

**FANG v REFUGEE APPEAL BOARD AND OTHERS 2007 (2) SA 447 (T)****2007 (2) SA p447**

<b>Citation</b>	2007 (2) SA 447 (T)
<b>Case No</b>	4077/05
<b>Court</b>	Transvaal Provincial Division
<b>Judge</b>	Seriti J
<b>Heard</b>	October 31, 2006
<b>Judgment</b>	November 15, 2006
<b>Counsel</b>	A Katz and M Strydom for the applicant. L M E Moloisane for the respondents.

**Annotations** [Link to Case Annotations](#)

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**B****Flynote : Sleutelwoorde**

Immigration - Refugee - Asylum seeker - Who is - Well-founded fear of persecution - Membership of particular social group - Particular social group - What constitutes - Whether social group definable by reference to act giving rise to fear of persecution - Whether parenthood in context of China's one-couple, one-child family-planning policy constituting ground for granting of c asylum - Whether distinction between person at risk, not for what person is, but for what person does or has done, valid - Refugees Act 130 of 1998, s 3(a).

Immigration - Refugee - Asylum seeker - Who is - Well-founded fear of persecution - Test for - Well-founded fear entailing both subjective and objective components - Existence or otherwise of subjective component requiring assessment of credibility of d applicant - Applicant's claim of 'well-founded fear of persecution by virtue of political opinion' failing on subjective leg - Not qualifying for refugee status - Refugees Act 130 of 1998, s 3(a).

**Headnote : Kopnota**

The second respondent (the Standing Committee for Refugee Affairs) rejected the claimant's application for refugee status and e asylum on the ground that his fear of persecution in China, his country of origin, was not well founded. On appeal to the first respondent, the first respondent confirmed the decision of the second respondent. The claimant thereupon made application to the High Court for orders, *inter alia*, (1) declaring him to have a well-founded fear of persecution on the grounds of (a) his political opinion and (b) his membership of a particular f social group (by virtue of his having four children, contrary to the one-child policy in China), as contemplated in s 3(a) of the Refugees Act 130 of 1998; and (2) granting him asylum as contemplated in s 24(3)(a) thereof.

'Well-founded fear of persecution' g

*Held*, that 'well-founded fear' involved both a subjective and an objective component, namely the claimant's subjective fear, and the objective facts which supported that fear. The subjective component may be based on the applicant's reaction to events that impinge on him personally, but to make it 'well-founded fear' there must be other proof or objective facts that lend support to the applicant's subjective fear. (At 456C - D.) h

*Held*, further, that the existence or otherwise of the subjective component required an assessment of the applicant's credibility. (At 456G.)

(a) By reason of political opinion

*Held*, that on the evidence the claimant was not credible in demonstrating his subjective fear of persecution by reason of his political opinion. (At 458B - C.) i

(b) By reason of membership of a particular social group

*Held*, that where a persecutory law or practice applied to all members of society, it did not

create a particular social group. Where a persecutory law or practice applied by virtue of what a person had done, rather than who he was, it did not create a particular social group. (At 459F - G and 460C.) ǂ

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*Held*, further, that China's one-child policy was a law of general application. People who contravened the policy were not ǂ persecuted by reason of their membership of a particular social group. If they contravened the policy, they were punished for what they had done, rather than for who they were. (At 460D - E.)

*Held*, accordingly, that the claimant had failed to establish that he had a 'well-founded fear of being persecuted by reason of his ǂ membership of a particular group'. (At 460G.) Application dismissed.

## Cases Considered

### Annotations

#### Reported cases

*Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 190 CLR 225 ǂ (HCA) ((1997) 142 ALR 331): applied

*Canada (AG) v Ward* [1993] 2 SCR 689: dictum at 739 applied

*Chan v Canada (Minister of Employment and Immigration)* FCA A-223-92 [1993] 3 FC 675 (CA) ((1993) 20 Imm ǂ LR (2d) 181): dicta in paras [21] - [23] applied

*Zainab Esther Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680: applied.

