:

"The example of left-handed men given by McHugh J in Applicant A indicates how it is possible that over time, due to the operation of social and legal factors prevailing in

the community, persons with such a characteristic may be considered to hold a certain position in that community (his Honour's first proposition). Left-handed men share a common attribute (that is, they are left-handed), but, ordinarily, there is nothing to separate or to distinguish them from the rest of the community. However, to expand on his Honour's example, **if the community's ruling authority were to legislate in such a way that resulted in discrimination against left-handed men, over time the discriminatory treatment of this group might be absorbed into the social consciousness of the community. In these circumstances, it might be correct to conclude that the combination of legal and social factors (or norms) prevalent in the community indicate that left-handed men form a particular social group distinguishable from the rest of the community.**

The decision in Chen may also be understood in this way. Gleeson CJ, Gaudron, Gummow and Hayne JJ concluded that children born in contravention of China's 'one child policy' could constitute a group defined other than by reference to the discriminatory treatment or persecution they feared. To reach this conclusion, their Honours relied on the Tribunal's finding that a 'child is a 'black child' irrespective of what persecution may or may not befall him or her'. Kirby J emphasised that the membership by the children of the particular social group was defined not by anything they had done but by the 'wrongdoing' of their parents.

In Chen, the tribunal had found that 'black children' were a 'particular social group' within the meaning of the Convention definition, but had held against the applicant on other grounds. In the Full Court, it had been held by the majority that such children could not, as a 'pure question of law', constitute such a group because they were defined by reference to the persecutory conduct liable to be suffered by their members. The effect of the orders of this court was that the matter was remitted to the tribunal to be dealt with on the basis that the appellant was entitled to refugee status.

There is no reason in principle why cultural, social, religious and legal norms cannot be ascertained objectively from a third-party perspective. Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognise or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.

The third-party perspective is a common feature in the decision-making by the tribunal and by the delegates of the minister. Decisions made by these decision-makers may rely on 'country information' gathered by international bodies and nations other than the applicant's nation of origin. Such information often contains opinions held by those bodies or governments of those nations. From this information it is permissible for the decision-maker to draw conclusions as to whether the group is cognisable within the community. Such conclusions are clearly objective. However, as accepted by McHugh J in Applicant A, subjective perceptions held by the community are also relevant.

Conclusions as to 'particular social group'

Therefore, the determination of whether a group falls within the definition of 'particular social group' in Art 1A(2) of the Convention can be summarised as follows. 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'. As this Court has repeatedly emphasised, identifying accurately the 'particular social group' alleged is vital for the accurate application of the applicable law to the case in hand." [Emphasis added]

29 Their Honours applied the above principles at 255 [50]:

"**Disposition of the appeal**

The majority of the Full Court erred in law by requiring that there had to be evidence before the tribunal that would support the claim that Afghan society perceived young able-bodied men as comprising a separate group. Further, however, **the tribunal failed to consider the correct issue. This was whether because of legal, social, cultural and religious norms prevalent in Afghan society, young able-bodied men comprised a social group that could be distinguished from the rest of Afghan society**. …' [Emphasis in bold added]

30 McHugh J stated at 260 [69]:

"Thus, although the group must be a cognisable group within the society, it is not necessary that it be recognised generally within the society as a collection of individuals which constitutes a group that is set apart from the rest of the community. **To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle.** As I have indicated, it is not necessary that the persecutor or persecutors actually perceive the group as constituting 'a particular social group'. **It is enough that the persecutor or persecutors single out the asylum-seeker for being a member of a class whose members possess a 'uniting' feature or attribute, and the persons in that class are cognisable objectively as a particular social group.**" [Emphasis in bold added]

31 And at 261 [73]:

"Carr J thought that 'able-bodied Afghan men' were 'not defined by reference to the discriminatory treatment that its members fear.' That proposition is true only if young, able-bodied Afghan men are cognisable as a particular social group, independently of the conduct of their persecutors. As I have indicated, ordinarily, the description

‘able-bodied young men’ is an intellectual construct, not ‘a particular social group’. In the absence of evidence that at the relevant time young, able-bodied Afghan men were cognisable as such a group, the basis for the appellant's claim for refugee status must fail.”

