

**IMMIGRATION AND PROTECTION TRIBUNAL
NEW ZEALAND**

[2019] NZIPT 801627-630

**RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA**

Appellants:	FE (China)
Before:	L Moor (Member)
Representative for the Appellants:	The appellants represent themselves
Counsel for the Respondent:	No appearance
Date of Hearing:	11 November 2019
Date of Decision:	4 December 2019

DECISION

[1] This is an appeal against a decision of a refugee and protection officer declining to grant refugee status or protected person status to the appellants, a family group comprising of the wife (801627), the husband (801628), their 19-year-old daughter (801629), and their eight-year-old son (801630). All members of the family are citizens of China.

INTRODUCTION

[2] The central issues to be determined for these appeals are whether the appellants accounts are credible, and whether their claims are well-founded. For the reasons which follow, the Tribunal finds the appellants' accounts to be credible, and that the wife and husband each has a well-founded fear of being persecuted. They are recognised as refugees. The children are not recognised as refugees or protected persons.

[3] The husband is the responsible adult for the son for the purpose of section 375 of the Immigration Act ('the Act').

[4] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANTS' CASE

[5] The account which follows is a summary of that given by the appellants at the appeal hearing. It is assessed later. The Tribunal heard from the husband, wife and daughter in respect of the appeals. The evidence was to stand as the evidence for all appellants.

The Husband's Evidence

[6] The husband was born in Jilin Province in the late 1970s. He is an only child. His mother remains living in China.

[7] In December 2000, the husband and wife first met. In 2001, the husband, the wife and the wife's daughter from her first marriage, moved in to live together. In December 2008, the husband and wife married.

[8] In November 2009, the daughter experienced high fever, vomiting and diarrhoea after eating a lunch provided by her school. She required hospitalisation. Upon her discharge, her parents reported the incident to the police. It was discovered that the school was providing expired food.

[9] In April 2010, the wife discovered she was pregnant with her second child, the husband's first child.

[10] A few months before their son was born, the husband and wife applied for a birth permit. This was required under Chinese law, as permission for the second child. The permit was issued, after payment of a large sum of money.

[11] Around the end of 2010, the appellants were visited at their home by local government officials, demanding that they write and sign a pledge agreeing to have no more children.

[12] In February 2011, the son was born. The family was required to pay further money to register him and receive a birth certificate. The son was recorded in the appellants' *hukou* (household registration).

[13] The husband and wife received no receipt for the birth permit and registration payments. Over subsequent years, they were required to pay further amounts to the local government authorities whenever they were demanded. They sold their house to make these payments.

[14] After the son's birth, local government officials continued to visit the family home, demanding the husband and wife write and sign the pledge agreeing to have no further children. They both refused. The officials would threaten and insult them when they refused. These visits continued at various points until 2016.

[15] In addition to visits to the home, the husband's employer also exerted pressure on him to not have further children. The state-owned company told the husband he had to sign a pledge to that effect, or resign. He refused both options. In response, his employer removed the husband from his normal duties and detained him in a room at the company each day on his arrival at work. There, he was lectured two times a day about needing to sign the pledge. This continued for approximately two years, with the husband being required to spend each day of work in the room. The husband's income was reduced to the minimum wage and, as a result, he struggled to support his family. He eventually resigned and undertook part-time jobs, including in Shanghai, where he spent periods of time living and working. While in Shanghai, he received telephone calls from government officials, again telling him he needed to obey the family planning laws.

[16] From 2011 until approximately 2014, the daughter was bullied at school by fellow students. They had discovered that the husband was not her birth father. She was the subject of insults and abuse. In 2014, the husband and wife transferred her to another school. The bullying did not continue as the daughter avoided contact with other students and isolated herself. She was too scared to engage with others, for fear of further bullying. Her parents also moved to live near her school, so they could accompany her to and from school every day. The daughter suffered both physically and psychologically from the bullying. She was admitted to hospital for viral myocarditis.

[17] In approximately December 2015, the wife discovered she was pregnant for a third time. The news was received with much joy by her and her husband. The husband's father's dying wish had been for them to have more children. They

shared the news with immediate family and suspect, due to her excitement, the husband's mother told some of her close friends and neighbours.

[18] Shortly afterwards, the appellants' home was visited by local government officials. They knew the wife was pregnant again and told her she needed to have an abortion. She refused.

[19] On 15 January 2016, the husband, wife and son were at home when a group of local government officials came to the house. They pushed and prodded the wife and told her she was a pig for wanting so many children. They told her she needed to have an abortion and told her to sign a document agreeing to this. After she fainted, they left.

[20] Later that evening or the next day, the wife started bleeding heavily. She and the husband went to the hospital. While there, they admitted this was her third pregnancy and received a cold reception from medical personnel. The wife was taken away into a theatre for an operation. The husband believes that officials directly or indirectly killed their child.

[21] Since the operation, the couple has had difficulty getting pregnant. They experienced no difficulty in this regard previously.

