IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

[2021] NZIPT 801793–794

Appellants:	**GD (China)**
Before:	B L Burson (Member)
Counsel for the Appellants:	C Curtis
Counsel for the Respondent:	No Appearance
Date of Hearing:	20 October 2020
Date of Decision:	28 January 2021

DECISION

[1] These are appeals against decisions of a refugee and protection officer declining to grant refugee status or protected person status to the appellants, both nationals of the People's Republic of China.

INTRODUCTION

[2] The appellants are a mother and her seven-year-old son. They arrived in New Zealand with their husband/father (hereinafter the husband) who was recognised as a refugee by the Refugee Status Unit (RSU) in the same decision which declined refugee or protected person status to the appellants. The appellants' appeals have raised a number of issues requiring clarification relating to (a) the basis upon which appeals by family members of recognised refugees are to be assessed and (b) the human rights content of the assessment of appeals by children.

[3] Because the son is a minor, the wife was the responsible adult for him for the purposes of section 375 of the Immigration Act 2009 (the Act). The appellants will be referred to as "the wife" and "the son".

[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 husband and wife at the appeal hearing. It is assessed later. Because the claimed risk to the appellants derives from the husband's activities, it is appropriate to begin with his evidence.

[6] The couple, both from X province, were married in early 2013. The son was born later that year. Following the marriage, the mother's *hukou* was transferred to the husband's family home and the son was registered at this address in the same *hukou*.

[7] The wife now began working in the husband's family restaurant that his family had owned and operated since the early 1990s. Subsequently, her own parents also began working in the restaurant as did her younger brother.

[8] The husband came to be politically active online while in China. He used his personal WeChat account which he had established in 2013 using a profile name which was not his own. He came to learn that certain websites were blocked and he was unable to access the information he sought.

[9] In 2016, he installed proxy software which enabled him to bypass the Chinese government's internet firewall. He now became sensitised to topics which were not easy to obtain information about in China, such as issues relating to the "4 June event" (Tiananmen Square). He began posting and commenting on matters of a very sensitive nature. His comments shared a common theme of concern about corruption and the resulting injustices that the Chinese people suffered. From this perspective, he posted critical material about various topics. These included the use of expired or out-of-date vaccines which caused great harm and how the children of high-ranking officials in another province had tried to use their influence to seek retribution against the family members of a person they had assaulted who were seeking justice. The husband established a second WeChat account, using another profile name as a backup account in case his main account was locked or frozen.

[10] Throughout 2017 and 2018, the husband continued to post material of a sensitive nature. In addition to issues relating to the problems with corrupt officials and vaccines, he also touched upon issues relating to Chinese foreign policy (particularly in Africa), fiscal policy and corruption as well as personal attacks on Xi Jinping.

[11] The wife knew that this was dangerous but, talking to her husband, he impressed upon her that he felt compelled by the need to express his opinions and to pass on this information because the Chinese people needed to be told the truth, otherwise their situation would be "hopeless". Nevertheless, the wife was worried that, if the local officials found out what he was doing, this could cause problems and, in particular, that he, and even they, could be arrested and detained. She had heard of family members of some prominent figures being targeted. Although she realised they were not in that category, she was nevertheless worried that this was something that could happen to them and urged upon her husband the need to take adequate precautions. The husband took her advice to heart and used images instead of words where he thought the words might bring adverse attention to the posts. He also deliberately misspelt sensitive words, using Chinese character approximations.

[12] In around 2018, the husband also established a private WeChat discussion group with a number of people with whom he had formed close friendships, trading bitcoin currency. He gave this discussion group a neutral name as a precaution. The message board touched on matters of a sensitive political and economic nature. Some of the people involved in this discussion group had their own chat discussion groups which also discussed issues of a sensitive political nature and one of which subsequently became blocked.

[13] The family departed China in late 2018 as holders of New Zealand visitor visas. While here, the husband used the greater internet freedom to continue to post sensitive material to his WeChat account, relating to various issues such as the demonstrations in Hong Kong, the treatment of the Uighur population, and Taiwan.

[14] In January 2019, the husband's primary WeChat account was blocked. He found this out when he discovered a login message, informing him that his account had been subject to an intervention. While it could be used for cash transactions, he was unable to view or share posts.

[15] At around this time, the husband received a number of suspicious telephone calls from his local police station in China, which he did not answer. He and the wife contacted their families and learned that the authorities had visited to make inquiries about him, first to the family restaurant and later to the family home. During the visit to the police station, the wife's father and brother were summonsed to the police station along with the husband's father. The husband's father told him that the officers were very unfriendly during the visit. His family were told that the husband should stop his online activity otherwise they would take action against them and that, if he (the husband) carried on posting, they would search for him all over the world.

[16] To ascertain whether he was under surveillance, the husband posted a comment critical of Xi Jinping to his backup WeChat account. There was then a further visit to his family by the authorities.

[17] Concerned, the husband deleted both of the WeChat accounts. He set up a new WeChat account with an English profile name in New Zealand, using a New Zealand number. Unlike the Chinese process, this did not require having to use identification for verification. He has continued to post material on sensitive issues to this account. However, he has done so using the false English name profile and has refrained from posting as fully as he would like in terms of content out of concern for his family still in China.

[18] Since that time, there have been no further approaches to either the wife's family or her husband's family. The restaurant has remained open although it was shut for a month during a COVID-19 lockdown.

[19] The husband and the wife believe that, if the wife and son are in China and he remains in New Zealand, the Chinese authorities may arrest, detain and harm the wife and son in order to place pressure on the husband to return to China. Although he understands that the decision by the RSU recognising him as a refugee means he cannot be forced to return to China, he considers that he would have little option but to return to China with his wife and son, in order to prevent such harm occurring to them.

[20] Furthermore, the wife is worried about the impact that this attention on her husband will have on the son. Like any small boy, he looks up to his father and he would find it difficult to understand why his father had been arrested and detained if he were in China. She is also concerned that any torture or other mistreatment of her husband in detention would also cause emotional or psychological damage

to her son. She also fears that, if her husband is arrested, this will become known and her son may be bullied in school or get into fights or other trouble. For herself, any arrest or detention of her husband would be a source of worry and anxiety. She, too, would be affected by any mistreatment he suffered in detention.

Material and Submissions Received

[21] The Tribunal received written submissions (9 October 2020) from counsel, together with:

(a) further statements of the husband and wife, both dated 8 October 2020;

(b) copies of political post made by the husband (various dates) to the WeChat account he established in New Zealand, with translations thereof;

(c) a copy of the Chinese State Security Law of 1993;

(d) country information relating to surveillance of online activity by the Chinese government;

(e) articles and commentary relating to the *non-refoulement* obligation; and

(f) a copy of the decision of the High Court in *DG (Bangladesh) v Refugee Protection Officer* [2020] NZHC 1528 granting leave to appeal to the High Court on a point of law relating to the application of the United Nations 1989 *Convention on the Rights of the Child* (UNCROC).

[22] During the hearing, the Tribunal served on counsel a copy of its decision in *AL (Myanmar)* [2018] NZIPT 801255 and drew counsel's attention to the paragraphs dealing with the nature of the enquiry in refugee status determination (RSD). Counsel made closing submissions. On 28 October 2020, the Tribunal received further legal submissions on the nature of the enquiry and the risk to the appellants.

ASSESSMENT

[23] Under section 198 of the Act, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise each 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).

[24] In determining whether the appellants are refugees or protected persons, 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' account.

Credibility

[25] The husband and wife each gave evidence which was consistent with what they had said at the RSU. The husband's claim that his WeChat account had been blocked by the government was confirmed by a screenshot of a message informing him "This WeChat account has been suspected of spreading malicious rumours and has been permanently blocked". The claim that the husband continues to post material relating to topics sensitive to the Chinese government, such as the protest movement in Hong Kong, or critical of it is supported by documentary evidence. The Tribunal notes the failure of the husband to mention to the RSU anything about the visits to their families in his statement in support of the claim. His explanation that this was an oversight is supported by the fact that he did file, in advance of his RSU interview, a statement from his father regarding the approach by the authorities and that the wife also mentioned the questioning of her family at the outset of her RSU interview. While he did not mention the second approach to his family at the outset of his RSU interview, he did mention it at a later point. Having looked at the RSU file as a whole, his explanation that he thought that this would be sufficient is, in the overall context of this case, a plausible one.

