CHAPTER 9

THE CASE OF THE CHINESE WOMAN

Introduction

9.1 Ms Z,[1] a Chinese national, arrived in Darwin by boat (codenamed "Cockatoo") on 22 November 1994. Having come without a visa she was designated an unauthorised non-citizen and transferred to Port Hedland Immigration Processing and Detention Centre (IDC) where she was held until her removal to the PRC on 14 July 1997. At this time Ms Z was accompanied by her *de facto* husband; she had a 20 month old daughter and was in the late stages of pregnancy with her second child. Ms Z is thought to have formed a relationship with the father of her child on the boat which brought them both from China.

9.2 While in Australia, Ms Z made two unsuccessful applications for refugee status under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.[2] Ms Z voiced repeated concerns about forced abortion in the PRC. According to her representative, she pleaded to be allowed to remain in Australia until after the birth of her second child. These pleas were reportedly made to the new DIMA deputy manager, the Australian Protective Service (APS)[3] welfare officer, the doctor[4] and the nursing sister at the Port Hedland IDC up until the eve of her departure.[5] These concerns were not pursued by DIMA staff at the Port Hedland IDC.

9.3 The Committee accepts that Ms Z's baby was aborted shortly after her removal back to the PRC, a result that cannot be described as anything less than abhorrent and a tragedy. The outcry that ensued after news of this event reached Australia is central to Terms of Reference (g), (h) and (j) of the Committee Inquiry which read as follows:

> (g) the recent case of the Chinese woman allegedly deported to the PRC, despite pleas for protection, to face a forced abortion when eight and a half months pregnant;

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1 The person discussed in this Chapter currently has an application for protection under consideration. The Committee refers to her as Ms Z or the Chinese Woman in order to protect her privacy

2 For a discussion of these, see Chapters 1 and 2. The second application was deemed an invalid purported application – see below, Paragraphs 9.35 – 9.36

3 At that time, Australian Protective Service provided security services for Immigration Processing and Detention Centres. Part of their responsibility also included the provision of welfare services

4 The doctor worked part-time at the Immigration Processing and Detention Centre, and was based at the Port Hedland hospital. It has been stated that the Department of Immigration and Multicultural Affairs was responsible for the provision of health services, *Transcript of evidence* [In camera], p. 167

5 Ayers Report (1999), Paragraphs 36; 37; and 43-44; and *Transcript of evidence* [In camera], p. 193

> (h) the responsibility of Australia under international law for the very serious human rights violation of forced abortion which is claimed in this case; and
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> (j) why cases such as the Chinese woman and that of Mr SE are not being picked up early enough by the Department of Immigration and Multicultural Affairs and the Refugee Review Tribunal.

9.4 A chronology of events leading to the removal of Ms Z and her daughter from Australia, and details of the subsequent interviews and inquiries, can be found at Appendix 10 of this Report.

9.5 The Chapter ends with a series of conclusions and recommendations. The Committee believes that the recommendations, if accepted and implemented by Government, would prevent such a tragedy recurring.

Confidential nature of material

9.6 The Committee has addressed the issues raised by the case of Ms Z through consideration of an extensive range of material. Much of the information on which the Committee's conclusions are based is of a sensitive nature, and includes:

- personal health records;
- Departments of Foreign Affairs and Trade and Immigration and Multicultural Affairs documents;
- government to government communications;
- copies of confidential interviews;
- details of applications and tribunal hearings; and
- in-camera evidence.