[22] After losing her third pregnancy, the wife has suffered psychologically. Each time she saw Chinese government officials she would shake, fearing they would do her further harm.

[23] In June 2016, the husband and wife discovered that their son and others at his kindergarten were given sleeping pills to make them sleep for longer periods. This was reported to police. In response, the teacher was detained by police for 15 days.

[24] In September 2016, the husband travelled to Korea. He returned in December 2016.

[25] In January 2017, the husband and son were granted New Zealand visitor visas.

[26] In March 2017, the husband travelled to New Zealand alone. He did not claim refugee and/or protected person status initially, as he feared the consequences for his family back in China. The wife and children remained living in China. They stayed at the wife's sister's house in the same city.

[27] In February 2018, the wife and daughter applied for visas. In March 2018, the wife and children arrived in New Zealand.

[28] On 18 January 2019, the appellants lodged their claim for refugee and protection status with the Refugee Status Unit (RSU).

[29] In New Zealand, none of the appellants have sought medical assistance, due to a lack of funds. They also were not aware they could receive medical assistance after applying for recognition of refugee and/or protected person status.

[30] In New Zealand, the appellants have continued trying to conceive again. However, they have been unsuccessful. They have not sought fertility assistance, again due to a lack of funds. They wish to have further children and will continue trying. They have also considered adopting a child.

The Wife's Evidence

[31] The wife's evidence largely corroborated the husband's evidence to the Tribunal. In addition, she provided the following relevant evidence.

[32] The wife was born in Jilin province in the late 1970s. The wife has one older sister, who remains living in China with the wife's mother.

[33] The wife married her first husband in 1999. The next year, they divorced and she gave birth to the daughter. The daughter has never met her birth father and has been raised by the husband. However, she is legally the child of her birth father. The wife does not have any on-going contact with the daughter's birth father.

[34] In April 2010, the wife discovered she was pregnant with her second child, the husband's first child. She shared the news with her husband who was elated. They both wanted further children, as they believe is their right. Particularly as a woman, the wife believes it is for her to decide what she would like to do with her body.

[35] Despite the fact that the couple were able to obtain a birth permit for the second child's birth, they were required to pay a large sum of money for this. They then started to receive visits and pressure from local government committees, including the family planning committee. These were to impress upon them the family planning laws and demand they commit to having no more children.

[36] After their son was born in February 2011, the visits demanding a written undertaking that they would not have further children continued. The local government officials would also harass and abuse the wife during such visits.

[37] In approximately December 2015, the wife discovered she was pregnant for a third time. The news was received with much joy by her and her husband. A week or so afterwards, local government officials visited the appellants' home two to three times. They knew the wife was pregnant again, but she does not know how. They demanded she have an abortion and presented her with a document stating that she would. She tried to appease them, so that they would leave, saying she would agree, but did not sign the document.

[38] On 15 January 2016, the husband, wife and son were at home when a group of local government officials again came to the house. They told the wife she was a pig and pushed her. Again, they told her she needed to have an abortion and tried to make her sign a document agreeing to this. She fainted, and the men left.

[39] After she experienced bleeding, her husband took her to the hospital. The doctors and nurses treated her coldly after they learnt it was her third pregnancy. No scans or other tests were undertaken to check on the health of the baby, or to see if there was a heart-beat. The wife was taken into theatre and was told she was having an operation to remove the remainder of the foetus, after the miscarriage. Neither she, nor her husband, signed any consent forms in relation to the operation.

[40] The wife asked for an anaesthetic, but was refused one. The operation was extremely painful. The pain continued afterwards, but she was similarly given no pain medication. She thinks the denial of pain relief may have been because it was her third pregnancy, as it was illegal. Due to the trauma of the event, the wife has trouble remembering what happened, but remembers seeing her baby being sucked out a tube and into a drainage pipe during the operation. She does not know if her baby was alive at the time or had miscarried. As no checks were done to see if her baby was still alive, he/she may have still been. No attempts were made to save her baby.

[41] Since the operation, the wife has not had regular periods. She and her husband have tried to get pregnant again, but have been unsuccessful. Previously, they had had no difficulty getting pregnant.

[42] Losing her third child has had a seriously negative impact on the wife's mental state. She would shake when she saw Chinese government officials, as she

believes that they killed her baby. She fears what else they will do to her or her children. She is deeply distrustful of the Chinese government and strongly disagrees with their policies and treatment of women. She has the right to decide what she does with her own body, and whether she wants to have children or not. She hates the way the state has restricted women having children, for population control, but now says more children are needed to support the population, so the government is making women have them. It should be a women's choice what she does with her body and not the government's choice. While in China, she was previously too fearful to express these views. She knew that, if she did, her children would be at risk. However, if she returned to China now, she would feel compelled to express her views, that she and other women have rights and the Chinese government has killed her baby, if her children were not harmed. She would share her experience at the hands of the state and advise other women of the need to protect themselves. She believes it is a women's choice whether to have a baby, or not, and no-one else's. She also believes it is not a personal issue, but one for all women and they should join together to defend their rights.