32 I have set out the relevant passages from *Chen* and *Applicant S* at some length as they clearly explain and articulate the principles to be applied in determining whether a group of persons is a “particular social group” for the purposes of the Convention. Applying the reasoning of Gleeson CJ, Gummow and Kirby JJ in *Applicant S* and, in particular, their Honours’ observations at 252 [36] and 255 [50], the issue the RRT was required to consider in the present case was whether, because of the legal and social norms prevalent in Chinese society, parents of children born in breach of China’s family planning laws, or parents of “black children”, comprised a social group that could be distinguished from the rest of Chinese society. In considering that issue the RRT was entitled to disregard the shared fear of persecution of the parents as an attribute common to all members of the group. Nonetheless, it was required to consider whether, over time, the singling out of parents of “black children” for discriminatory treatment under China’s family planning laws might have been absorbed into the social consciousness of the community with the consequence that a combination of legal and social factors (or norms) prevalent in the community indicated that such parents form a social group distinguishable from the rest of the community: cf *Applicant S* at 251 [31].

33 While the RRT appears to have treated the possible social group the parents may fall into as either parents who breached the family planning laws or parents of “black children” (see, for example, pages 23-24 of the transcript of the RRT hearing) it appears from both *Chen* and the country information in the present case that the relevant group may be most appropriately characterised as parents of “black children” (ie children who do not have household registration because they are born in breach of family planning laws). That would be so if the attribute of being parents of “black children”, rather than breaching family planning laws, identified the parents as a particular social group if such a group were found to exist. For present purposes nothing turns on that issue, which will be a matter of fact for the RRT on any remitter.

34 In my view the RRT fell into the same kind of error in relation to the reasoning in *Applicant A* as the Full Court of the Federal Court fell into in *Chen*. In the RRT’s reasoning in respect of the applicant parents it treated the parents’ reliance on their fear of the penalties they are likely to suffer under laws of general application as precluding them, on the basis of *Applicant A*, from being members of a particular social group. As a result of that conclusion the RRT did not consider the correct issue, as articulated above, of whether the harm and disabilities parents of “black children” suffer have, as a result of the legal and social norms prevalent in Chinese society, over time resulted in such persons becoming a particular social group.

35 It must follow that the RRT failed to apply itself to the question the law prescribes and therefore to address the correct issue with the consequence

that there has been a constructive failure to exercise jurisdiction: see *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 422 and *Yusuf* at 351 [82].

36 In arriving at the above conclusion I have taken into account that the RRT stated as one of its findings that the "only characteristic of the applicant parents which may separate them from other members of Chinese society is the fact of having been penalised, or anticipating penalties, because of their breach of China's family planing regulations". If that finding was arrived at after considering the legal and social norms in the manner discussed above the applicant parents' claim would fail. However, the reasoning and findings of the RRT do not warrant the conclusion that it considered those norms. Further, in its reasoning the RRT appeared to be relying upon its view that breaching of the "family planning policy", a law of general application, cannot amount to the imposition of penalties for a Convention reason. In that regard the RRT was relying upon *Applicant A* as establishing that a breach of a law of general application cannot be a defining element of a particular social group. For the reasons explained in *Chen* at 300-301 ([18]-[21]) and in *Applicant S* that is not determinative of whether the persons who breach those laws can constitute a particular social group.

37 The RRT, in its reasons for rejecting the claims of the applicant child, also relied upon its view that the family planning laws were laws of general application, are not discriminatory, are applied equally to all Chinese citizens and are directed at a legitimate purpose. Plainly, those matters will be of particular relevance to the claims of the applicant parents on any remitter. As the views relate to a question of some importance it is appropriate to make some observations about them.

38 There are two fundamental difficulties with the RRT's approach. It may be accepted that the family planning laws, in so far as they relate to parents, are laws of general application in the sense that, although they may vary from province to province, in general, they give effect to China's one-child policy by penalising parents who have more than one child. However, as was pointed out in *Chen* at 301 [21] even general laws that are apparently non-discriminatory may impact differently on different people and, thus, operate discriminatorily. Also, the selective enforcement of such laws may result in discrimination. In the present case the country information accepted by the RRT stated:

- documents or administrative approvals can be obtained (or penalty avoided) through personal connections or payment of "incentives";
- practice in relation to the laws "can vary considerably from place to place";
- there is a considerable difference in enforcement of the laws between rural areas, where enforcement is lax, and in urban areas where it is stringently enforced.

39 The country information actually drawn upon by the RRT was scant and very general. That probably came about because it did not appreciate the complexity of the issues discussed in *Chen* and explained in *Applicant S*, which was handed down after the RRT's decision. Plainly, the country information accepted by the RRT is to the effect that the one-child laws do operate or impact discriminatorily on certain groups. A question on any remitter will be whether there is a real chance of that occurring in relation to the applicant parents.