9.7 The Committee prefers evidence to be public where possible, and to provide sources for the statements made and conclusions reached in this evidence. However, given the need to protect the privacy of individuals and of some aspects of government to government communications, the Committee has decided to limit publication of relevant material and minimise references to individuals. Where no other source is available, it has been necessary to refer to confidential material, including the Ayers Report.[6]

9.8 The Committee has decided that material given to it on a confidential basis will not be released.

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6 See Paragraphs 9.10 –9.11 below

Related investigations

9.9 This Senate Inquiry was established on 13 May 1999, with Terms of Reference (g); (h); and (j) referring specifically to the case of Ms Z. Initially, the Minister for Immigration and Multicultural Affairs, Mr Ruddock, and the Minister for Foreign Affairs and Trade, Mr Downer, instructed their Departmental representatives not to respond to Committee questions about Ms Z. The reason given for this instruction was that a separate Ministerial Inquiry (the "Ayers" Inquiry) had been instituted by DIMA and was underway. The Committee, after much deliberation, consultation and resultant delay, issued orders to the respective officials, requiring them to appear before the Committee, to produce certain documents, and to respond to questions. Relevant officers did duly appear and the Committee is pleased to record its appreciation of the eventual co-operation of the Departments.

9.10 The matter of the return of Ms Z to the PRC came to be the subject of the separate Ministerial Inquiry, following questions that were asked by Senator Harradine at a Senate Estimates Committee hearing. On 10 May 1999 the Minister for Immigration and Multicultural Affairs announced the appointment of Mr David Sadleir, a former Ambassador to China, former Director-General of ASIO, member of the Australia China Council and adviser to the AMP on China, to conduct an independent inquiry to examine allegations that a pregnant national of the PRC was removed from Australia to the PRC, and was forced to undergo an abortion on her return.[7] On 19 May 1999, following the withdrawal of Mr Sadleir, the Minister announced the appointment of Mr Tony Ayers, former Secretary of the Department of Defence, to undertake the Inquiry.

9.11 Mr Ayers presented his Report to the Minister on 9 September 1999. Mr Ruddock, in a media release dated 14 September 1999, acknowledged the Report but did not release it publicly. The Committee has been supplied with a copy of this Report on a confidential basis.

9.12 It is noted that neither Mr Ayers nor the Committee was able to talk directly with Ms Z. Mr Ayers was refused a visa to visit the PRC and the Committee has limited resources for overseas travel, even if visas had been available to Committee members. The Committee did not seek to speak with any Chinese officials in Australia.

9.13 A visit on 27 May 1999 to the Australian Consulate-General's office in Guangzhou by Ms Z, who was accompanied by a Channel 9 "60 Minutes" television crew, is also pertinent to the Committee's inquiry because of the wide interest the broadcast program generated in Australia and of certain matters negotiated between

7 Department of Immigration and Multicultural Affairs, *Inquiry into return of pregnant woman to China*, Media Release, MPS 78/99, 10 May 1999

Ms Z and her representative and the Chinese authorities in the presence of Consulate officials.[8]

9.14 Before leaving Australia, the "60 Minutes" team had arranged a contact point where they could speak to Ms Z at Guangzhou in the PRC.[9] It has been stated that, during the interview, Ms Z became so distressed that the journalists felt that they had no option but to take her to the Australian Consulate-General in Guangzhao.[10] However, the Committee was advised by another source, at an *in-camera* hearing, that this plan to visit the Consulate-General's office was set up in advance by "60 Minutes".[11] This latter assertion gains support from the fact that arrangements were made in advance by a member of the "60 Minutes" team to meet with the Consul General.[12]

Issues arising from the case of Ms Z

9.15 The primary issue, in the case of Ms Z, is why she was returned to the PRC in her pregnant condition when there existed a substantial body of evidence suggesting a real risk of forced or coerced abortion. Other important issues are the extent to which Ms Z's treatment by Australia was in breach of international conventions to which Australia is a party; and whether her case reveals administrative problems that affected departmental officers' understanding of or compliance with international conventions.