[43] Since the operation, the wife has not been visited again by government officials. She does not know why, but it could be because they know she now cannot have children so are not concerned about her.

[44] The wife has seen her husband develop increasingly anti-government views because of how she and the children have been treated. He has tried to defend them, but has been unable to and his anti-Chinese government views have deepened.

[45] After the husband travelled to New Zealand in March 2017, the wife and children moved in to live with her sister. In March 2018, they joined him here.

[46] Since being in New Zealand, the couple have tried to have more children, but she cannot fall pregnant. They will keep trying and intend to have more children, if they are able to. Thus far, they have been unable to afford to see a doctor.

[47] The wife continues to experience physical and psychological pain. Since the operation she has had pain in her pelvic region. She feels highly distressed at the thought of returning to China. She would rather die than return to China. She was unable to protect her third child from the authorities and believes her other children may also be harmed. Despite this, she wishes to have more children, as this is something she feels compelled to do.

[48] In mid-2019, in New Zealand, the wife had a mental breakdown, where she was taken by ambulance to hospital. She was referred to mental health support in the community. As she was not suicidal, no further support was offered.

[49] Despite the fact that reports indicate that China has opened up its family planning policy and, legally, she could apply to have another child, she does not trust that this would be possible in reality as she is seen as having flouted Chinese rules previously. Her experience at the hands of the local government officials, and their past treatment of her, mean it is impossible for her to believe that she would be treated fairly. Her home in China is provincial and they do not follow rules that the state says it will follow. She also believes such rules are just for appearance, and not what happens in reality in their region.

The Daughter's Evidence

[50] The daughter was born in Jilin province, China in 2000. She has no memory of ever meeting her birth father. She has been raised by the husband, and sees him as her father.

[51] From the time the daughter was around 12 years old, until she was about 15 years old, she was bullied at school by other students after they discovered that the husband is not her birth father. This caused her to retreat into herself and not engage with anyone else.

[52] The daughter is aware that her mother became pregnant with her third child. She understands that the baby did not survive as the pregnancy was ended. Her mother did not want this to happen and wanted the baby.

[53] The daughter is scared to return to China. She fears what the government will do to her and her family. The government has not been there to help her when she has needed it, and she has seen the pain they have caused to her parents, even though her parents do not share much of what has happened to them to protect her.

Material and Submissions Received

[54] The Tribunal and the appellants have been provided with the files of the RSU, including copies of all the documents submitted to the RSU by the appellants.

[55] In addition to the appeal forms lodged on 19 June 2019, the following materials were provided to the Tribunal:

- (a) The appellants' joint statement, translated using an online translation service.
- (b) News articles and reports on forced abortions, forced sterilisations, family planning and women's rights in China, translated using an online translation service.
- (c) News articles and reports on bullying in schools and infants being fed medicines in China, translated using an online translation service.
- (d) Copies of the daughter's Chinese medical records, without translation.

ASSESSMENT

[56] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention" or "the Convention") (section 129); and
- (b) a protected person under the 1984 *Convention Against Torture* (section 130); and
- (c) a protected person under the 1966 *International Covenant on Civil and Political Rights* ("the ICCPR") (section 131).

[57] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants' accounts.

Credibility

[58] The Tribunal finds the appellants' accounts to be credible.

[59] While some inconsistencies emerged between the accounts provided to the RSU and the Tribunal, and between the accounts of the husband and wife, regarding the frequency and duration of visits by local government officials, the Tribunal accepts that people can remember stressful events differently and extends the benefit of the doubt to the appellants that they were visited on a number of

occasions by local government officials, from various committees, including the family planning committee, in attempts to impose upon them the family planning laws.

[60] However, the Tribunal does not accept that the husband was detained in a room during working hours at his place of employment for approximately two years. It finds this to be an embellishment that lacks plausibility. When questioned on this by the Tribunal, the husband was unable to provide a reasonable explanation as to why he would continue to be required to attend work, but not to work, over such an extended period of time. It does accept that pressure was exerted upon him in the workplace, and this resulted in his employment ending.

[61] Notwithstanding this embellishment, the Tribunal accepts the appellants' accounts that the couple have been subjected to on-going harassment, targeting and abuse by local government officials for breaching the family planning laws, starting when the wife was pregnant with the son. When the wife became pregnant with her third child, the officials demanded she have an abortion. After a threatening visit, she started to bleed. At the hospital, she was not provided any medical support to check if the baby was still alive. There is a real chance she was given a forced abortion. Further, the Tribunal is satisfied that based on the couple's inability to have further children after the operation, the absence of further visits and denial of a required general anaesthetic, there is a real likelihood she was forcibly sterilised.

[62] Both the husband and wife hold sincere anti-government views, as well as strong views on women's rights to self-determination and bodily integrity, arising from their past experiences. They will both express these views if pressed by government officials, or if confronted with a situation where these views are repeatedly challenged.