## Statutes Considered

### Statutes

The Refugees Act 130 of 1998, s 3(a): see *Juta's Statutes of South Africa 2005/6* vol 5 at 2-22. ǂ

## Case Information

Application for asylum in terms of the Refugees Act 130 of 1998. The facts and issues appear from the reasons for judgment.

*A Katz and M Strydom* for the applicant.

*L M E Moloisane* for the respondents. ǂ

*Cur adv vult.*

*Postea* (November 15).

## Judgment

**Seriti J:** ǂ

### Introduction

This matter came before Court by way of motion.

In the notice of motion it is stated that the applicant intends to make application for the following orders: ǂ

1. Declaring that the decision of the Refugee Appeal Board taken on or about 13 July 2005, rejecting the applicant's appeal against the decision of the Standing Committee for Refugee Affairs (Standing Committee) taken on or about 17 September 1997, in which his application for refugee status and asylum was denied, was inconsistent with the Constitution [of the Republic of South Africa,] ǂ 1996, and unlawful.
2. Reviewing and setting aside the decision of the Refugee Appeal Board taken on or about 13 July 2005 rejecting the applicant's appeal against the decision of the Standing Committee taken on or about 17 September 1997. ǂ

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3. Declaring that the decision of the Standing Committee taken on or about 17 September 1997 rejecting the applicant's application <sup>A</sup> for refugee status and asylum, was inconsistent with the Constitution, 1996, and unlawful.
4. Reviewing and setting aside the decision of the Standing Committee taken on or about 17 September 1997 rejecting the applicant's application for refugee status and asylum. <sup>B</sup>
5. Declaring that the applicant is deemed to have a well-founded fear of persecution on the grounds of his political opinion and membership of a particular social group, as contemplated by s 3(a) of the Refugees Act 130 of 1998. <sup>C</sup>
6. Granting applicant asylum as contemplated by s 24(3)(a) of the Refugees Act.
7. Declaring that the applicant's wife and his children are dependants of applicant as contemplated by s 3(c) of the Refugees Act.
8. Directing third and fourth respondents\* to issue to applicant and his dependants formal recognition of refugee status documents as contemplated by s 27 of the Refugees Act, within <sup>D</sup> ten days from date of the order.

The respondents are opposing this application.

Founding affidavit <sup>E</sup>

Applicant alleges that he is an adult male and a national of the People's Republic of China. He is a member of the majority Chinese ethnic group. Presently he is resident, together with his wife and four children, at Queenstown, Eastern Cape.

The Refugee Appeal Board on or about 13 July 2005 rejected his <sup>F</sup> appeal against the decision of the Standing Committee in which his application for refugee status and asylum was denied.

In a letter dated 17 September 1997 the Standing Committee rejected his application for refugee status and asylum as it held that his fear of persecution was not well founded. <sup>G</sup>

He was born on 25 April 1964 in Xiamen, Fujian Province, China.

Prior to his leaving China, he was a student at Xiamen University, Fujian Province. On or about 5 or 6 June 1989 he saw news coverage, via a Taiwanese news channel to which he had access, of the Tiananmen Square massacre where a student protest against the communist Chinese government was violently suppressed by the Chinese military forces. <sup>H</sup>

The following day he voiced his anger about the massacre to his classmates. He persuaded some of them to join him on the Xiamen University campus in protests against the massacre. About a thousand students joined in said protests.

Together with other protesters, they marched around the Xiamen <sup>I</sup> University campus for a number of hours, chanting and waving placards protesting against the Chinese government's actions of 4 June 1989 on

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Tiananmen Square, as well as the corruption in the government, and the lack of freedom of speech in China, and calling for the <sup>A</sup> establishment of a multiparty government in China.

About two to three days after leading the protest march mentioned above, his uncle, who was a policeman stationed at the Lujiang police station, which is located near the Xiamen University campus, informed <sup>B</sup> him that the police want to arrest persons who encouraged others to participate in the protest marches on the Xiamen University campus. His uncle further informed him that his name was on the list of persons who were to be arrested for instigating the protest marches.

After his discussion with his uncle, he immediately packed his personal belongings and fled to a friend who lived in Lang-An, a small <sup>C</sup> town that is approximately 200 km from Xiamen. He lived with his friend for about a year; he could not return to Xiamen as the people who had participated in the protest march on the Xiamen University campus were still being arrested.