40 The second, and more fundamental, difficulty arises in relation to the observations by Gleeson CJ, Gummow and Kirby JJ in *Applicant S* at 253-254 [43]-[45]:

"The criteria for the determination of whether a law or policy that results in discriminatory treatment actually amounts to persecution were articulated by McHugh J in Applicant A. His Honour said that the question of whether the discriminatory treatment of persons of a particular race, religion, nationality or political persuasion or who are members of a particular social group constitutes persecution for that reason ultimately depends on whether that treatment is 'appropriate and adapted to achieving some legitimate object of the country [concerned]'. These criteria were accepted in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in Chen. …

In Applicant A, McHugh J went on to say that a legitimate object will ordinarily be an object the pursuit of which is required in order to protect or promote the general welfare of the state and its citizens. His Honour gave the examples that (i) enforcement of a generally applicable criminal law does not ordinarily constitute persecution; and (ii) nor is the enforcement of laws designed to protect the general welfare of the state ordinarily persecutory. Whilst the implementation of these laws may place additional burdens on the members of a particular race, religion or nationality, or social group, the legitimacy of the objects, and the apparent proportionality of the means employed to achieve those objects, are such that the implementation of these laws is not persecutory.

The joint judgment in Chen expanded on these criteria:

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

41 The RRT did not enquire whether the harm feared by the applicant parents was appropriate and adapted to achieving the legitimate object of

population control. That issue is to be determined by reference to "the standards of civil societies which seek to meet the calls of common humanity" (see *Chen* at 303 [29]). As was explained in *Chen*, visiting the "sins" (if they be that) of the parents on the child can be persecutory of the child. Similarly, there are many instances where the view may be taken that the birth of a second child may not have come about as a result of any "sin" on the part of the mother. The birth of twins, or a child born as a result of a rape, or even failed contraception, are examples. A law of general application mandating the imposition of severe penalties on the mother irrespective of her personal circumstances may be regarded as a measure that, according to the standards of civil societies, is not appropriately adapted to achieving a legitimate object.

42 The position of the first applicant in the present case is a case in point. Her evidence before the RRT, which was not rejected, was as follows. She had a difficult history of seeking to avoid pregnancy and childbirth (see RRT decision at para [23]; transcript of RRT hearing at pp 12-13). After the birth of her first child the first applicant had been required to undergo "sterilisation surgery", which appears from the evidence to be a reference to the insertion of an Intra-Uterine Device ("IUD"). However, this procedure was apparently unsuccessful and she became pregnant. She explained that she was given a "tablet for stopping pregnancy". After contraception failed to prevent a further pregnancy she took leave from work in order to have her second child while staying with a relative far away from her home so that she would not be "caught out by the Chinese authorities". After the birth of her daughter, who was unofficially adopted by another couple, the first applicant again had "surgery". That procedure was also unsuccessful and was followed by an ectopic pregnancy which miscarried. In Australia the first applicant continued to have difficulties avoiding pregnancy. As she suffered side effects from the contraceptive pill she used condoms, which she said were not effective. Fearing the consequences of further breaches of Chinese family planning regulations she underwent two abortions. When she became pregnant again she was advised that it would be dangerous for her to have another abortion, and so gave birth to her third child.

43 Plainly, whether China's general laws are appropriately adapted to meet the varying situations of parents who have more than one child is a question of some complexity and difficulty. It was not a question that was considered by the RRT.

44 Finally, I have considered whether, notwithstanding the RRT's jurisdictional error, its findings in relation to the financial harm the applicant parents might suffer fall short of the persecutory conduct required by Art 1A(2) and s 91R and, as a consequence, the applicant parents' claim must have failed in any event: see *Stead v State Government Insurance Commission* (1986) 161 CLR 141 and *Minister for Immigration and Multicultural Affairs v Al Shamry* (2001) 110 FCR 27 at 41 [42].

45 As explained later in these reasons I have concluded that the RRT also erred in its approach to "serious harm" in accordance with s 91R when it

considered the claims of the applicant child. However, it is not necessary to pursue that aspect of the matter at this stage as the harm claimed to be feared by the applicants included the forced sterilization of the second applicant which can plainly constitute serious harm (see for example *Cheung v Canada (Minister of Employment and Immigration)* [1993] 2 FC 314 at 322-325). As there was no finding on that issue, which found some support in the country information accepted by the RRT, it cannot be concluded that the applicant parents' claim must have failed in any event.