[63] The Tribunal also accepts that the daughter was given expired food and bullied, and the son was given sleeping pills, in the state education system in China.

The Refugee Convention

[64] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[65] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[66] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[67] For the purposes of refugee determination, “being persecuted” requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]–[130] and [177]–[183].

[68] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the appellants being persecuted if returned to China?

[69] The executive summary of the United States Department of State’s *Country Report on Human Rights Practices 2018: China* (13 March 2019) (‘the USDOS report’) provides a helpful overview of the political and human rights situation there:

“The People’s Republic of China (PRC) is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount authority. CCP members hold almost all top Government and security apparatus positions. Ultimate authority rests with the CCP Central Committee’s 25-member Political Bureau (Politburo) and its seven-member Standing Committee. Xi Jinping continued to hold the three most powerful positions as CP general secretary, state president, and chairman of the Central Military Commission.

Civilian authorities maintained control of security forces.

During the year the government significantly intensified its campaign of mass detention of members of Muslim minority groups in the Xinjiang Uighur Autonomous Region (Xinjiang). Authorities were reported to have arbitrarily detained 800,000 to possibly more than two million Uighurs, ethnic Kazakhs, and other Muslims in internment camps designed to erase religious and ethnic identities. Government officials claimed the camps were needed to combat terrorism, separatism, and extremism. International media, human rights organizations, and former detainees reported security officials in the camps abused, tortured, and killed some detainees.

Human rights issues included arbitrary or unlawful killings by the government; forced disappearances by the government; torture by the government; arbitrary detention by the government; harsh and life-threatening prison and detention conditions; political prisoners; arbitrary interference with privacy; physical attacks on and criminal prosecution of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others as well as their family members; censorship and site blocking; interference with the rights of peaceful assembly and freedom of association, including overly restrictive laws that apply to foreign and domestic nongovernmental organizations (NGOs); severe restrictions of religious freedom; significant restrictions on freedom of movement (for travel within the country and overseas); *refoulement* of asylum seekers to North Korea, where they have a well-founded fear of persecution; the inability of citizens to choose their government; corruption; a coercive birth-limitation policy that in some cases included sterilization or abortions; trafficking in persons; and severe restrictions on labor rights, including a ban on workers organizing or joining unions of their own choosing. Official repression of the freedoms of speech, religion, movement, association, and assembly of Tibetans in the Tibet Autonomous Region (TAR) and other Tibetan areas and of Uighurs and other ethnic and religious minorities in Xinjiang worsened and was more severe than in other areas of the country.

Authorities prosecuted a number of abuses of power through the court system, particularly with regard to corruption, but in most cases the CCP first investigated and punished officials using opaque internal party disciplinary procedures. The CCP continued to dominate the judiciary and controlled the appointment of all judges and in certain cases directly dictated the court's ruling. Authorities harassed, detained, and arrested citizens who promoted independent efforts to combat abuses of power."

Family Planning

[70] In *BY (China)* [2016] NZIPT 800770–773, the Tribunal conducted a review of the general country information and human rights implications relating to China's population control policies. It held that family planning policies were not inherently persecutory, but that there were instances of coercive practices impermissible under both domestic Chinese law and international human rights law.

[71] Since that time, China has undergone changes to its family planning laws. In 2016, China abolished its "one-child" family planning policy, with amendments to the National Population and Family Planning Law allowing two children.

[72] In addition, the USDOS report noted that some married couples can apply for permission to have a third child:

"The Population and Family Planning Law permits married couples to have two children and allows couples to apply for permission to have a third child if they meet

conditions stipulated in local and provincial regulations. State media claimed the number of coerced abortions had declined in recent years in the wake of loosened regulations, including the implementation of the two-child policy. Nevertheless, citizens were subject to hefty fines for violating the law, while couples who had only one child received a certificate entitling them to collect a monthly incentive payment and other benefits that vary by province--from approximately six to 12 yuan (one to two dollars) per month up to 3,000 yuan (\$450) for farmers and herders in poor areas. Couples in some provinces were required to seek approval and register before a child was conceived.”

[73] In Jilin province, Article 29 of the Jilin Provincial Population and Family Planning Regulations (2016) (at <https://perma.cc/XH4PX54M>) states that:

“Citizens shall give birth according to law and encourage a couple to have two children.

If a husband and wife has one of the following circumstances, they can have another child:

- (1) Two children have been born, one of whom is disabled and cannot grow into a normal workforce;
- (2) The remarried couple has more than two children before remarriage, the other party has no children or both have one child;
- (3) The remarried couple has one child before remarriage, the other has no children, and only one child after remarriage;
- (4) The husband and wife of the household registration and residence in the border counties (cities, districts) have two children;
- (5) Re-fertility due to special circumstances.”

[74] However, despite these formal changes and an apparent opening up of family planning rights in China, implementation of such changes depends on local level officials. According to the latest Australian Department of Foreign Affairs and Trade report on China (*DFAT Country Information Report: People’s Republic Of China* (3 October 2019) (“the DFAT report”) at p50:

“[l]ower level governments down to neighbourhood and village committees are responsible for implementation of the two-child policy. Interpretation and implementation of the policy varies enormously across China.”