Only his close family members and friends knew his whereabouts. <sup>D</sup>

His brother managed to bribe a passport-issuing officer to issue him (the applicant) with a passport and visa for Lesotho and arranged and paid for a flight ticket, via Hong Kong to Lesotho. He left China for Lesotho on or about 15 June 1990.

He stayed in Lesotho until about 21 May 1991 when political turmoil forced him to leave that country. He entered South Africa and <sup>ε</sup> was issued with a temporary residence permit by the relevant authorities. He went to live with a friend in King William's Town where he found employment as a technician in a textile factory. The factory applied on his behalf for a work permit in the Ciskei. He remained in King William's Town for six months. Thereafter he travelled to Thaba Nchu where his employer applied for a residence <sup>ϕ</sup> permit for Bophuthatswana. In 1992 while working in Ga-Rankuwa he obtained a residence and work permit.

Whilst in Lesotho he met his wife, Libin Fang. She was legally employed as a contract worker until about 21 May 1991 when the same political turmoil that forced him to leave Lesotho compelled her to leave Lesotho as well. After she left Lesotho she legally entered <sup>ϑ</sup> and remained in South Africa with him.

On 16 July 1993 they got married in Pretoria. Out of his marriage with his wife, four children were born - the first on 14 September 1993 in Pretoria, the second on 16 July 1997 in Bloemfontein, the third on 22 July 1999 in Queenstown, and their youngest child on 24 September 2002 in Queenstown. <sup>η</sup>

On or about 22 May 1996 he was informed that his residence permit would be revoked. He could not go back to China for fear of persecution. He applied for asylum in South Africa and he was issued with a prohibited person's permit in terms of s 41 of the Aliens Control Act 96 of 1991 by the relevant authorities. <sup>ι</sup>

His past political activities place him at risk of being persecuted should he return to China. He faces a threat of being arbitrarily arrested and deprived of his freedom of movement and liberty for the sole reason that he participated in a public protest march against the actions of the Chinese government. <sup>κ</sup>

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The threats mentioned above amount to persecution and constitute a <sup>α</sup> violation of his right to freedom of expression, his right to freedom of movement and his right to be free from arbitrary arrest and detention as contemplated in the 1949 Universal Declaration of Human Rights.

Furthermore, should he return to China, he will also face further persecution due to the fact that he has four children in contravention of the Chinese government's one-child policy. <sup>β</sup>

He further alleges that it is a well-recorded fact that China has introduced a family planning policy which, *inter alia*, prohibits couples from having more than one child. Only in very few and particular circumstances are exceptions allowed. Chinese government's family planning policy is enforced through various methods and amongst <sup>γ</sup> others are forced sterilisation, abortion, levying disproportionately high fees on parents who have contravened the policy, loss of employment, etc.

He further alleges that the decision of the Standing Committee for Refugee Affairs taken on or about 17 September 1997, denying him refugee status and asylum, was materially influenced by an error of law <sup>δ</sup> and is consequently unlawful as being inconsistent with s 6(2)(d) of the Promotion of Administrative Justice Act 30 of 2000 (PAJA).

In terms of s 3(a) of the Refugees Act an applicant may qualify for asylum by demonstrating a 'well-founded fear' of being persecuted on account of race, religion, nationality, political opinion or membership of a particular social group. Under this standard the <sup>ε</sup> applicant must prove that he has a genuine fear that a reasonable person in his position would share that fear.

There is a subjective and an objective component to 'well-founded fear'. The subjective component may be based on the applicant's reaction to events that impinge on him personally, but to make it <sup>ϕ</sup> 'well-founded fear' there must be other proof or objective facts that lend support to the applicant's subjective fear.

Whether or not he will in fact suffer persecution in China is not the correct test. The test is whether there is a reasonable possibility that he will suffer persecution. <sup>ϑ</sup>

An assessment of the subjective element of 'fear' primarily involves an evaluation of his credibility, his personal background and experiences, membership of a particular social or political group and statements regarding his state of mind on departure and/or upon having returned to the country of origin. <sup>h</sup>

There is no evidence on record which indicates that an adverse credibility assessment was made on his testimony during the interview conducted on 22 May 1996.