The applicants' concession

46 Before the RRT the applicants were represented by their migration agent Mr Sutherland who, after the applicant parents had given their evidence, was asked by the RRT whether there was anything he wanted to add by way of submissions. The following response was given:

"MR SUTHERLAND

Only to reiterate that refugee claims have been made on behalf of the child. That I understood that in Chen Zi Hi in the High Court that whilst the family planning laws breaching it would be considered more …… they did not necessarily accept that that also applied to a child who has innocently breached these laws.

MRS CHEETHAM

What you are saying is that basically parents of black children or parents who have breached the family planning regulations is not a particular social group according to Chen, but children who were born as a consequence of the breach of the family planning regulations can form a particular social group.

MR SUTHERLAND

Yes."

47 At the conclusion of the hearing the RRT stated that its only power was to decide whether it was satisfied that the applicants come within the Refugee Convention and that the applicants would be advised of the decision the RRT has made on their applications.

48 The Minister submitted that it was not open to the applicant parents to now contend that the RRT erred in determining that they were not members of a particular social group because that matter had been conceded by their representative.

49 That submission requires consideration of the nature of a hearing conducted by the RRT. It is well established that a proceeding before the RRT is not adversarial in nature (see *Minister for Immigration and Multicultural*

Affairs v Wang (2003) 196 ALR 385 per Gleeson CJ at 390 [18], McHugh J at 394-395 [37], and Gummow and Hayne JJ at 403 [71]). In *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 Brennan J observed that the duty of such a tribunal is to "arrive at the correct or preferable decision in the case before it according to the material before it". In *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 63 I observed that the RRT is required to determine the substantive issues raised by the material and evidence before it. Thus, the RRT is not to limit itself to the case articulated by an applicant where the facts found by it, or not negated by its findings, might support an argument that the applicant is entitled to the protection of the Convention: see *Minister for Immigration & Multicultural & Indigenous Affairs v VFAY* [2003] FCAFC 191 at [97] and *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184 at 196. However, although the RRT has to determine an applicant's claim by reference to the fear of persecution claimed it is not obliged to determine claims not advanced by an applicant: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 457 [31]-[32].

50 It is clear from the cases that, although it is incumbent upon an applicant to state the facts upon which the applicant's claim of having a well-founded fear of persecution for a Convention reason is founded, the applicant is not required to articulate precisely how the claim falls within the Convention. It is sufficient that the evidence and material before the Tribunal which it accepts, or which its findings do not negate, supports an argument that the applicant is entitled to the protection of the Convention. In such a case it is the duty of the RRT to determine whether or not the applicant is entitled to the protection of the Convention. In arriving at that determination the RRT is under a duty to characterise the claims made and then to determine whether they fall within the protection of the Convention.

51 In the present case the applicant parents' claimed, and advanced evidence in support of their claim, to have a well-founded fear of persecution by reason of being members of a particular social group. In the course of the hearing before the RRT the applicants' migration agent was permitted to appear and may be regarded as having represented the applicants (see s 276(1)(d) of the Act and *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687 at 705 [60]). In that capacity he conceded that according to *Chen*, "parents of black children or parents who have breached the family planning regulations" are not a particular social group.

52 Several observations can be made about that concession. First, it related to a matter of law rather than fact. Second, in making the concession the migration agent was not withdrawing, or resiling from, the claims that had been made by the applicant parents that they had a well-founded fear of persecution by reason of being parents of "black children" or parents who have breached the family planning regulations. Third, as explained above, the concession was based on an erroneous view of the law held by the RRT and the applicants' migration agent.

53 As was recognised by Davies J in *Tuite v Administrative Appeals Tribunal* (1993) 40 FCR 483 at 488 an inquisitorial tribunal such as the Administrative Appeals Tribunal "may act upon concessions made by parties or their representatives or may reject such concessions if, in the circumstances of each case, it chooses so to do". His Honour also recognised that the parties before the Tribunal may request it to limit the issues they pose for decision. I see no reason why the same principles should not apply to the RRT. Thus, if the RRT acts upon a concession by treating it as withdrawing an issue for decision there may be some difficulty in a contention that the RRT had fallen into jurisdictional error in respect of that issue.

54 However, in the present case the RRT did not choose to act on the concession but, rather, treated the claims of the applicant parents as claims that it was required to determine on the merits which it then proceeded to do. Indeed, the RRT concluded the hearing by stating that it would determine the applicants' claims. Accordingly, the applicant parents are not precluded, by reason of the concession, from contending that the RRT fell into jurisdictional error in reviewing their claims.