[75] Furthermore, in March 2018, when the Chinese Constitution was amended, relevant statements such as “the state promotes family planning” remained unchanged (Q Renyu “China Signals That It Won’t Scrap Birth Restrictions” *Caixing* (13 February 2019):

“China’s National Health Commission (NHC) says it has no plans to delete references to “family planning” from laws and regulations, multiple Chinese media outlets reported Tuesday.

In a response to formal suggestions put forth by a delegate to the National People’s Congress, China’s legislative body, published online (link in Chinese) on Jan. 8, the

NHC wrote that family planning laws are formulated in accordance with the constitution, it would not be appropriate to delete “family planning” content.”

[76] With regards to China in general, the DFAT report (at pp50–51) noted that couples who have “out-of-policy” children can be treated in various ways, depending on the leniency of local authorities (emphasis added):

“There are financial and administrative penalties for births that exceed limits or violate regulations. The law, as implemented, requires each woman with an unauthorised pregnancy to abort or pay a ‘social compensation fee’ (SCF, ‘*shehui fuyang fei*,’ also known as ‘social maintenance fees’).’ The parents of each unapproved child must pay a SCF. The national law does not set out a fee schedule that applies to all localities; exact SCF amounts vary widely across and within provinces, and on individual financial circumstances.

...

Authorities calculate individual SCFs according to ‘last year’s local disposable annual income per capita’ in urban places, and ‘the net annual income per capita’ in rural places. Average annual disposable incomes for urban residents and net average incomes for rural areas differ according to the county, city or district (see Family Planning in Fujian). In some cases, this can amount to up to ten times a person’s annual disposable income. **Information on actual fees charged is difficult to obtain as they are subject to local discretion** (leaving open the possibility of individual or institutionalised manipulation).

...

Awareness of SCFs is widespread and, in many cases, couples wishing to have an additional child will save the required SCF. In these cases, the SCF operates as a pseudo tax, rather than as a punitive arbitrary measure. Local authorities have the discretion to decide whether to impose a more lenient fine if parents report an out-of-policy (child born to a single woman) or unauthorised birth (additional child born to a married couple) soon after it occurs. **Authorities are likely to apply heavier penalties for uncooperative behaviour**, such as hiding children, and can apply additional surcharges to those who fail to pay the required fee. The local family planning bureau and employers may also pressure the parents of out-of-policy and/or unauthorised children. In some provinces or counties, authorities have also imposed fines on entire work units in addition to the individuals concerned.”

[77] Furthermore, the USDOS report states that forced abortions and sterilisations continue to occur. However, government statistics on the percentage of abortions that were coerced during the year was not available. In addition, it also reports:

“State media claimed the number of coerced abortions had declined in recent years in the wake of loosened regulations, including the implementation of the two-child policy.

...

As in prior years, population control policy continued to rely on social pressure, education, propaganda, and economic penalties, as well as on measures such as mandatory pregnancy examinations and, less frequently, coerced abortions and sterilizations. Officials at all levels could receive rewards or penalties based on whether or not they met the population targets set by their administrative region. With the higher birth limit, and since most persons wanted to have no more than two children, it was easier to achieve population targets, and the pressure on local officials was considerably less than before. Those found to have a pregnancy

in violation of the law or those who helped another to evade state controls could face punitive measures, such as onerous fines or job loss.

...

Family-planning officials face criminal charges and administrative sanction if they are found to violate citizens' human or property rights, abuse their power, accept bribes, misappropriate or embezzle family planning funds, or falsely report family planning statistics in the enforcement of birth limitation policy. Forced abortion is not specifically listed as a prohibited activity."

[78] Since the changes to the family planning policy in 2016, the Tribunal (differently constituted) in *DX (China)* [2018] 801287-290, has reaffirmed its earlier position and continued to find that a real chance of coercive practices can amount to serious harm.

Treatment of Political Dissidents

[79] According to the USDOS report, those viewed as opposing the Chinese State face risks of arbitrary detention in harsh conditions, where they are subjected to serious ill-treatment:

"Government officials continued to deny holding any political prisoners, asserting persons were detained not for their political or religious views but because they had violated the law. Authorities, however, continued to imprison citizens for reasons related to politics and religion. Human rights organizations estimated tens of thousands of political prisoners remained incarcerated, most in prisons and some in administrative detention. The government did not grant international humanitarian organizations access to political prisoners.

...

Numerous former prisoners and detainees reported they were beaten, raped, subjected to electric shock, forced to sit on stools for hours on end, hung by the wrists, deprived of sleep, force fed, forced to take medication against their will, and otherwise subjected to physical and psychological abuse. Although prison authorities abused ordinary prisoners, they reportedly singled out political and religious dissidents for particularly harsh treatment."