On the contrary, the determination of eligibility for refugee status questionnaire records a positive assessment of his testimony during the <sup>i</sup> interview. It is clearly stated in annexure JF2 that he may be experiencing political concerns in his country of origin.

The preponderance of country condition reports on China reveal that the state of affairs to date is one where participation in political protests during and after the Tiananmen Square uprising was and is still punished severely. <sup>j</sup>

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The Standing Committee made a material error of law and fact by <sup>a</sup> rejecting as unfounded his application for refugee status based on his political opinion without any evidence on the eligibility determination questionnaire from which it could reasonably be concluded that his statements were not credible, coherent, plausible and in accordance with generally known facts. <sup>b</sup>

The birth of his three youngest children in contravention of the Chinese government's one-child policy constitutes a new and relevant personal circumstance that constitutes a further ground for claiming asylum which also renders him a refugee *sur place*.

The Standing Committee, when it rejected his application for refugee <sup>c</sup> status based on his political opinion, did not consider the fact that he has a further 'well-founded' fear of persecution, based on the fact that he is a parent of four children in contravention of the Chinese government's one-child policy. At the time that the Standing Committee considered his application, the fact that he has four children contrary to the Chinese government's one-child policy was unknown to it. <sup>d</sup>

During the Refugee Appeal Board hearing on 2 April and 3 June 2003 his attorney brought to the attention of the Refugee Appeal Board the new facts mentioned in the previous paragraph. The Refugee Appeal Board, correctly so, decided to consider his appeal as a *de novo* hearing of all the facts applicable in his case. <sup>e</sup>

The Refugee Appeal Board, incorrectly so, found that he had failed to establish that he was a member of a particular social group for the purposes of the Refugees Act.

The Refugee Appeal Board had to ascertain whether he had a well-founded fear of persecution due to the fact that he was a member of a particular group; in this instance, a parent with more than one <sup>f</sup> child in contravention of the Chinese government's social and political policy.

In this regard the Refugee Appeal Board stated in its decision that a group cannot be defined solely on the basis of the persecution feared.

He further alleges that the Refugee Appeal Board made material errors of law in conflict with s 6(2)(d) of PAJA by, *inter alia*, ruling that to declare parents of children born in <sup>g</sup> contravention of the family planning policies of China as a social group would be to define the social group merely by virtue of the persecutory conduct and by not recognising that parenthood is as an immutable characteristic for the purposes of defining a social group.

Answering affidavit <sup>h</sup>

Same was served and filed on behalf of the first respondent. The deponent thereto is Mr Tjerk Damastra. He alleges that he is a male person in the employ of Refugee Appeal Board and presently the acting chairperson of the Refugee Appeal Board. <sup>i</sup>

His investigation regarding the Tiananmen Square protests of 4 June 1989 revealed that all the people who were arrested for participating in the said protests have been released.

There is no indication that the applicant faces a risk of being arrested should he be deported to his country of origin. In a questionnaire he <sup>j</sup>

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completed to determine his eligibility for refugee status on 21 May 1996, the applicant stated that he arrived in the Republic of South Africa from Lesotho on 22 May 1991, having left the People's Republic of China in June 1990 and that he does not belong to any political party in China. He further stated that he 'might be arrested' if he went back to China. He further stated that he is not sure what would happen to him if he returned to his country of origin. <sup>B</sup>

No explanation was furnished by the applicant as to why on his arrival in South Africa, he did not apply for refugee status and did so only five years later.