9.16 Other issues which arise in this case include:

- The operation of the Minister's discretion (s417), including the means by which s417 requests are made and processed;
- The lack of response on the part of DIMA officers to Ms Z's concern that she would face a forced abortion if returned to the PRC whilst pregnant;
- The relevance of PRC's one-child policy in the assessment of an individual's status under the Refugees Convention;
- The manner in which illegal or 'black' children are recognised and treated in China;[13]

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8 Ms Z's registration papers and her identity are among the matters of interest at the time as she had claimed she had no papers

9 *Transcript of evidence*, Independent Council for Refugee Advocacy, p. 726

10 *Transcript of evidence*, Independent Council for Refugee Advocacy, p. 725

11 *Transcript of evidence* [In camera], pp. 200-201

12 *Transcript of evidence* [In camera], p. 200; Department of Foreign Affairs and Trade, Guangzhou Cable O.GZ600139

13 In the PRC children born contrary to the one-child policy are called 'black children' and are classified by the popular appellation 'hei haizi' (*Chen Shi Hai v The Minister for Immigration and Multicultural Affairs [2000]* HCA 19 (13 April 2000) (http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html) at Paragraph 54

- Ms Z's access to advice in the latter stages of detention;
- Allegations made about the use of sedation on Ms Z during her removal from Australia;
- The sequence of events following Ms Z's removal from Australia, including: the abortion; who signed the consent for the abortion; her registration; her identity; and the nexus with the so-called "Big Brother";[14] and
- The circumstances surrounding the Channel 9 "60 Minutes" television crew involvement with Ms Z, and the subsequent visit to the Australian Consulate-General's office by that team, Ms Z, and her daughter.

9.17 A number of other issues have also been raised which, while relevant to aspects of Ms Z's case, are outside the Committee's terms of reference. These include:

- Whether the abortion of an 8 month old foetus is at law not only an abortion, but also the crime of child destruction;
- Detention practices for those who arrive unlawfully in Australia;
- The privatisation of the management of the detention facilities;
- The delay in Ms Z's removal from Australia after she had exhausted the administrative avenues to gain protection in this country; and
- The opportunities for Ms Z to marry her *de-facto* husband while in detention in Australia.

International conventions

9.18 Chapters 1 and 2 of this Inquiry consider the international conventions to which Australia is a signatory, and the conventions outline the responsibility for providing protection for asylum seekers.[15] Obligations not to *refoule* or return an individual to a place of persecution arise under four international conventions:

- Convention relating to the Status of Refugees (1951) and 1967 Protocol (the Refugee Convention);
- Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (1967) (CAT);
- The International Convention on Civil and Political Rights (ICCPR); and
- The Convention on the Rights of the Child (CROC).

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14 Mr Ayers notes that there are regular references in M Z's personal records to a man whom she calls "Big Brother" or "The Boss" (Ayers Report (1999), Paragraph 90). This individual, believed to be a cousin, appears from material provided to be responsible for organising various actions undertaken by Ms Z

15 For the distinction between refugees and asylum seekers generally, see Chapter 1

9.19 The primary source of Australia's international obligations to refugees is contained in the Refugee Convention and the subsequent 1967 Protocol. Article 33(1) of the Refugee Convention prohibits States from expelling or returning (refouling) a refugee to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion.

9.20 The obligation of non-refoulement in the CAT is contained in Article 3 and provides that this shall not take place where there are substantial grounds for believing that a person, if returned, would be in danger of being subjected to torture. When determining whether these grounds exist, it is necessary to take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

9.21 Various Articles in the ICCPR impose obligations of non-refoulement, although it is not expressed in the direct language that is present in either the Refugee Convention or CAT. Article 7 of the ICCPR provides that no-one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. The United Nations Human Rights Committee has asserted that refouling a person to a country where that person will be placed at risk of torture or inhumane or degrading treatment or punishment by another country will constitute a breach of Article 7.[16]

9.22 The principle of non-refoulement attaches to the ICCPR (Article 6) protection of the right to life,[17] Article 9 protection of the right to security of person[18] and to the general requirement for the protection of the rights of individuals contained in Article 2.1.[19]