[80] The USDOS report also observes that in 2018, the Chinese government's monitoring of its citizens increased, including through technological advancements:

"Authorities monitored telephone calls, text messages, faxes, email, instant messaging, and other digital communications intended to remain private. Authorities also opened and censored domestic and international mail. Security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines.

...

According to media reports, the Ministry of Public Security used tens of millions of surveillance cameras throughout the country to monitor the general public. Human rights groups stated authorities increasingly relied on the cameras and other forms of surveillance to monitor and intimidate political dissidents, religious leaders and adherents, Tibetans, and Uighurs. These included facial recognition and 'gait

recognition' video surveillance, allowing police not only to monitor a situation but also to quickly identify individuals in crowds. The monitoring and disruption of telephone and internet communications were particularly widespread in Xinjiang and Tibetan areas. The government installed surveillance cameras in monasteries in the TAR and Tibetan areas outside the TAR (see Special Annex, Tibet). The law allows security agencies to cut communication networks during 'major security incidents.'

According to Human Rights Watch, the Ministry of State Security partnered with information technology firms to create a 'mass automated voice recognition and monitoring system,' similar to ones already in use in Xinjiang and Anhui Province, to help with solving criminal cases. According to one company involved, the system was programmed to understand Mandarin Chinese and certain minority languages, including Tibetan and Uighur. In many cases other biometric data such as fingerprints and DNA profiles were being stored as well. This database included information obtained not just from criminals and criminal suspects but also from entire populations of migrant workers and all Uighurs applying for passports.

...

The government continued implementing a 'social credit system,' which collects vast amounts of data to create scores for individuals and companies in an effort to address deficiencies in 'social trust,' strengthen access to financial credit instruments, and reduce public corruption. Unlike Western financial credit-rating systems, the social credit system also collected information on academic records, traffic violations, social media presence, quality of friendships, adherence to birth control regulations, employment performance, consumption habits, and other topics. This system is intended to promote self-censorship, as netizens would be liable for their statements, relationships, and even information others shared within closed social media groups.

An individual's 'social credit score,' among other things, quantifies a person's loyalty to the government by monitoring citizens' online activity and relationships. There were indications the system awarded and deducted points based on the 'loyalty' of sites visited, as well as the 'loyalty' of other netizens with whom a person interacted. The system also created incentives for citizens to police each other. Organizers of chat groups on messaging apps were responsible for policing and reporting any posts with impermissible content, making them liable for violations.

...

There were several cases in which an individual's credit score resulted in concrete limitations on that person's activities. Users with low social credit scores faced an increasing series of consequences, including losing the ability to communicate on domestic social media platforms, travel, and buy property. In April state media reported the social credit system 'blocked' individuals from taking 11 million flights and four million train trips.

In a separate use of social media for censorship, human rights activists reported authorities questioned them about their participation in human rights-related chat groups, including WeChat and WhatsApp. Authorities monitored the groups to identify activists, which led to users' increased self-censorship on WeChat, as well as several separate arrests of chat group administrators."

Application to the Facts – Wife

[81] The wife has been targeted, harassed and threatened over multiple years by local government officials due to her breaching family planning laws in force at the time. She repeatedly refused to agree to state demands seeking to restrict her right

to have further children and to family life. She rejects the idea that the government can control what she, as a woman, wishes to do with her own body.

[82] After her third pregnancy, the wife was threatened with a forced abortion if she did not agree to terminate the pregnancy. After threats and harassment in mid-January, she experienced bleeding and sought medical help believing she was miscarrying. The Tribunal is satisfied that the events at the hospital, including denying her an anaesthetic as it was her third pregnancy, and removing the foetus through an operation without checking on the health or well-being of her foetus, amount to serious harm in the form of cruel, inhuman and degrading treatment. This has resulted in emotional and psychological harm for the wife, and further strengthened her opposition to the Chinese government, which she would express on return to China, if able to without jeopardising the safety of her children.

[83] Due to the nature of surveillance in China, including through their local neighbourhood committee (*jumin weiyuanhui*), it is accepted that the appellants' return to China will become known to authorities. It also accepts that, in turn, their return to China can be expected to be reported to the local Family Planning and other authorities.

[84] Due to their past profile as individuals who have intentionally breached and rejected family planning laws and state policy, the Tribunal is satisfied that the wife and her husband will be the subject of on-going harassment and questioning. While the Tribunal acknowledges that in some circumstances, including in remarriages, third children may be permissible, country information also confirms that this falls to the discretion of local authorities. The Tribunal is satisfied that in this circumstance, where the adult appellants already have an adverse profile with the local authorities, they would not be permitted further children.

[85] On the contrary, due to their profile as individuals who have previously breached family planning laws and as such have challenged the government's authority, the Tribunal is satisfied that they will be targeted for further harassment and mistreatment to ensure social compliance. Upon questioning, the Tribunal is satisfied that the wife would be unable to repress her views, even if her children were present in the country, due to her past trauma and the impact it has had on her. The consequences of this on the wife, the Tribunal finds, will amount to serious harm.