The applicant child's claims

55 The RRT's reasoning process was difficult to analyse as it tended to state conclusions without explaining the basis for them. At [45] of its reasons the RRT stated that the family planning regulations are not "discriminatory but are applied equally to all Chinese citizens and are directed at a legitimate purpose". At [46] the RRT stated that it was not satisfied that the imposition of a fine on parents for breach of the family planning regulations is "discriminatory or persecutory to unregistered children as a particular social group". If, in arriving at those conclusions, the RRT was relying on the laws being of general application and serving a legitimate purpose, then as explained above, the reasoning in *Chen* make it clear that those matters do not result in the enforcement of the family planning laws not being discriminatory or persecutory of "black children". Further, the reasoning in *Chen* makes it clear that the 4-1 majority regarded enforcement of China's family planning laws as involving conduct that is systematic and is discriminatory against "black children". The RRT appears to have misunderstood the distinction between a law that applies generally and a law, such as that applicable in the present case, that targets or impacts adversely upon "black children" by preventing their household registration, with the disabilities that attend that lack of status, until the "social subsidy fee" is paid (see especially *Chen* at 300-301 [18]-[19]). Thus, the RRT's conclusion would have been based on a misunderstanding of the requirement of discriminatory and persecutory conduct in relation to the applicant child's claims and, as a result of the misunderstanding, the RRT did not address the questions required to be addressed.

56 More generally, in considering whether the harm claimed to be feared by the applicant child constituted a well-founded fear of persecution, the RRT

was under a duty to apply s 91R(1). In particular, it was required to be satisfied that the persecution involved "serious harm to the person" and "systematic and discriminatory conduct". As explained above, the reasoning in *Chen* would tend to situate China's family planning laws in the latter category in so far as "black children" are concerned.

57 The more difficult issue the RRT was required to consider was whether the harm fell within s 91R(1). Although s 91R(2) specifies instances of serious harm it does so "[w]ithout limiting what is serious harm for the purposes of paragraph (1)(b)". It follows that s 91R(2) does not lay down the criteria that must be satisfied before conduct can involve serious harm, nor does it provide an exhaustive statement of what amounts to "serious harm" for the purposes of s 91R(1)(b). Yet, the RRT's consideration of that issue was expressed by reference to the instances of serious harm set out in s 91R(2). For example, it stated:

"49. Further, I am not satisfied that for the third named applicant in the future to be excluded from public sector employment amounts to a denial of his capacity to earn a livelihood of any kind such that it threatens his capacity to subsist, as required by subs.91R(2).

…

51. I accept the independent information set out above that there is no social stigma attached to 'black children', and certainly no reports of discrimination or abuse serious enough to amount to persecution within the meaning of the Convention and s.91R(2) of the Act."

58 In its final conclusion at [55] the RRT stated:

"For the reasons I have given above, I am satisfied that the financial burden which the applicant parents have attracted by reason of their family planning choices, although serious, does not amount to persecution within the meaning of the Convention or of s.91R(2) of the Act."

59 Further, in [46] and [48] the RRT expressed its conclusions in terms of harm which was not sufficient to threaten the applicant child's and the applicant family's, "capacity to subsist": cf s 91R(2)(c), (d) and (e).

60 The RRT's references to s 91R(2) and to instances of harm described in s 91R(2)(c), (d) and (e) suggest that it was addressing the question of whether the harm feared fell within the instances set out in s 91R(2), rather than whether the harm feared constituted "serious harm". That view is reinforced by the following matters. The RRT did not consider how the phrase "serious harm" is to be interpreted. In [49] the RRT referred to what s 91R(2) "*required*" and in [51] it found the harm did not amount to persecution "*within the meaning of s 91R(2)*". In [46], [48] and [49] the RRT applied the language of the examples contained in s 91R(2)(c), (d) and (e) as if those examples represented the appropriate legislative test. Also, in its reasoning the RRT

made a number of references to s 91R(2) but it did not refer to s 91(1) or 91R(1)(b).

61 Under the earlier section in its reasons headed “Legal Principles” the RRT accurately set out s 91R(1) and accurately stated its relationship to s 91R(2), but it does not appear to have applied s 91R(1) in the reasoning employed by it in reaching its ultimate findings. While the reasons of the RRT are not to be construed minutely and finely with an eye keenly attuned to the perception of error (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272) that approach does not authorise a court to read into the reasoning of the RRT the application of a criterion which, on a fair reading of the reasons as a whole, does not appear to have been applied by it. In arriving at my conclusion I have taken into account that the RRT referred, in general terms to the seriousness of aspects of the harm (see for example [51], [52], [53] and [55]) but those references are also consistent with it accepting the requirement of serious harm specified in the examples provided as laid out in s 91R(2). Further, those general references are not sufficient to overcome the views I have formed, on the basis of the reasoning of the RRT, that it applied s 91R(2), rather than s 91R(1).