During his evidence-in-chief before the first respondent on 2 April 2003 the applicant testified that he does not know if <sup>C</sup> anyone was arrested for the Tiananmen Square protests, but that he only heard that someone was arrested. He further testified that he was scared to return to Xiamen, China as he was told by his uncle that his name was on the list of people police want to arrest. There is no corroboration of the fact that police had a list, on which his name appears, of people police wanted to arrest, nor of the fact that his uncle told him about the said list of people police wanted to arrest. <sup>D</sup>

The applicant's reliance on the Tiananmen Square protests as his ground for applying to be granted refugee status is without any justification and legal basis. His application was correctly rejected by the Standing Committee for Refugees Affairs on 17 September 1997. <sup>E</sup>

The applicant's alleged fear of persecution was not well founded. He could not furnish any evidence either in the form of media reports or correspondence that he indeed faces the risk of being arrested for student protests that took place more than 16 years ago. <sup>F</sup>

During the hearing before the first respondent on 4 April 2003 he was questioned about his passport which was found in the applicant's departmental file. He testified that he approached the Embassy of China in Pretoria and his passport was stamped with a Chinese stamp to acknowledge that he had children, as children were, <sup>G</sup> during that time, not given passports, and instead the passport was stamped by the Chinese authorities in that regard. He further stated that the stamp in regard to the first child was put in by the official, and in respect of the second child, was put there by a friend who knew the official well.

The deponent further alleges that it appears that the applicant's passport was valid and authentic, otherwise the Chinese Embassy or <sup>H</sup> authorities would not have stamped it in acknowledgment of his two children.

He further alleges that the above is clearly indicative of the fact that the applicant's application to be granted refugee status in South Africa is not based on true facts, more so as he never applied for asylum when he arrived in South Africa on 22 May 1991, but only applied five years later on 21 May 1996. <sup>I</sup>

During the hearing on 3 June 2003 the applicant's wife testified that contravening the one-child policy of China would have negative economic impact on her and the applicant. The applicant's evidence corroborated his wife's evidence on this point. <sup>J</sup>

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He further alleges that the one-child policy was brought into operation by the government of the People's Republic of China during <sup>A</sup> 1980 and was aimed at achieving the goal of a national population policy directed at what is a very real concern about the possible adverse effects of a burgeoning population.

The one-child policy of China is a valid policy. In terms of international law and practice, those resisting a valid State policy <sup>B</sup> such as population control do not qualify as refugees.

Policy on population control in China is a law of general application which is applied uniformly in China and not only to a particular social group or persons.

He further alleges that his investigation into the one-child policy <sup>C</sup> applicable in China revealed that a big percentage of urban families have followed the one-child policy since 1980, and only a small percentage of rural families have done so, as a result of which the rural population is growing faster than the urban population in most areas of the country - he referred to an

article published <sup>d</sup> in the *People and Population Pressures Journal* dated 15 February 2001 written by Ding Yimin, titled 'China's One-Child Policy Enters New Phase', which article was attached to the papers and marked annexure TD2.

Applicant or his spouse, apart from economic considerations, did not adduce any evidence of persecution for failure to comply with the <sup>e</sup> one-child policy of China.

The applicant does not qualify as a member of a particular social group by virtue of having more than one child contrary to the one-child policy. There is no element of discrimination aimed at a particular category of persons.

On the evidence presented before the Refugee Appeal Board and the <sup>f</sup> Standing Committee for Refugees Affairs there were no facts to support the existence of the 'well-founded fear'. In other words, no objective facts to lend support to the applicant's subjective fear were presented.

#### Applicant's replying affidavit <sup>g</sup>

The applicant alleges that the first respondent was not properly constituted when it took its decision which is the subject of this application, as the requisite quorum of members did not hear his appeal. He denies allegations contained in the answering affidavit that all persons arrested for participation in the Tiananmen Square protests of 4 June 1989 have been released. He reiterates that the <sup>h</sup> preponderance of country condition reports on China reveal that the state of affairs, even to date, is one where participation in political protests during and after the 1989 protests is still severely punished. Allegations of the deponent to the answering affidavit are selective reporting generated by agents of the Chinese government, without giving <sup>i</sup> due regard to independent reports from human rights organisations.