[26] Therefore, the accounts of the husband and wife are accepted as credible.

Facts as found

[27] The appellants are the wife and young son of a man who has used his WeChat account since 2016 as a platform for posting material denigrating of Xi Jinping and the Chinese Communist Party (CCP). He has posted critical commentary on matters the CCP regards as highly sensitive topics and he has been blocked by the Chinese authorities for "spreading malicious rumours". He has since established a new WeChat account under a false English name and has continued to post such material. He has openly supported Guo Wengui.

[28] In January 2019, shortly after the appellants and the husband arrived in New Zealand, the police summonsed the husband's father, and the father and brother of the wife, seeking information as to their background and whereabouts. The husband's family home was visited by the authorities again in February 2019. There have been no further visits to either family since this time.

[29] By decision dated 2019, the father was recognised as a refugee by the RSU.

[30] The husband continues to post material critical of Xi Jinping and the CCP from New Zealand, using a false English name profile but, wary of the Chinese state's surveillance capacities, he has been restraining himself in terms of content out of concern for his family in China.

The Refugee Convention

[31] 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.

[32] 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.

[33] It is to be recalled that the Tribunal, adopting the approach of the Refugee Status Appeals Authority in *Refugee Appeal No 70074* (17 September 1996), has long summarised the principal issues as:

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

(b) If the answer is yes, is there a Convention reason for that persecution?

[34] This appeal brings into focus some important questions, fundamental to the operation of RSD in New Zealand. The first relates to the nature of the inquiry. The second relates to the *de novo* nature of the inquiry on appeal when only one member of a family group is recognised as a refugee at first instance. Finally, the appeal raises issues as to how the predicament of a dependant of a recognised refugee is to be approached.

The nature of the enquiry

[35] Some aspects of the nature of the inquiry in RSD are settled. The inquiry is unquestionably concerned with the assessment of the appellant's predicament, measured against the metric of enjoyment of international human rights. 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].

[36] As also explained in *DS (Iran)*, this is fundamentally a forward-looking inquiry (emphasis added):

> [203] The inquiry under the human rights approach to being persecuted should be understood as requiring the following sequential questions to be addressed once the claimant's credibility has been assessed and the facts found (the predicament question):
>
> (a) Does the claimant's predicament, as found, indicate there **will be** an interference with a basic human right or rights in the form of a restriction on its exercise or enjoyment? (the question of scope).

[37] To be "well-founded" under Article 1A(2) of the Convention, 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].

[38] But, other aspects are arguably less settled. In particular, there is the question of whether the assessment of the anticipated future predicament assumes the presence of the appellant in the country of origin or former habitual residence or depends on 'if' they are returned there.

[39] The issue is not an academic one. As will be discussed, the answer to this question shapes the assessment of the refugee inquiry in important ways. More generally, a lack of clarity can cause confusion. The recent grant of leave in *DG (Bangladesh)* is notable for the fact that case law cited by counsel for the applicant in relation to the domestic application of various international human rights standards and principles relevant to children did not concern the question of entitlement to refugee and protection status, but deportation. Unlike refugee and protection claims, with deportation cases, the focus of the inquiry concerns the impact of *departure* from New Zealand on the appellant and other relevant persons such as family members, and the balancing of these impacts, where required, against other interests.

[40] In *AL (Myanmar)* [2018] NZIPT 801255, the Tribunal drew attention to concerns relating to the framing of this forward-looking inquiry into refugee status around the concept of returnability:

> [92] … The jurisprudence of the RSAA is characterised by a difference of opinion as to the impact returnability has on entitlement to refugee status; see *Refugee Appeal No 72635, Refugee Appeals No 73861 and 73862* (30 June 2005) and *Refugee Appeal No 74880*. There was a divergence of opinion in these cases on the issue of whether factual returnability to a country of former habitual residence was a precondition for recognition as a refugee; the former held that it was whereas the latter two concluded it was not; see here, the summary of jurisprudence in *Refugee Appeal No 74880* at [57]-[73].
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> [93] In the Tribunal's view, the issue of returnability plays no part in the assessment of risk. Returnability is not an element of the refugee definition but, in New Zealand at least, derives from the summation of the first of the two principal issues in *Refugee Appeal No 70074* (17 September 1996) set out at [49] above, as being (emphasis added): 'Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?'.
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> [94] In *DS (Iran)* at [126], the Tribunal drew attention to the dangers of 'using concepts designed to elucidate the meaning of the Convention terms as substitutes for the Convention definition'. Consistent with this warning, the phase 'if returned' should not be understood as imposing a returnability test of any kind in any case. The 'if returned' in the above summation is best understood as signalling the hypothetical nature of the exercise that is required by the forward-looking nature of the inquiry into refugee status. It is the condition of being presently outside the country of nationality or former habitual residence which inheres to the refugee definition under Article 1A(2), not the ability to return at some point in the future.
>
> [95] This is the position adopted in the United Kingdom. In *EB (Ethiopia)*, Longmore LJ emphasised the essentially hypothetical nature of the inquiry into refugee status:
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> > 71. That does not, of course, conclude the question since the hypothetical question whether EB would suffer persecution (or would have a well-founded fear of such persecution) on her return is the critical question which has to be addressed. The question is hypothetical because Ethiopia will not currently allow EB to be returned but the question must be answered now, not as at some date in the unknowable future when Ethiopia might change its mind and decide to re-admit EB for some reason which cannot be currently predicted. Once it is clear that EB was

> persecuted for a Convention reason while in Ethiopia, there is no basis on which it can be said that that state of affairs has now changed. I would therefore conclude that EB has a well-founded fear of persecution for a Convention reason and that she is now entitled to the status of a refugee.

[96] Similarly, in *MA (Ethiopia)*, Elias LJ stated

> 43. I also accept, as Ms Giovannetti concedes, that the Tribunal should have dealt with the question of Ethiopia's attitude to return as part of its assessment whether there was a real risk of persecution. It is true that the Tribunal will not generally be concerned about the process of removal; it must determine asylum status without regard to that issue, which is a matter for the Secretary of State. So the fact that it may, for example, prove to be impossible in practice to return someone seeking asylum has no relevance to the determination of their refugee status. But where the applicant contends that the denial of the right to return is part of the persecution itself, the Tribunal must engage with that question.

[41] Commenting on the Tribunal's decisions and the English authorities, Ms Curtis submits that "the administrative process of removal must be distinguished from the 'real risk of persecution on return'". The Tribunal agrees insofar as 'on return' signals no more than an assumed physical presence in the country of nationality for the purposes of assessing the future risk of being persecuted for a Convention reason there. Further, the reference to 'hypothesis' should not be taken to imply a process of uninformed guesswork, untethered to an evidentially-established reality, but rather describes an assessment of risk in an assumed future presence in the country of nationality, grounded in evidence of relevant country conditions. Should the risk assessment conclude that the current alienage arises because the claimant satisfies the requirements of the Convention's refugee definition, status must be recognised.

[42] But, what is key to understand is that, in every risk assessment for the purposes of RSD the *current alienage* of the claimant is effectively set aside for the purpose of this exercise. This has implications on how the recognition of one family member in conjoined claims influences the claims of others.

Appeals concerning family members of recognised refugees

[43] Not all families flee together. It is not uncommon for a family member at risk of being persecuted to flee alone, leaving loved ones behind. It is therefore unsurprising that, in some instances, separate but related claims are brought at a later date by family members of a person recognised previously as a refugee through a separate RSD process on the basis that, in the absence of that person in the country of nationality, they have become the object of the adverse attention of the agent of persecution. In such cases, the claim of the family member is straightforwardly assessed on the basis of the previously recognised refugee being outside the country of nationality.