[86] In *DS (Iran)*, after considering in detail the role that the concept of serious harm plays in the ‘being persecuted’ element of the refugee definition, the Tribunal observed, at [179]:

“‘Serious’ harm should be taken to mean exactly that, namely, harm arising from breaches of human rights as codified under international human rights law which, due to their nature, intensity and/or duration, are appropriately categorised as serious. But the form the serious harm can take is shaped by the particular aspect of human dignity that the relevant right or bundle of rights speaks to and protects, considered in the particular context of the case including the characteristics and circumstances of the individual claimant.

The claimant’s particular individual characteristics will help to shape the specific objective factors of nature, intensity and/or duration of the harm.”

[87] In light of the particular characteristics of the wife, including the ongoing psychological impact on her of the forced abortion, the Tribunal is satisfied that further harassment, mistreatment and periods of arbitrary detention aimed at ensuring her compliance with state law and policy, will result in serious harm in the form of psychological and emotional harm, of sufficient severity to amount to cruel, inhuman or degrading treatment in breach of Article 7 of the ICCPR).

[88] In such circumstances, there is a real chance that the state will react strongly to her politically opposing views and this will also result in her being subjected to coercive measures such as further physical ill-treatment and/or arbitrary detention also in breach of Articles 7 and 9 of the ICCPR, in an attempt to silence her opposition.

[89] For these reasons, the Tribunal finds that the wife has a well-founded fear of being persecuted in China. The first principal issue is answered in the affirmative.

Is there a Convention reason for the persecution?

[90] The wife’s predicament arises on account of her political opinion. The second principal issue is therefore also answered in the affirmative.

Application to the Facts – Husband

[91] The husband feels that he is responsible for protecting his wife and children. He feels that he has been unable to fulfil this role and as a result his third child (second biological child) was killed either directly or indirectly by government officials. This event, combined with the years of on-going threats, harassment and pressure applied to the husband and his wife, including in his workplace, combined with the state’s failure to respond adequately to the bullying of his daughter and

drugging of his son, have resulted in the husband forming strong anti-Chinese government views.

[92] While in China the husband expressed these views when he came into contact with government officials through his refusal to sign a pledge not to have further children. However, he did not take any further action in expressing these views more widely. However, the Tribunal is satisfied that the combination of years of harassment, what the Tribunal has found appears to be a forced abortion and potential forced sterilisation and the psychological impact of these events on his wife, on return to China the husband will feel compelled to challenge government authorities to a greater extent.

[93] Similarly, the husband of a couple with adverse profiles with family planning authorities, and who had been subjected to a forced abortion after the 2016 changes in *DX (China)* (at [58]), was found by the Tribunal to be at risk of being persecuted through pressure exerted on him to adhere to family planning policies:

“As to this, it is to be expected that the husband will continue to suffer harassment, including repeated detentions of short duration, to force the couple to comply. Further, the Tribunal accepts counsel’s submission that, by their past actions, the father and the wife are seen as particularly troublesome by Ms Ge who has made it clear that she is not willing to allow the couple to pay a social maintenance fee in respect of the birth of the third child, even though this appears to be something permissible under the provincial regulations. These would amount to arbitrary detentions in breach of his right under Article 9 of the ICCPR.

...

In the father’s case, his detention(s) would not be sanctioned by law and will be *solely* designed to force his wife to undergo a forced abortion or sterilisation which in itself amounts to a breach of *her* human right to be free from cruel inhuman or degrading treatment. Even though the duration of each detention has, in the past, been relatively short, their nature and inherent coercive purpose, imbues them with a serious quality. Moreover, the wife’s objection to the family planning regulations is not merely personal, but is now also a religious matter for her. Although not a Jehovah’s Witness himself, the husband supports her in her beliefs. The couple – and the wife in particular – are unlikely to give in easily to the pressure they would be placed under. Translating this into the assessment of the father’s predicament, this increases the risk that he will be subjected to ongoing and repeated detentions. The fact that the couple have already fled the country rather than comply will increase the chance that he is detained more frequently, for longer periods or both. Moreover, given the country information, and their particularly adverse profile at the local level, the prospect that he would be subjected to physical to harm contrary to his rights under Article 7 (to not be subjected to cruel, inhuman or degrading treatment or punishment) and 10(1) (to be treated with humanity and with respect for the inherent dignity of the human person when deprived of his liberty) of the ICCPR, cannot be easily dismissed as remote or speculative. While an exact time frame is impossible to say (but most likely within a year after their return), the Tribunal is satisfied that the coercive power of the state will, in the end, triumph over the couple’s resistance, but that in the meantime, the husband will suffer serious harm arising from breaches of his internationally recognised rights.

Accumulating these matters, the Tribunal is satisfied that the father has a well-founded fear of being persecuted in accordance with the approach set out in *DS (Iran)*.”