He obtained the passport through his brother who bribed a passport-issuing officer - the possession of a valid passport cannot always be considered as evidence or an indication of the absence of fear and consequently cannot be invoked as a bar to refugee status. <sup>j</sup>

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On his arrival in South Africa he obtained valid work permits during <sup>a</sup> the first five years and consequently there was no need to apply for refugee status. When his work permit expired, his personal circumstances, particularly the fact that he had more than one child, together with the inevitable persecution that he was to face in China on his arrival, was such that it warranted a successful application for refugee status. <sup>b</sup>

It is clear that from his wife's and his evidence the impact on his family, if they return to China, will not be restricted to an economic nature - they fear that their children will be excluded from educational opportunities and will not be able to receive medical care - they also fear that his wife will face forced sterilisation due to the fact that they have more than one child. <sup>c</sup>

He denies that the one-child policy of China is a law of general application. He came to South Africa due to the persecution that he faced in China after the 1989 student protests.

#### Applicable law

Section 3 of the Refugees Act 130 of 1998 reads as follows:

'Subject to ch 3, a person qualifies for refugee status for the <sup>d</sup> purposes of this Act if that person -

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail <sup>e</sup> himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) . . .
- (c) is a dependant of a person contemplated in para (a) or (b).' <sup>f</sup>

Section 6 of the Act (*supra*) stipulates that the Act must be interpreted and applied with due regard to the Convention Relating to the Status of Refugees (UN 1951), the Protocol Relating to the Status of Refugees (UN 1967), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU 1969), the Universal Declaration of Human Rights (UN 1948), and any other relevant <sup>g</sup> convention or international agreement to which the Republic is or becomes a party.

Section 39(1) of the Constitution of the Republic of South Africa, 1996, reads as follows:

- '(1) When interpreting the Bill of Rights, a court, tribunal or forum -
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.'

Article 1(2) of the Convention Relating to the Status of Refugees, signed at Geneva on 28 July 1951, contains almost similar provisions to s 3(a) of our Refugees Act 1 (*supra*).

John Dugard *International Law - A South African Perspective 2* ed (Juta 2001) at 270, while dealing with 'well-founded fear of persecution', states the following:

'The 1951 Convention and 1967 Protocol do not provide a definition or ...

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otherwise clarify what is meant by persecution. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* provides that:

"There is no universally accepted definition of persecution, and various attempts to formulate such a definition have met with little success. From art 33 of the 1951 Convention it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution."

The learned author further states that the threat of persecution must exist for the claimant in his/her country as a whole. If there is an area in his/her own country in which an asylum claimant would be safe from persecution, his/her claim for asylum may fail. He also states that

'well-founded fear involves both a subjective and an objective component. The former is based on the applicant's reaction to events that impinge upon him or her personally; but to make it well-founded fear, there must be other proof of objective facts that lend support to the applicant's subjective fear.'

See also James C Hathaway *The Law of Refugee Status* (Butterworths, 1991) at 65; *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* at 195 in para 38.

The concept of 'well-founded fear' is intended to restrict the status of refugee to those people who can demonstrate that there is a risk of persecution if they are returned to their country of origin. At 75 *James C Hathaway (supra)* states the following:

'We are told that a "well-founded" fear is one that is "supported by an objective situation", and that ultimately this objective test is rooted in subjectivity: in general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'

In order to assess whether the allegations of the applicant for refugee status are correct or not, his credibility comes into the picture. In para 32 at 195 of the *Handbook (supra)*, it is stated that the determination of refugee status will primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

Article 195 at 200(a) of the *Handbook (supra)*, when dealing with establishing the facts, principles and methods reads as follows:

'The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.'

Article 62 of the *Handbook* deals with economic migrants. It states that a migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee.

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Article 94 defines what a refugee '*sur place*' is. It states that it is a person who was not a refugee when he left his country, but who becomes a refugee at a later date.

## Findings

The applicant alleges that he left his country because of a 'well-founded fear of persecution' because of his political opinion. <sup>b</sup> Secondly he alleges that because he has four children he is a member of a particular social group and if returned to People's Republic of China they will be persecuted because of the one-child policy of the People's Republic of China. <sup>c</sup>

The respondent's counsel, correctly so, submitted that the applicant bears the *onus* of proving that he has a 'well-founded fear of persecution' as contemplated in s 3 of the Refugees Act and art 1A of the United Nations Convention on the Treatment of Refugees of 1951. I will deal firstly with the allegation that the applicant left his country for fear of persecution because of his political opinion. <sup>d</sup>