[44] The assessment cannot be different where families flee together. In some jurisdictions, the issue of how the recognition of one family member in a connected group of claims being considered together might influence the assessment of the claim of other family members does not arise because the other family members are either included in the claim of the principal applicant at the outset or they are otherwise given 'derivative' status when the principal applicant's claim is accepted. Any risk to them is not separately assessed. Such an approach is favoured and promoted by United Nations High Commissioner for Refugees (UNHCR) as promoting family reunification.

[45] New Zealand does not, however, accord derivative refugee status to family members, independent of any enquiry into whether such family members have, in their own right, met the terms of Article 1A(2). Neither the Act nor the Convention prescribe such an approach. To the contrary, refugee status is personal to the individual. That is not to say that principles of family reunification are overlooked by New Zealand, in terms of respecting its international obligations. Its compliance is to be found in its long expressly operated immigration policy which allows for the inclusion of dependent immediate family members in the application for residence by a successful refugee claimant. Indeed, an entire section of immigration instructions exists to allow for this – see, in particular, instruction S3.10 which relevantly provides:

> **S3.10 Permanent resident visas for refugees and protected persons**
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> …
>
> c. All refugee claimants who are recognised as having refugee status may apply for a permanent resident visa on the basis of that recognition …
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> …
>
> f. Applicants eligible to apply for a permanent resident visa may include dependants in the application in accordance with residence instructions (see R2).
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> …

[46] It can be seen that, under immigration instructions, non-recognised family members of recognised refugees may apply for an immigration status in order to maintain family unity. Yet, this is a process which can, the Tribunal understands, take some time. Under the Act, all persons wanting refugee status must file their own claim and this allowance under instructions does not therefore obviate the need for the assessment of the family member's refugee claim. The decision maker in New Zealand cannot avoid considering their claims. If, unlike the principal applicant, the claim of a family member is declined at first instance

and that person appeals, the Tribunal is obliged to deal with the appeal with all reasonable speed; see section 222(1).

[47] The starting point in terms of understanding how the recognition of one family member influences the claims of other family members must of course be the Act. Section 193 relevantly provides:

> (1) Every appeal relating to whether a person should be recognised as a refugee or a protected person in New Zealand must be determined in accordance with this Act.
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> (2) Every appeal as to whether a person should continue to be recognised as a refugee or a protected person in New Zealand must be determined in accordance with this Act.
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> (3) To the extent that an issue is not dealt with in this Act, the Tribunal, in carrying out its functions in relation to the recognition of a person as a refugee, must act in a way that is consistent with New Zealand's obligations under the Refugee Convention.

[48] As noted in *YLs v Refugee and Protection Officer* [2017] NZCA 582, [2018] 2 NZLR 371 at [48], there is a hierarchy mandated under the Act. The wording of section 193(3) means that the Tribunal is first to have regard to provisions of the Act, and only if the matter is not addressed therein is it to act consistently with the Convention.

[49] The first point to note is the *de novo* nature of the inquiry under Section 198 of the Act. This relevantly provides:

> **198 Determination of appeal against declining of claim for recognition, cancellation of recognition, or cessation of recognition**
>
> (1) Where an appeal is brought under section 194(1)(c), (d), or (e), the Tribunal must—
>
> (a) determine the matter de novo; …

[50] But the Act does not explain what a '*de novo*' determination means in terms of the inquiry in cases such as this, where only one member of a family group who have each lodged refugee claims has been recognised as a refugee by the time the Tribunal becomes seized of the appeal.

[51] Because this case involves circumstances in which the recognition of one family member occurred at first instance (and so was a *fait accompli* by the time these appeals were heard), it is convenient to address such circumstances first, before turning to the somewhat more vexed question of conjoined family appeals in which the Tribunal itself is intending to recognise one family member.

[52] At the time of the first instance decision in the present case, the predicament of the non-recognised family members (both the wife and the son) were assessed alongside that of the family member now recognised as a refugee (the husband) apparently with them all being assumed to have a concurrent continued presence in the country of nationality. Whether or not that approach was correct will become apparent from the following discussion.

[53] The question now arises, on appeal, as to whether the obligation for a *de novo* consideration by the Tribunal of the appeals requires that the family members' predicament is assessed as it would be but for the intervening recognition of status by the RSU, or with this factored in.

[54] The Act is simply not clear on this point. Therefore, in accordance with section 193, the Tribunal must be guided by an approach which best ensures consistency with the Refugee Convention.

[55] As noted, one approach would be to ignore the grant of refugee status by the RSU to the family member and assess the predicament of non-recognised family members with the assumed presence of the recognised refugee alongside them in the country of nationality. This approach is straightforward in application but problematic in principle. To assess the predicament of non-recognised family members by effectively ignoring the impact of an RSU decision to recognise another family member would be to hypothesise a future in which the recognised refugee has self-refouled by returning to the country of nationality. In the Tribunal's view, consistency with the Convention requires an assessment of the predicament of family members which preserves the recognised refugee's fundamental right to *non-refoulement*, a point emphasised in counsel's submissions. Being inconsistent with the Convention, this more theoretical approach, of effectively ignoring the grant of refugee status to a family member, is impermissible given the Tribunal's statutory obligation under section 193(3). Further, an approach which recognises the recognised refugee's alienage and right to *non-refoulement* also aligns cases of this type with those cases where families do not flee together.

[56] It is also necessary, as foreshadowed, to address the impact of the recognition by the Tribunal of a family member on the assessment of the predicament of other family members in consolidated appeals. Past case law suggests that a principled basis for approaching such a situation has proven difficult to divine.

[57] It is accepted that there are some differences between the two situations. Where a family member has been recognised by a first instance decision maker in the same RSD process, at the time an appeal is lodged by a family member later in the same RSD process, or in a later RSD process altogether, the national RSD system has already declared one (or more) family member to be a refugee. That person's alienage from the country of nationality is unarguably a characteristic they possess which is to be factored into the assessment of the claims on appeal of the other family members.

[58] The principal conceptual difficulty is how the recognition on appeal of a family member should influence the assessment of the predicaments of other family members whose appeals are being heard at the same time: whether their alienage should continue to be ignored or whether, like the family member recognised at first instance or through a separate RSD process altogether, their alienage should now also be factored into the assessment of the predicament of the remaining family members.

[59] Recalling, first, that RSD is a declaratory process and, second that the focus in RSD is always on the future predicament in the country of nationality, once the decision maker is satisfied that a previously non-recognised family member should be recognised as a refugee, it is difficult to see why their current alienage should be treated differently. Up to that point in time in the RSD process, their current alienage had been set aside to assess their individuated risk, and the person was assumed to have a concurrent presence in the country of nationality alongside that of any other non-recognised family member. However, at the point in time a risk of being persecuted is established to the satisfaction of the decision maker, in the Tribunal's view, as with the previously recognised family member, no principled basis exists for assuming that person's continued presence in the country of nationality for RSD purposes.

[60] Such an approach to RSD organised around the concept of alienage as opposed to returnability, not only grounds the inquiry more directly in the express language of the Convention but, in the Tribunal's view, also captures the reality of the predicament of refugee claimants and their families. The accepted alienage of the recognised refugee will, for the assessment of appeals by family members predicated on the latter's assumed continued presence in the country of nationality, necessarily involve consideration of the refugee's separation from the family and whether any risk previously existing only in respect of the recognised

family member is now, in their absence, effectively transferred to the family member, or gives rise to some other, new risk.

[61] What this means in practice for decision makers in New Zealand is that the risk assessment will need to *cascade* though the family group, ensuring that the assessment of the individuals comprising the family group is informed by considering how that person will be treated by an agent of persecution in light of the now accepted refugeehood-related alienage of one or more family members. As noted, it may be a question of *risk transference* or *risk creation*. The agent of persecution may or may not be the same: a non-state agent may become emboldened by the absence of a refugee whose predicament arose at the hands of the state. The risks may not be the same. For example, a female family member may now face a risk of sexual assault to which the previously recognised male family member was never exposed, and whose presence in the past ensured her safety. The assessment remains individuated.