62 There is a further matter that suggests the RRT applied s 91R(2), rather than s 91R(1). To apply s 91R(1) the RRT would have to consider whether the claims of the applicant child, cumulatively, constituted persecution that involved “serious harm”. That follows from the duty of the RRT to consider the “totality of the case put forward” (see *Khan v Minister for Immigration & Multicultural Affairs* [2000] FCA 1478 at [31]) and in doing so consider each of the integers of the claim: see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at 247-248 [8]-[12] and 259 [41]-[42] and *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 625 at 636-637 [29].

63 On the evidence and material before the RRT, which it accepted or did not reject, the following forms of harm were claimed to be feared in respect of the applicant child if he returned to China:

- deprivation of access to China’s free education and medical services;
- deprivation of ability to acquire public sector employment in adulthood;
- denial of official registration with its consequential ramifications; and
- imposition of a significant financial penalty on the applicant parents in order to remove or mitigate the above forms of harm.

64 In relation to the last item it can be accepted that the means of the parents “to mitigate the consequences of [their child’s] adverse treatment” is relevant to whether “the treatment in question could be viewed as appropriate and adapted to the implementation of China’s ‘one-child policy’ and not as persecution”: see *Chen* at 305 [36]. Further, it may be that where parents have such means there may be no real chance of the child suffering those consequences. Nonetheless, for so long as the applicant child is unregistered,

and therefore a “black child”, all four forms of apprehended harm are capable of being relevant to his claim.

65 The RRT considered the likelihood of the financial penalty being paid. However, it failed to consider the cumulative effect of *all* of the forms of harm which on its findings of fact the applicant child might suffer, and then address the question of whether the totality of that treatment met the legislative criterion of persecution involving serious harm. Plainly, if s 91R(1), rather than s 91R(2), was being applied the RRT could have been expected to have addressed that question.

66 In my view a fair reading of its reasons as a whole establishes that the RRT failed to address the question of whether the conduct feared by the applicant child constituted “serious harm” but, rather, it addressed whether that conduct fell within s 91R(2). Thus, the RRT failed to address the correct issue and question required to be addressed.

67 In summary, the question of whether the treatment likely to be suffered by the applicant child amounts to “persecution” involving “serious harm” and “systematic and discriminatory conduct” is one of fact to be determined by the RRT on the merits of the case. However, the RRT is required to apply the correct tests and ask the correct questions in arriving at its determination. I am satisfied that, in failing to do so, it has constructively failed to exercise its jurisdiction.

68 I would add that I also have some concern as to whether the RRT correctly considered whether the fear of the applicant child of certain types of harm was “well-founded”. It is well-established that an applicant need not show that the persecution feared is more likely than not to occur. The applicant need only show that there is a “real chance” of the relevant persecution occurring (see *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 and 429). The RRT’s findings as to what would occur on the return of the applicant child to China were expressed generally in terms of what would happen or be likely, unlikely or very unlikely to happen, rather than whether there was a real chance of the feared harm occurring. However, as this aspect of the matter was not the subject of argument I do not pursue it further.

Conclusion

69 For the above reasons I am satisfied that the RRT fell into jurisdictional error by constructively failing to exercise its jurisdiction in relation to the claims of each of the applicants. Accordingly, the decision was not made under the Act and is not a decision protected by the privative provisions in s 474(1): see *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 129 FCR 259 at 270 [37].

70 In the circumstances it is appropriate to grant a declaration that the decision of the RRT is invalid and to issue a writ of certiorari quashing and setting aside the decision. It is also appropriate that the matter be remitted to a

differently constituted RRT to be determined in accordance with law. Although a writ of prohibition restraining the Minister from acting on the decision was also sought, the proposed declaratory relief, the writ of certiorari and the order requiring the RRT to discharge its duty by reviewing the delegate's decision according to law are, in the circumstances, adequate and appropriate relief. The Minister is to pay the applicants' costs of and incidental to the application.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 19 July 2004

Counsel for the Applicant:	Mr A Krohn
Solicitor for the Applicant:	MSC Legal Services
Counsel for the Respondent:	Mr W Mosley
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	1 July 2004
Date of Judgment:	19 July 2004