In the founding affidavit he stated that his uncle informed him that the police wanted to arrest persons who encouraged others to participate in the protests on the Xiamen University campus and that his (the applicant's) name was on the list of people that police want to arrest for instigating the protests. <sup>e</sup>

He later said that after fleeing home, he went to stay with a friend at a small town approximately 200 km from Xiamen, where he stayed for about one year. He could not return to Xiamen, as people who participated in the protests on the Xiamen University campus were still being arrested and jailed. <sup>f</sup>

It is interesting to note that he alleges that his uncle informed him that police want to arrest leaders of the protests, but he (the applicant) later said that people who participated in the protests were arrested and jailed.

Applicant, when he came into South Africa, did not apply for refugee status, but did so only five years later. When he first entered South Africa he was issued with a temporary residence permit and later found <sup>g</sup> employment. He was later issued with a work permit.

There is no explanation why the applicant, when he left his home country, decided to go to Lesotho, and why he waited for five years before he applied for refugee status in South Africa. It is also not clear whether he had a visa to enter Lesotho or South Africa. <sup>h</sup>

He does not explain on what basis he was issued with a residence and/or working permit. Furthermore, the respondent's counsel, in my view correctly so, submitted that the applicant's visit to the People's Republic of China's Embassy in Pretoria to have his passport stamped and endorsed with his eldest child's name is indicative that he did not have a 'well-founded fear of persecution'. It should also <sup>i</sup> be noted that the applicant's second child's name was also included in his passport at a later stage, although he says that was done with the assistance of a friend who was acquainted with the Chinese officials in question.

It is also strange that when his work permit was about to expire, he <sup>j</sup>

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considered applying for refugee status but was advised by a friend to <sup>a</sup> apply for a permanent residence permit.

On or about 22 May 1996, only after he was informed that his residence permit would be revoked, did he apply for asylum in South Africa. This to me indicates that applying for asylum was an afterthought which arose after he realised that his residence permit was going to be revoked. <sup>b</sup>

My view is that the applicant has failed to discharge his *onus* to demonstrate that because of his political opinion he has a 'well-founded fear of persecution' if he is returned to China. His version is not coherent and plausible.

The next issue that needs to be considered is the allegation by the <sup>c</sup> applicant that he is a member of a particular social group as he has four children contrary to the one-child policy of the Republic of China.

This point was not raised before the Standing Committee for Refugee Affairs but was raised with the Refugee Appeal Board.

In a letter dated 29 September 1997 addressed to the Refugee Board by the applicant's attorneys, after the decision of the Standing <sup>d</sup> Committee for Refugee Affairs, one of the

paragraphs of the said letter reads as follows:

'The applicant faces a further problem caused by his two children which were born in the RSA because it is common knowledge that the PROC only allows one child and will this severely affect (negative effect) E on the second child as well as the parents with regards to penalties, food rations and education.'<sup>†</sup>

At the Refugee Appeal Board hearing, the applicant's wife testified. She testified that she is also from China and she came to South Africa in May 1991. Prior to coming to South Africa she met the F applicant in Lesotho; they both came to South Africa and got married in 1993 in Pretoria - she had a work permit and she worked at different places in South Africa.

She further testified that she has four children and if she goes back to China her children will not get a good education because of China's G one-child policy. She further stated that because of China's one-child policy, she would be forcibly sterilised.

In his heads of argument the applicant's counsel submitted that applicant has also a well-founded fear that, due to his membership of a particular social group, being the parent of four children in contravention of China's one child per family policy, he will face H persecution on account thereof.

In *Zainab Esther Fornah v Secretary of State for the Home Department*, a case heard by the England and Wales Court of Appeal (Civil Division Decisions),<sup>‡</sup> Lord Justice Auld, when dealing with an applicant applying for refugees status said the following in para [13]: I

'The second main proposition, to which I have already referred and to which the High Court of Australia gave its authority in *Applicant A*, and which the

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House of Lords acknowledged in *Shah and Islam*, is that, in general, there can only be a A "particular social group" if the group exists independently of the persecution.'