[62] It is important to stress that this approach to risk assessment does not mean that, just because one family member has had the adverse attention of the agent of persecution transferred to them, or now faces a new risk, given the alienage of a family member sufficient to establish an entitlement to refugee status of their own, that all remaining family members will necessarily be at risk of similar transference. As with all claimants, family members must establish their claim and identify the characteristic(s) or behaviour said to give rise to a risk of transferred adverse interest.

Alienage and the assessment of the risk being persecuted

[63] In terms of the assessment of the forward-looking risk to family group members who have not been recognised, an alienage-based approach requires that the assessment of their predicament in the country of nationality proceeds, presumptively, on the basis:

(a) that the recognised family member remains in the country of refuge; and

(b) that the recognised refugee will continue to exercise the rights and freedoms associated with the recognition of refugee status.

[64] What this means will be case and context specific. Cases where the family share a characteristic such as ethnicity or religion will necessarily differ from those

where the claims of family members are contingent on the activities in the country of nationality of a family member and that person's subsequent alienage as a refugee. The refugeehood of the family member may be risk-enhancing or risk-reducing for those still in the country of nationality.

[65] In appeals by family members of a claimant granted refugee status in New Zealand based upon conduct or activity undertaken as a manifestation of an international human right such as freedom of expression or association, it means the assessment will likely need to factor in any evidence that such activity will continue in New Zealand. Freedom of expression is protected under Article 19 of the ICCPR (reflected in section 14 of the New Zealand Bill of Rights Act 1990), and it would, after all, be odd to say the least if the successful appellant was not required to exercise discretion in the country of nationality in order to avoid their being persecuted, but be expected to do so in New Zealand in order to avoid the persecution of family members. As noted in *DS (Iran)* at [216]:

> [I]t is hardly in keeping with the purpose of the Convention that a refugee claimant is required to hide the very characteristics contained in the five Convention grounds which, alongside the concept of 'persecution', the drafters had expressly included in Article 1A(2) to delineate the specificity of the refugee predicament.

[66] In such circumstances, it will be necessary to consider factors such as whether the agent is a state or non-state actor, whether the agent of persecution is aware of, or will potentially become aware of, the place of residence of the family, and the pressure, if any, that the agent of persecution will place on the family members in order to compel the refugee family member to cease the offending conduct and/or to return to the country of nationality.

[67] Ms Curtis raises the issue of separation as an element of being persecuted. The Tribunal accepts that, loaded into the very fabric of the Refugee Convention's definition via the concept of alienage – that the refugee must, at a minimum, be a person who is outside the country of nationality or former habitual residence – is the potential for there to be a disruption of family relations whereby the at-risk family member is forced to flee abroad in order to avoid being persecuted. Separation from family is undoubtedly one of the most keenly felt impacts of having to flee abroad to avoid being persecuted. As K Jastram and K Newland "Family Unity and Refugee Protection" in E Feller, V Türk and F Nicholson *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 555 at p556, remark:

> Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families. For individuals who, as refugees, are without the protection of their own countries, the loss of contact with family members may disrupt their major remaining source of protection and care or, equally distressing, put out of reach those for whose protection a refugee feels most deeply responsible.

[68] It does not take much to believe that repressive regimes at the very least understand this all too well; something which can be relied on to keep people in line or to force them to cease whatever conduct, activity or behaviour is raising official ire. Refugee families have an invidious choice to make when not every member of the family is the primary focus of persecutory conduct: to either break up the family unit for an unknowable length of time in order that the at-risk family member be safe, or flee together with all the disruption to lives that this too often brings.

[69] While, under an alienage-based approach, the predicament of non-recognised family members is one which is inherently shaped by the refugeehood of the other family member, in accordance with the approach mandated under *DS (Iran*) such interference as this does not mean that family separation will, in and of itself, amount to the family members being persecuted. Something more is needed because the individual nature of refugee status means the risk of being persecuted must be established by each claimant – even children who are separated from their parents – in accordance with the facts of the particular case.

[70] No authority has been cited to support the proposition that it was ever intended by the drafters of the Convention that the separation of refugee parents from their children is, in and of itself, sufficient to establish that the child meets the Article 1A(2) definition. Indeed, it seems clear that this was not intended. The drafters debated whether to include lists of known refugee groups which included unaccompanied children who were “war orphans, or whose parents had disappeared” and such a category appeared in an early draft of the Convention, but was ultimately removed; see J M Pobjoy *The Child in International Refugee Law* (Cambridge University Press, Cambridge, 2017) at p18.

[71] While the drafters of the Refugee Convention recognised that the right to family unity is an important adjunct to refugee protection, their concern was expressed in terms of an immigration status by which equivalent rights were conferred on family members, not refugee status itself. The *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* A/CONF 2/108/Rev.1 (25 July 1951) at Recommendation B states:

> The Conference, considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and noting with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family, recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

[72] This brings us to the final matter about which submissions have been made – namely the use of human rights norms and standards in assessing the predicament of appellant children.

The role of children-centred rights in the inquiry

[73] Counsel refers in her submissions to the recent grant of leave in the case of *DG (Bangladesh)*. In that case, leave to appeal has been granted in relation to aspects of the Tribunal's approach in an appeal concerning children, notwithstanding that the decision records that the same legal issues were not advanced in any significant way before the Tribunal itself; see [39] above. As already noted above, the deportation cases referred to in that judgment have a different starting point to refugee cases. Nor, for the reasons given in *BG (Fiji)* [2012] NZIPT 800091 at [186]–[196], can the approach of the European Court of Human Rights starting with *D v United Kingdom* (1997) 24 EHRR 423 (ECHR) and *N v United Kingdom* [2008] INLR 335 (ECHR) which, effectively, regards the act of deportation as the effective 'treatment' for the purposes of an Article 7-type analysis, apply to protection claims under the Act.

[74] The grant of leave is also notable for its reference to the underlying "contextual value judgements" which may lie behind statutory decision making; see *DG (Bangladesh)* at [55]. In granting leave, the Court considered that the Tribunal's approach to the assessment of the child appellant's claim arguably failed to make the necessary "contextual value judgement"; see [57]. Leave was granted on the basis that the Tribunal "ought to have had regard to those provisions of the UNCROC and the ICCPR on which the applicants rely"; see [59].

[75] It is beyond question that the inquiry into refugee status as explained in *DS (Iran)* includes, where relevant, UNCROC rights. That UNCROC may inform entitlement to refugee status has long been recognised in New Zealand refugee

law. Further, the Tribunal's jurisprudence recognises how the rights contained in UNCROC intersect with other international human rights instruments such as the ICCPR and the 1966 *International Covenant on Economic Social and Cultural Rights* (ICESCR); see, for example, *AB (Germany)* [2012] NZIPT 800107–111, 147 concerning home-schooling. Children are just as much holders of rights under these and other relevant general international human rights treaties as they are in relation to the rights contained in UNCROC. In *AE (Hungary)* [2012] NZIPT 800325–327, the Tribunal again drew extensively on UNCROC and ICESCR in a case concerning state-condoned racial discrimination in schooling.

[76] Beyond this, state repression of one family member which includes arbitrary and/or unlawful interference with a shared home in breach of Article 17 of the ICCPR may also amount to an interference with the enjoyment of this right by other family members, children included. Child family members have the additional protection in this regard under Article 16(1) of UNCROC. Article 17 of the ICCPR provides:

> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[77] There is some support in international jurisprudence for the proposition that State repression of one family member amounting to arbitrary and/or unlawful interference with a shared home, such as searches in breach of Article 17, may also amount to an interference with the enjoyment of this right by other family members.

[78] In *Rojas Garcia v Colombia* CCPR/C/71/D/687/1996 (16 May 2001), for example, the relevant facts as recorded in the decision were as follows: at 2 am, a group of hooded and armed men from the Colombian Public Prosecutor's Office, wearing civilian clothes, forcibly entered the author's house through the roof and carried out a room-by-room search of the premises, "terrifying and verbally abusing the members of the author's family, including small children". In the course of the search, one of the officials fired a gunshot. Two more persons then entered the house through the front door. The search was conducted as part of an investigation into the murder of a mayor. In response to the submission by the State "that the raid on the Rojas García family's house was carried out according to the letter of the law", the Committee stated, at [10.3] (emphasis added):

> [T]he concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home **of the Rojas García family**.