[94] In this case, in light of the husband’s strong anti-government views and sense of responsibility to protect his wife and children, coupled with the impact of the years of harassment and pressure, including in his workplace, and the trauma of the forced abortion, the Tribunal is satisfied that the husband will react strongly when subjected to further questioning and harassment. This will be perceived by government authorities as a challenge to their authority. Country information confirms that individuals seen as attempting to undermine the Chinese government are treated harshly. The Tribunal is satisfied that there is a real chance that the husband will be subjected to periods of arbitrary detention and ill-treatment in breach of Articles 7 and 9 of the ICCPR.

[95] The Tribunal is satisfied that the husband also has a well-founded fear of being persecuted.

Is there a Convention reason for the persecution?

[96] The husband’s predicament arises on account of his political opinions.

Application to the Facts - the Children

[97] The appellants fear that the daughter will be harmed through further bullying on return to China, which the Chinese state did not assist in resolving.

[98] The Tribunal accepts that the daughter was bullied while she attended school in China between approximately 2011 and 2014. However, the bullying ceased after she was moved to a new school. There is no evidence that the daughter would be subjected to further bullying from the same individuals on her return to China. In addition, she has now finished her schooling and would not have cause to return to the school where she was bullied or another school.

[99] While the bullying affected her psychologically, resulting in her becoming socially isolated, the Tribunal is not satisfied that it has had such an effect on her that returning to China would cause her harm, psychological or otherwise, that would amount to the necessary threshold of “serious harm”. It finds that the daughter does not have a well-founded fear of being persecuted within the meaning of the Refugee Convention.

[100] The appellants fear that the son is at risk of further ill-treatment at the hands of the Chinese state. Previously, he was given sleeping pills, by a government run pre-school. They also fear the consequences of vaccines he was required to be given by the state. While the Tribunal accepts that such incidents caused distress to the son's parents and discomfort to the son, at the time, it is not satisfied that he will face any long-term consequences of these events. Any future negative impact of having taken sleeping pills at a young age, or from receiving vaccinations, is entirely speculative. Based on available evidence, the Tribunal is not satisfied that the son faces a real chance of serious harm on return to China. He does not have a well-founded fear of being persecuted within the meaning of the Refugee Convention.

Conclusion on Claim to Refugee Status

[101] For the reasons given above, the Tribunal finds that the wife and husband have well-founded fears of being persecuted if returned to China for the Convention ground of political opinion. They are recognised as refugees.

[102] The children do not have a well-founded fear of being persecuted on return to China and are, therefore, not refugees.

The Convention Against Torture

[103] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Assessment of the Claim under Convention Against Torture

[104] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[105] The wife and husband have been recognised as refugees. In accordance with New Zealand's obligations under the Refugee Convention, they cannot be

deported from New Zealand by virtue of section 129(2) of the Act (the exceptions to you to which do not apply). Accordingly, the question whether there are substantial grounds for believing that they would be in danger of being subjected to torture if deported from New Zealand does not arise. The wife and husband are not persons requiring protection under the Convention Against Torture. They are not protected persons within the meaning of section 130(1) of the Act.

[106] As to the children, they rely on the same evidence in support of their claims under the Convention Against Torture as they did in support of their claims under the Refugee Convention. For the same reasons, the Tribunal finds that the children have not established substantial grounds for believing they would be in danger of being tortured if returned to China.

[107] The children are not entitled to be recognised as protected persons under section 130(1) of the Act.

The ICCPR

[108] Section 131 of the Act provides that:

“(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

...

(6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Assessment of the Claim under the ICCPR

[109] By virtue of section 131(5):

“(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:

(b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.”

[110] For the reasons already given, the wife and husband cannot be deported from New Zealand. Accordingly, the question whether there are substantial grounds for believing that they would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand does not arise. The wife and

husband are not persons requiring protection under the ICCPR. They are not protected persons within the meaning of section 131(1) of the Act.

[111] As to the children, they rely on the same evidence in support of their claims under the ICCPR as they did in support of their claims under the Refugee Convention. For the same reasons, the Tribunal finds that the children have not established substantial grounds for believing they would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if returned to China.

[112] The children are therefore not persons requiring protection under the ICCPR, and it follows that they are not protected persons within the meaning of section 131(1) of the Act.

CONCLUSION

[113] For the foregoing reasons, the Tribunal finds that the wife and husband:

- (a) are refugees within the meaning of the Refugee Convention;
- (b) are not protected persons within the meaning of the *Convention Against Torture*;
- (c) are not protected person within the meaning of the *International Covenant on Civil and Political Rights*.

[114] The husband's and the wife's appeals are allowed.

[115] For the foregoing reasons, the Tribunal finds that the children:

- (a) are not refugees within the meaning of the Refugee Convention;
- (b) are not protected persons within the meaning of the *Convention Against Torture*;
- (c) are not protected person within the meaning of the *International Covenant on Civil and Political Rights*.

[116] The children's appeals are declined.

Order as to Depersonalised Research Copy

[117] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellants.

"L Moor"

L Moor
Member

Certified to be the Research
Copy released for publication.

L Moor
Member