In the matter of *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* No FC004 of 1997,<sup>\*</sup> \* High Court of Australia, Brennan CJ said the following: B

'Thus the definition of "refugee" must be speaking of a fear of persecution that is official, or officially tolerated or uncontrollable by the authorities of the country of the refugee's nationality.

Secondly, the feared persecution must be discriminatory. The victims are persons selected by reference to a criterion consisting of, or criteria including, one of the prescribed categories of discrimination C ("race, religion, nationality, membership of a particular social group or political opinion") mentioned in art 1(A)(2). The persecution must be "for reasons of" one of those categories. This qualification excludes indiscriminate persecution which is the product either of inhuman cruelty or of unreasonable antipathy by the persecutor towards the victim or victims of persecution. Persecution of that kind is a general, non-discriminatory denial of fundamental rights D and freedoms. The qualification also excludes persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application.'

The learned Judge<sup>§</sup> continued further and said the following: E

'For example, a law or practice which persecuted persons who committed a contempt of court or broke traffic laws would not be one that persecuted persons by reason of their membership of a particular social group. Where a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms.' F

In this case Dawson J was of the view that where a persecutory law or practice applies to all members of society, it cannot create a particular social group consisting of all those who bring themselves within its terms.

In *Chan v Canada (Minister of Employment and Immigration)* A-223-92, Federal Court of Appeal,<sup>\*\*</sup> the appellant who was a citizen of the People's Republic of China fled to Canada G where he applied for refugee status - his claim was based on a fear of persecution on account of his political opinion and his membership of a particular social group. He testified, *inter alia*, that his wife gave birth to their second child, the authorities came to know about it, and he was accused of violating the birth-control policy of the People's Republic of China. He agreed to H undergo sterilisation within three months but left the country prior to his undergoing sterilisation. In paras [21] - [23] of the above judgment, Heald JA said the following:

'More recently in the case of *Canada (Attorney General) v Ward* [1993] 2 SCR 689, at p 739, *per* La Forest J, the Supreme Court of Canada identified three categories of "particular I social groups":

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- (1) groups defined by an innate or unchangeable characteristic (for example, individuals fearing persecution on the basis of gender, A linguistic background and sexual orientation);

- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association (for example, human rights activists); and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence. An example of such a group might be persons who were capitalists and independent businessmen in pre-communist Eastern Europe.'

On the issue of persecution on the basis of membership of a particular social group, the learned Judge found that the appellant had not established persecution by reason of membership in a particular social group. The Judge said: 'As in *Ward*, the appellant's fear clearly stems from what he did and not from what he was.'

In this case, the applicant is worried, *inter alia*, about the financial impact on his family occasioned by the one-child policy if they are returned to the People's Republic of China. Economic considerations *per se* do not qualify a person as a refugee.

The respondent's counsel, in my view correctly so, submitted that China's one-child policy is a law of general application. People who contravene said policy will not be persecuted by reason of their membership of a particular social group. <sup>E</sup>

I associate myself with the categories of particular social groups as enumerated in the Canadian case of *Ward v Attorney-General of Canada*<sup>††</sup> mentioned above.

The applicant does not fall into any of the said groups.

Furthermore, the one-child policy of the People's Republic of China <sup>F</sup> is a law of general application. It applies to all people in the country. The relevant penalties are applied to those who have contravened said policy. They are punished for what they have done and not for what they are.

My view is that the applicant has failed to establish that he has a well-founded fear of being persecuted by reason of his membership of a particular group. <sup>G</sup>

Conclusion

In my opinion the applicant has failed to make out a case for the relief as contained in the notice of motion.

The Court therefore makes the following order:

1. The application is dismissed. <sup>H</sup>
2. The applicant is ordered to pay the costs of the respondents on a party and party scale.

Applicant's Attorneys: *Pretoria Law Clinic*. Respondents' Attorneys: *State Attorney*.

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\* The Minister of Home Affairs and Director-General of Home Affairs, respectively - Eds.

† *Sic* - Eds.

‡ [[2005] EWCA Civ 680 - Eds.

\* (1997) 190 CLR 225 (HCA) ((1997) 142 ALR 331) - Eds.

§ *Per Dawson J* - Eds.

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