[79] The committee also found the conduct to be a violation of Article 7.

[80] That unlawful and arbitrary searches of a family home may also involve breaches of each family member's rights under Article 23(1) was recognised in *Peiris v Sri Lanka* CCPR/C/103/D/1862/2009 (18 April 2012). In that instance, the Committee examined a complaint of extensive police harassment following a complaint made that a police officer had sold a stolen vehicle to the author and her husband by passing it off as his own. The harassment was extensive but included threatening visits to the family home by police officers, including one instance where the couple were threatened and assaulted along with the couple's 10-year-old son, and the attempted undressing of their daughter. The author's husband was later shot and killed. The Committee stated (emphasis added):

> 7.6 The Committee has taken note of the author's contention that police officers harassed her and her family in their home through threatening telephone calls and forced visits, including the severe assault on their home in November 2007, and that subsequently they feared to live in their home and were forced into hiding, and were unable to live a peaceful family life. The Committee also notes the continuing harm resulting from the State party's failure to take any action in response to the Committee's request to adopt interim measures to protect the author and her family. In the absence of any rebuttal by the State party, the Committee concludes that the State party's interference with the privacy of the family home of the author was arbitrary, in violation of article 17 of the Covenant.
>
> 7.7 The Committee further takes note of the author's contention of a violation of article 23, paragraph 1, of the Covenant, and finds that the violation of articles 6, 7 and 17, in light of the circumstances of the case, also constitute a violation of these articles read in conjunction with article 23, paragraph 1, of the Covenant.
>
> 8. The Human Rights Committee, … is of the view that the facts as found by the Committee reveal violations by Sri Lanka of article 6 read alone and in conjunction with article 23,paragraph 1, vis-à-vis the author's husband; article 2, paragraph 3, read in conjunction with article 6 and article 7, vis-à-vis the author herself, her husband, and their two children; article 7, read alone and in conjunction with article 23, paragraph 1, vis-à-vis the author, her husband and their two children; article 9, paragraph 1, vis-à-vis the author, her husband and their two children; **and article 17, read alone and in conjunction with article 23, paragraph 1, of the Covenant vis-à-vis the author, her husband and their two children.**

[81] Moreover, there are forms of harm which can only inhere to children. As observed by J Pobjoy *The Child in International Refugee Law* (Cambridge University Press, Cambridge, 2017) at p117:

> Only a child can be at risk of infanticide, underage military recruitment, forced child labour, forced child marriage, child prostitution, child pornography, domestic child abuse, corporal punishment, or pre-puberty FGC. Similarly, only a child can be denied a primary education, separated from a parent because of discriminatory custody laws or discriminated against because of [his/] her status as an illegitimate child.

While the Tribunal has reservations about the claim in relation to corporal punishment (as being a child-only form of harm), the general point is well-made.

[82] Further, being a child is relevant to the assessment of the seriousness of harm. In *DS (Iran)*, the Tribunal noted, at [172];

> In the context of the inquiry into serious harm, the claimant's particular individual characteristics shape the specific objective factors of nature, intensity and duration of harm, to project Convention protection outwards in appropriate instances. For example, … . Age (both youth and elderly) and associated emotional, physical or psychological frailty may shape the intensity factor, such that harm inflicted on a healthy adult male not of sufficient seriousness may be serious if inflicted on a child or elderly claimant.

[83] Specifically, in relation to Article 7 of the ICCPR, in *AC (Syria)* [2011] NZIPT 800035 at [102] the Tribunal noted:

> Under the 'human rights approach' to the interpretation of the 'being persecuted' element of the refugee definition, Article 7 ICCPR is a mechanism to identify forms of serious harm. Issues such as the age, gender and standard of health of a claimant are thus already factored into the refugee status inquiry as such personal characteristics are relevant to assessing whether treatment amounts to a breach of Article 7 ICCPR … .

[84] As for the international human rights law provisions referred to in *DG (Bangladesh)*, these concerned Articles 3, 5, 9 and 18 of the UNCROC and Article 23 of the ICCPR and reference the best interest of the child principle and the principle of family unity. Ms Curtis draws attention to each in her submissions. These relevantly provide:

> ICCPR, **Article 23**
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> UNCROC
>
> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> **Article 5**
>
> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided

> for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.
>
> **Article 9**
>
> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
>
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.
>
> **Article 18**
>
> 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

The best interests of the child

[85] As for the best interests of the child principle, its relevance to the refugee status inquiry is mediated by the reality that it cannot displace the refugee definition as the touchstone of that inquiry. If a child is not a refugee, applying the Refugee Convention definition, the 'best interests of the child' principle will not make him/her so. It cannot convert the need for an objective assessment of the 'well-founded' criterion into a subjective one, nor does it mean that a speculative or remote risk is elevated to the real chance level. This critical point has also been recently emphasised in *KA (India)* [2020] NZIPT 801719 ,801723 at [156].

[86] That said, insofar as the best interests of the child principle may broadly be conceived as an injunction to approach the assessment of the predicament of

children from a child-centred perspective, including by reference to the rights contained within UNCROC, it serves to reinforce the validity of the human rights approach that is taken by the Tribunal, and has been since its inception. The rights contained in UNCROC reinforce, modify, and contextualise the rights children already enjoyed under general international human rights law treaties such as the ICCPR and ICESCR. Some child-specific rights also arise – see, for example, Articles 31–35 of the UNCROC. Moreover, the failure by the state in the child's country of nationality to have regard to the best interests of the child in relation to decisions it takes affecting a child appellant may in some circumstances inform the substantive content of being persecuted.

[87] The best interests of the child principle also informs the RSD process. A best-practice approach concerning whether to take, and the modalities for taking, a child's evidence must reflect the best interest principle.

Family unity and parental care

[88] Ms Curtis submits that the son's claim is also based on "the fragmentation of his family". As noted above, the family unit is to be protected by the State under Article 23 of the ICCPR. Article 9 of UNCROC is founded on the presumption that maintaining family unity will be in the best interests of the child, such that a decision to separate a child from his/her family must be in the best interests of that child. Further, Article 9 "exists as part of [a] package of rights which are designed to protect, preserve, and assist the family unit"; see J Tobin and J Cashmore "Article 9: The Right Not to be Separated from Parents" in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at p309.

[89] However, while an alienage-centred approach factors in the physical separation of a refugee from family members whose claims are subject to an appeal in terms of shaping the risks to family members, as already noted, the Refugee Convention was never intended by the drafters to operate on the basis that fragmentation of the family as a result of the refugeehood-related alienage of one or more parent was sufficient to establish that the children met the Article 1A(2) definition. No authority or commentary has been cited to show that Articles 23 of the ICCPR and 9 of UNCROC has been interpreted such that the refugeehood-related separation in itself constitutes a relevant form of harm in terms of the 'being persecuted' inquiry for the family members. While Article 9(4) refers to state obligations arising by reason of separation through the detention,

imprisonment or deportation of a parent, those obligations relate to the notification of the parent's whereabouts and are fundamentally ill-suited to the issue of separation from a recognised refugee, the status of which is contingent upon the parent being outside the country of nationality or former habitual residence.

[90] Article 22(1) of UNCROC provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

[91] Commenting on this article, Pobjoy notes that, while it cannot displace the Refugee Convention definition, "there remains a compelling argument that the duty to ensure the child seeking refugee status receives '*appropriate* protection' in such a way that [it] takes into account the rights and interests of the child"; see J Pobjoy "Article 22: Refugee Children" in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at p826. As already noted above, this can be accepted at the general level. However, when discussing Article 9(1) in this context, Pobjoy states, at p843:

> [T]he language of article 9(1) makes plain that no countervailing interests, including the enforcement of immigration control measures, can be invoked to justify the separation of a parent and child. Hence, if separation is not in the best interest of the child, a state is under a duty to take positive measures to ensure that the child and his or her parent/s can remain together, irrespective of the fact that only one member of the family may be eligible for refugee protection.

[92] There is no suggestion here that, through the prism of Articles 9 and 22 of UNCROC, the separation of family via the grant of refugee status to only one family member in any way informs the entitlement of the other family members to protection as refugees. It does, of course, underscore why the children of refugees will ordinarily be granted an immigration status in line with that of the refugee parent or parents, and why the deportation of children of refugees raises matters of significant humanitarian concern. As noted already, New Zealand has long expressly operated immigration policy which allows for the inclusion of dependent immediate family members in the application for residence by a successful refugee claimant.

[93] In summary, while the Tribunal accepts that the principle of family unity is fundamental to refugee protection in the general sense of the refugee protection regime, it does not accept that the fragmentation of the family though the

refugeehood of a parent *in itself* means the child is 'being persecuted' for the purposes of the Refugee Convention.

[94] Having set out these general observations, the Tribunal now turns to the assessment of the appellants' claims.

Assessment of the Claim to Refugee Status

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

[95] Adopting the alienage approach, the assessment of the appellants' predicament will be made on the basis that the husband continues to rely on his right to *non-refoulement* and will continue to exercise his right to freedom of expression. This means that the impact of separation in itself, as well as the risks arising to the appellants as a result of the husband's social media activism, are to be considered.

[96] As to the latter, Ms Curtis submits that both the wife and the son face a real chance of being detained and questioned in China because of the negative political opinions being imputed to them or as a means to "force someone who has contravened the security laws of China … back to China to face the law". It is, she submits "fanciful" to assess their entitlement to status "on the basis they are going to be able to return to China without being questioned by State Security officials about the [husband's] continuing anti-CCP blogs and State critical internet base publications".

Country Information

Digital authoritarianism and state surveillance in contemporary China

[97] Ms Curtis has filed country information regarding China's state security law and practice in relation to the surveillance of its citizens inside and outside China. At the core are Article 7 of the 2017 National Intelligence Law of the People's Republic of China and Article 28 of the 2016 Cybersecurity Law of the People's Republic of China.

[98] Human Rights Watch *China's Global Threat to Human Rights* (2019) notes:

> At home, the Chinese Communist Party, worried that permitting political freedom would jeopardize its grasp on power, has constructed an Orwellian high-tech

> surveillance state and a sophisticated internet censorship system to monitor and suppress public criticism. Abroad, it uses its growing economic clout to silence critics and to carry out the most intense attack on the global system for enforcing human rights since that system began to emerge in the mid-20th century.

[99] Commenting on state surveillance, Human rights Watch argues:

> The Chinese Communist Party has long sought to monitor people for any sign of dissent, but the combination of growing economic means and technical capacity has led to an unprecedented regime of mass surveillance.

[100] Commenting on China's 'digital authoritarianism model', L Khalil "Digital Authoritarianism, China and COVID" *Lowy Institute* (2 November 2020) (the Lowy report) at p8 notes:

> China is the clear leader in tech-enabled autocracy and its model of digital authoritarianism involves the practice of many of the elements described above. The CCP uses technology to achieve social control in ways that are coercive, but also in ways that involve more subtle co-option of individuals and society. The CCP, now under the tightening control of President Xi Jinping, does this without any substantial checks and balances on its power or a civil society free to criticise or hold the government to account. …
>
> The CCP's coercive use of technologies, such as online censorship and mass surveillance, are widely reported. In a recent article in The Atlantic, Ross Andersen warned of President Xi's vision to develop China's AI sector in order to create a 'digital panopticon' — an 'all-seeing digital system of social control, patrolled by precog [future vision] algorithms that identify potential dissenters in real time'.
>
> China's model of digital authoritarianism deploys its technology to suppress dissent and manufacture support. But systems and mechanisms for regime maintenance and control that are enabled via technology often piggyback onto otherwise useful tools and services. China also harnesses technology to bring about efficient outcomes for its citizens and to exhibit the superiority of its system, which helps the regime to stave off dissent and bolster patriotic support.
>
> **Big Tech**
>
> China has invested substantially in building an indigenous technology sector, with accompanying industrial policies, such as the National IT Development Strategy, Made in China 2025, and China Standards 2035. These have furthered the country's goal of becoming a global leader in digital technology and AI, and in the process, positioned China to define global technological standards and to use its tech sector to reinforce regime durability and project the CCP's geostrategic goals.

[101] As for information control and censorship, the Lowy report at p10 notes:

> Chinese tech companies are leading developers of various monitoring tools to aid in censorship and surveillance. Via popular apps, the government uses these technologies to monitor individuals and block access to services and communication. Unlike Western technology companies, Chinese internet platforms are monitored and controlled by the CAC [Cyberspace Administration of China], which issues licences to internet companies and oversees all internet content. Companies are expected to invest in their own technology and personnel to censor content according to CAC regulations, or face hefty fines or loss of their licences. As a result of vaguely defined guidelines, these platforms have erred on the side of extensive censorship.

[102] Chinese state surveillance reaches its peak in Xinjiang, where, in what is described as 'hybrid repression', "[t]actics span the range from enforcing the involuntary collection of DNA samples and bio-data to imposing mandatory satellite GPS tracking of vehicles, monitoring text messages and social media posts for unfavorable content, and ordering the mass surrender of passports to local authorities"; see S Feldstein "Hybrid Repression Online and Offline in China: Foretelling the Human Rights Struggle to Come?" *Carnegie Endowment for International Peace* (25 January 2018).

[103] A Mitchell and L Diamond "China's Surveillance State Should Scare Everyone" *The Atlantic* (2 February 2018), noting the growing use of surveillance cameras and the social credit system, observe:

> While the Chinese government has long scrutinized individual citizens for evidence of disloyalty to the regime, only now is it beginning to develop comprehensive, constantly updated, and granular records on each citizen's political persuasions, comments, associations, and even consumer habits. The new social credit system under development will consolidate reams of records from private companies and government bureaucracies into a single 'citizen score' for each Chinese citizen. In its comprehensive 2014 planning outline, the CCP explains a goal of 'keep[ing] trust and constraints against breaking trust.' While the system is voluntary for now, it will be mandatory by 2020.
>
> …
>
> This planned data-focused social credit system is only one facet of China's rapidly expanding system of algorithmic surveillance. Another is a sprawling network of technologies, especially surveillance cameras, to monitor people's physical movements. In 2015, China's national police force—the Ministry of Public Safety—called for the creation of an 'omnipresent, completely connected, always on and fully controllable' national video surveillance network. MPS and other agencies stated that law enforcement should use facial recognition technology in combination with the video cameras to catch lawbreakers. One IHS Markit estimate puts the number of cameras in China at 176 million today, with a plan to have 450 million installed by 2020.

[104] As to this, the Lowy report at pp11–12 notes:

> The system is not fully centralised, and citizens in China do not yet have a national assigned score, as has been frequently reported. Rather, there is a patchwork of individual systems, some run by local governments and others via private company initiatives, particularly in the financial sector, which has its own social credit systems operating alongside those employed by the central government and agencies.
>
> …
>
> While the ultimate goal of a unified national system has not yet been reached, every citizen in China does have a national credit file, and there are local level social credit systems that do assign scores. But even without a centralised individual number ranking, the national social credit system can still meet its objectives of social control. The National Credit Information Sharing Platform (NCISP), a master database controlled by the central government, is a repository of all social credit systems' data.

[105] The report at pp14–15 continues in relation to punishment meted out to persons engaged in online dissent:

> For decades, China has suppressed dissent within its borders. The coronavirus pandemic has escalated this behaviour in two ways. First, it has given China 'cover' for expanding its already pervasive cyber policing and invasive online surveillance. Second, it has silenced critics and quelled discussion of COVID-19 in the name of virus control, which has also had the added effect of enabling China to more easily exercise 'discourse power'.
>
> According to the database of the Chinese Human Rights Defenders coalition, 897 netizens have been detained, reprimanded, or punished for 'spreading rumours', 'fabricating false information', 'causing panic', 'disrupting public/social order', or 'leaking privacy' in their online speech related to the COVID-19 outbreak. Those detained included citizen journalists Chen Qiushi, Fang Bin, and Li Zehua, legal advocate Xu Zhiyong, and businessman Ren Zhiqiang. Some, such as former prisoner of conscience Guo Quan and activist Xu Zhiyong, have been detained more than once. In some cases, the detentions were carried out under the guise of mandatory quarantine. Such is the case with legal scholar Xu Zhangrun, who published a critique of the Chinese government's pandemic response and authoritarianism under President Xi. Other intellectuals have been harassed and targeted online for their criticism of the CCP in relation to the pandemic. Still more are held under residential surveillance for their work storing and preserving online content critical of China's handling of the pandemic that had been deleted or blocked by government censors.

[106] Against a trend of an escalating digital authoritarianism and associated state surveillance in which the space for the free flow of information and free expression of opinions is tightly constricted, it is unsurprising that reports exist of the mistreatment of family members alongside that of the main target.

[107] In *FH (China)* [2020] NZIPT 801654–655 at [70]–[82], which concerned the 13 and 15-year-old children of persons granted protected person status by the RSU, the Tribunal extensively reviewed country information which confirmed the routine targeting of family members, including the children of human rights defenders, economic fugitives and dissidents. The Tribunal noted:

> [71] The measures deployed against family members are varied and may include: harassment, intimidation and surveillance; restrictions on movement, including exit bans; confiscation or freezing of assets and possessions; house arrest, detention, ill-treatment and torture: The Australian Department of Foreign Affairs and Trade *DFAT Country Information Report People's Republic of China* (21 December 2017) ("DFAT report") at [3.69]; United States Department of State *2018 Country Reports on Human Rights Practices: China* (13 March 2019) at pp1, 3, 7, 24, 41.
>
> [72] The Chinese authorities typically target spouses and children, including minors. The organisation Chinese Human Rights Defenders (CHRD) reported, in *"Flowers of the Country": Mistreated and Abused – A Report on Violations of the Rights of the Child in China* (August 2013) at pp9–10, that:
>
> > In China, it is common that children of political prisoners, persecuted human rights defenders, and dissidents face serious discrimination and harassment by the government due to their parents' opinions, beliefs, or activities. Authorities not only subject many human rights and democracy activists to harassment and imprisonment, but also try to force them to give up their activism or beliefs by

> mistreating their family members, including children. In this sense, authorities target children in order to punish and suppress activists, resulting in their children also becoming victims of political suppression.

[108] In "Entering the New Year in Handcuffs: An Account of Being Taken into Custody on New Year Eve" *Human Rights in China* (9 January 2020) Li Qiaochu, the partner of activist lawyer Xu Zhiyong, writes about her experience of the police search of his and her homes in Beijing on New Year's Eve, 2019:

> When officers came to search Xu's home, Li was there but Xu was not. Afterwards, they took Li to her home and conducted a search there. The officers were not in uniform, nor did they present search warrants or lists of the items confiscated from both homes. She was taken to a police substation in Haidian District where she was registered as 'Anonymous.' In custody for 24 hours on suspicion of 'picking quarrels and provoking trouble,' Li was handcuffed and interrogated three times totaling six hours. The police denigrated her, forced her to guarantee that she would distance herself from Xu, and threatened to keep her until she had a breakdown. In pain from her period, Li was forced to sleep on a stone slab in a cold cell and was allowed to take only half the dosage of the medication prescribed by her doctor. Since her release, she has been followed and monitored by state security personnel every day.

[109] In relation to children, in *FH (China)* the Tribunal also noted, at [74], that children may also encounter discriminatory measures and be prohibited from attending education facilities or denied access to health and social services.

[110] There are reports of children of even the son's age being assaulted during arbitrary searches of the family home. The non-governmental organisation, *Human Rights in China* noted, in "Poet Wang Zang and Wife Accused of 'Inciting Subversion'; Four Young Children Under Virtual House Arrest" *Human Rights in China* (21 September 2020):

> Human Rights in China has learned that poet **Wang Zang (王藏)** and his wife **Wang Li (王丽),** of Chuxiong City, Yunnan Province, have been arrested for 'inciting subversion of state power.' Police authorities have referred their cases in mid-September to the procuratorate to seek indictments. According to reports, the charge against Wang Zang is based on his poetry, essays, interviews, and performance art since his release from prison in 2015.
>
> Wang Zang was taken away from his home on May 30, 2020 by dozens of policemen. Officers pinned Wang Li, the couple's four young children (ages 11, eight, and four (twins)), as well as Wang Zang's elderly mother to the ground, and then took the entire family to the police station. Wang Li was interrogated for more than ten hours before being allowed to return home. Afterwards, police agents stayed at Wang's home for two days, ostensibly to 'take care of the children.' Since then, officers have been stationed outside of the building of the family's residence and at the entrance to their complex to monitor the family's every move.
>
> Following her husband's arrest, Wang Li (real name Wang Liqin) appealed for the public's attention to his case through social media and interviews with overseas media, exposing Yunnan police's persecution of the rest of the family, including suspending their bank cards, confiscating packages delivered to their home, prohibiting them from going out, and depriving them of food, after forcing the

> children to witness the arrest of their father. Then on June 27, Wang Li herself was detained.
>
> According to the official arrest notices received by the family in September, Wang Zang and Wang Li were formally arrested by the Chuxiong Prefecture Public Security Bureau on July 3 and July 24, respectively, for 'inciting subversion of state power.' Wang Zang is currently detained in the Chuxiong City Detention Center while Wang Li is being held in the Chuxiong Prefecture Detention Center.
>
> After the arrest of the couple, their four children have been taken care of by their grandmother. But all of them have been essentially cut off from the outside world: relatives have been warned not to visit, and no one has had any information about their condition. Of particular concern is Wang Li's mental state. Previously, under extreme stress on another occasion, she had attempted suicide.

[111] It is not only the family of high-profile dissidents or human rights defenders in China whose family can suffer repercussions. A Ma "Barging Into Your Home, Threatening Your Family, or Making You Disappear: Here's What China Does to People Who Speak Out Against Them" *Business Insider Australia* (27 August 2018) reports:

> Even when dissidents leave China, they are not safe. Many Chinese expats and exiles have seen family members who remained in China pay the price for their protest.
>
> One example is Chinese-Canadian actress Anastasia Lin, who repeatedly speaks out to criticise China's human rights record.
>
> She told Business Insider earlier this year that her uncles and elderly grandparents had their visas to Hong Kong – a Chinese region that operates under a separate and independent rule of law – revoked in 2016.
>
> Security agents also contacted Lin's father saying that if she continued to speak up, the family 'would be persecuted like in the Cultural Revolution' – a bloody ten-year period under Mao Zedong when millions of Chinese people were persecuted, imprisoned, and tortured.
>
> Shawn Zhang, a student in Vancouver who has criticised President Xi Jinping online, told Business Insider earlier this year that police incessantly called his parents asking them to take down his posts.
>
> The family members of five journalists with Radio Free Asia – a US-funded media outlet – were also recently detained to stop their reporting on human rights abuses against the Uighur minority in China's Xinjiang region
>
> …
>
> … Frances Eve, a researcher at Chinese Human Rights Defenders [said] [w]hile the Party has released political activists due to public pressure in the past, it has kept family members in China to make sure the activists don't speak out.
>
> Eve told The Guardian in July: 'The Chinese Communist Party has become more immune to international pressure to release activists and let them go overseas, coinciding with its growing economic clout.
>
> 'Nowadays, on the rare occasion it does allow an activist to go abroad, it's with the sinister knowledge that their immediate or extended family remains in China and can be used as an effective hostage to stifle their free speech.'

[112] Similar observations are made in relation to the Uighur communities abroad by P Mooney and D Lague "The Price of Dissent: Holding the Fate of Families in Its Hands, China Controls Refugees Abroad" *Reuters* (30 December 2015).

Application to the appellants' predicament

[113] It is important to stress at the outset that, even though the assessment of the wife's and son's predicaments is necessarily presented sequentially in this decision to reflect the reasoning and conclusion in the separate but conjoined appeals, their predicaments in China are in fact of *concurrent* nature and have been assessed as such. By this, the predicaments have been assessed on the basis that the husband is in New Zealand with refugee status, with all the entitlement that brings to him under New Zealand law and the appellants are together in China, subject to any decision by the Tribunal in the mother's favour which will necessarily locate her also in New Zealand in the future. Just as the refugeehood of the father has implications for the assessment of the wife and son, so too will any recognition by the Tribunal of the wife have implications for the son.

The wife's predicament

[114] The separation of the wife from the husband arises only due to the need for him to avoid being exposed to the persecutory conduct of the Chinese state. His remaining in New Zealand will mean that the wife will be separated from her husband and will remain so for an indeterminate period. It is difficult to know for how long this would endure. The Chinese authorities have the means to prevent the wife exiting the country.

[115] Added to this is the fact that country information establishes that the targeting of family members does occur. The form the harassment takes is variable, ranging from the telephoning of family members, pressuring them to have dissident relatives remove online posts, through to detention and mistreatment. However, the Tribunal notes that the country information detailing the more egregious harassment relates to economic fugitives, human rights defenders and prominent activists, which the husband is not.

[116] Nevertheless, the husband is already on the radar of the Chinese state. He clearly has some degree of negative profile locally. His family members in China have already been summonsed to the police station to account for the husband's whereabouts, and also that of the wife.

[117] There have been no visits to either family in over 18 months. The Tribunal has no doubt that the lack of recent visits reflects not so much a cooling of adverse interest in him, but simply that the husband now posts to a WeChat account with an English named profile that has been registered using a New Zealand mobile phone number. His New Zealand-based telecom provider, unlike its Chinse counterparts, cannot be compelled to hand over private information of its customers to the Chinese government. This means that the identity of the husband as the owner of the WeChat account is likely not currently known to the Chinese authorities.

[118] Nevertheless, the Tribunal is satisfied that this will change should the appellant mother be in China. The authorities are already aware of where she lives in China (and to where she is bound by her *hukou*). The Tribunal is satisfied that, within a short period of time, she would be at the very least summonsed to the police station and questioned about her husband's activities, both past and present. It will be obvious that he is not with the family, a matter likely to raise their suspicions about him. This amounts to arbitrary arrest and detention in breach of her rights under Article 9 of the ICCPR. It is difficult to determine how long this would last for, but the possibility that she could be held for days is entirely plausible. So too is the possibility that she might, over a period of some months, suffer repeated detention episodes.

[119] The mistreatment of detainees continues. Such practices remain endemic in China; see *CK (China)* [2017] NZIPT 800775–776. The country information cited above established that family members are not immune from such tactics. The Tribunal is satisfied that there is a real chance that the wife will be subjected to coercive measures once detained, amounting at the very least to serious harm arising from breaches of her right to security of the person under Article 9(1) of the ICCPR and her right to be free from cruel, inhuman or degrading treatment or punishment under Article 7 thereof.

[120] There is also every possibility that the family home will be subjected to a search by state agents. Given the wife has committed no crime and the purported 'crime' of the husband is the online activity by which he manifests his own right to freedom of expression, any searches to compel his return to China will amount to an arbitrary interference with her home, contrary to Article 17 of the ICCPR.

[121] Weighing these matters, the Tribunal is satisfied that the breaches of these rights will lead to harm which can properly be described as serious such that the wife does have a well-founded fear of being persecuted in China.

The son's predicament

[122] Counsel submits that "the son will be exposed to psychological harm should he be returned alone or with the mother". For the reasons already given, the Tribunal does not accept that this is the basis upon which the risk assessment of children proceeds under an alienage-based approach. Rather, the predicament of the son is required to be undertaken by reference to his assumed future presence in China with one of his characteristics being that both his parents will remain in New Zealand. Issues of harm arising from this characteristic that result in deportation from New Zealand are matters for the humanitarian jurisdiction, not the refugee and protection jurisdiction; see here the discussion in *BG (Fiji*) [2012] NZIPT 800091.

[123] As to this, the Tribunal is satisfied that he will live with his paternal grandparents where he is registered for the purposes of the *hukou* system. The husband and wife, the latter as responsible adult, expressed concerned about the son being detained and interrogated. The country information cited above indicates that even young children have been subjected to heavy-handed tactics and taken into detention for no reason other than being related to a person of interest. While there is no evidence to suggest that such children have been interrogated, such detentions, when they occur, are clearly arbitrary and constitute clear breaches of the child's rights under Article 9 of the ICCPR and 16 of UNCROC.

[124] In this case, the Tribunal has no doubt that it is the son's grandparents who will now become the focus of attention once more. It accepts that, given that the son would be residing with his paternal grandparents in China, the possibility cannot be ruled out that he too would be brought to the police station at some point along with them. Any detention of him would be arbitrary. It is also possible that police officers might be left at the house to look after him. Either eventuality will be transiently upsetting for him. However, the Tribunal is satisfied that, given his age, the chance of him being interrogated or otherwise harmed is entirely speculative.

[125] As for the risk in terms of denials of schooling and access to other services for the son, the evidence does not establish that the husband's current profile is such that there is a real chance of this occurring. The Tribunal is in no doubt that the main vector of familial punishment will be the couple's extended family, not the son, and any harm to him will be ancillary in nature and not serious. Indeed, that is consistent with the wife's main concern for the son, which was that he would be

subjected to taunts and bullying, and get into fights. But these risks are speculative, and well below the real chance threshold and would not be serious in the context of 'being persecuted'.

[126] The Tribunal accepts that, while the son will have available in China his grandparents and other family members who will be able to continue to provide him with support and care, separation from his parents will be distressing for the son. However, for the reasons given above, this in and of itself is not sufficient to mean he is being persecuted for the purposes of the Refugee Convention. The matters arising from his separation are more appropriately dealt with in the son's humanitarian appeal, which is issued concurrently with this decision.

[127] For these reasons, the Tribunal finds that the son does not have a well-founded fear of being persecuted.

Is there a Convention reason for the persecution?

[128] For the wife, her predicament arises only by reason of her family relationship to the husband. The family clearly constitutes a particular social group. The issue does not arise in respect of the son

Conclusion on Claim to Refugee Status

[129] For the above reasons, the Tribunal finds that the wife is entitled to be recognised as a refugee. The son is not.

The Convention Against Torture

[130] 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.

[131] 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.

[132] The wife has been found to be a refugee. The recognition of her as a refugee means that she cannot be deported from New Zealand; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129, which is set out in section 164(3) of the Act, does not apply on the evidence. Therefore, there are no substantial grounds for believing that the wife would be in danger of being subjected to torture in China.

[133] The son relies on the same evidence and submissions as he does in his refugee claim. For the reasons already given, there are no serious reasons for believing that he would be in danger of being tortured in China.

The ICCPR

[134] 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.

[135] Again, because the wife is recognised as a refugee, she is entitled to the protection of New Zealand from *refoulement* to China. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of her being deported from this country. Therefore, there are no substantial grounds for believing that she would be in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in China.

[136] The son relies on the same matters as he does in his refugee claim. For the reasons already given, there are no serious reasons for believing that he would be in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment in China.

CONCLUSION

[137] For the foregoing reasons, the Tribunal finds that:

(a) The wife is a refugee within the meaning of the Refugee Convention. The son is not.

(b) Neither the wife nor son are protected persons within the meaning of the *Convention Against Torture*.

(c) Neither the wife nor son are protected persons within the meaning of the *International Covenant on Civil and Political Rights*.

[138] The appeal of the wife is allowed. The appeal of the son is dismissed.

Order as to Depersonalised Research Copy

[139] 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 appellants' names and any particulars likely to lead to their identification.

"B L Burson"
B L Burson
Member

Certified to be the Research Copy released for publication.

B L Burson
Member