9.23 Like the ICCPR, CROC protects children from torture and other cruel, inhumane and degrading treatment and punishment (Article 37) and recognises the child's inherent right to life (Article 6).[20] There is an obligation not to expel, return or extradite a child to another country where he or she will be subjected to or at risk of being subjected to torture or other cruel, inhumane or degrading treatment or punishment or of death.[21]

Convention relating to the Status of Refugees (Refugee Convention)

9.24 Concern about Ms Z's refugee status focussed on her position in relation to the various grounds available for protection under the Refugee Convention. Her first

16 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 529

17 *Submission No 51*, Human Rights and Equal Opportunity Commission p. 529

18 *Submission No 51*, Human Rights and Equal Opportunity Commission, p 529

19 *Submission No. 75*, Attorney-General's department, p. 1139

20 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 530

21 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 530

application did not succeed, either at primary or review stage. As explained below her second application, made on different grounds, was deemed invalid.

9.25 The Refugee Convention has been outlined in Chapters 1 and 2 of this Report. The term 'refugee' is defined in Article 1A(2) of the Refugee Convention as follows:

> …a refugee [is] any person who: owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[22]

9.26 In Australia, this definition is the cornerstone for the provision of protection under Australia's Onshore Protection Program. Thus, for a person to engage protection under this Program, he or she must be a person who has been determined to be a refugee in accordance with the terms of the 1951 Refugee Convention and 1967 Protocol.[23]

Ms Z's Applications for protection under Refugee Convention

The first application

9.27 Ms Z made two applications for refugee status. She received assistance in the preparation of these applications from Legal Aid Western Australia (LAWA).[24] Her first application was lodged on 18 January 1995, claiming several reasons for refugee status. A copy of the application and the tapes of interviews were made available to the Committee.

9.28 This application for a Protection Visa was refused by the delegate of the Minister on 10 February 1995 and the applicant and her advisers were notified of this decision on 14 February 1995. A copy of the decision has been made available to the Committee.

9.29 Ms Z, with the assistance of LAWA, applied for a review of the decision by the RRT on 20 February 1995. The Tribunal affirmed the decision of the delegate on 11 April 1995. The tapes of the hearing and a copy of the RRT decision were made available upon the Committee's request.

9.30 In reaching its decision the Tribunal found that Ms Z had not demonstrated any Refugee Convention-related grounds of persecution. The Tribunal also considered

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22 Refugee Review Tribunal Reference: N97/15435 (28 January 1998). See also, *Submission No. 50*, Amnesty International, p. 496

23 See Chapters 1 and 2

24 *Submission No. 69B*, Department of Immigration and Multicultural Affairs [Confidential], Attachment B; and see also the Department of Immigration and Multicultural Affairs Folder 23/8/99 at Section 7

the issue of whether Ms Z had a well-founded fear for a Convention reason by virtue of her illegal departure alone. They found that her claim on this ground also failed.[25]

9.31 On 3 May 1995, a DIMA officer recorded that Ms Z's case had been considered under the Ministerial discretion, which is conferred by s417 of the Act,[26] and which would have permitted Ms Z to remain in Australia on humanitarian grounds. The delegate found Ms Z did not meet the Ministerial Guidelines for intervention under s417.[27]

9.32 It was possible, at any time after the RRT decision, for Ms Z or her agent to then make a request to the Minister for consideration of her case under s417 of the Act. There is no evidence to show that she, or her agent, made such an application.[28]

The second application

9.33 Ms Z, with the assistance of LAWA, made a second application for a Protection Visa on 21 June 1995. Second applications may be made if an individual is able to demonstrate that he or she is raising a new Refugee Convention-related matter, or is providing new information not previously available in respect of the Convention ground raised in the earlier application.[29] Where such an application meets one of these criteria, the Minister may give permission for it to proceed.[30] Where such an application is deemed by the delegate not to meet the criteria, it is unsuccessful.

9.34 Ms Z's second application claimed that she:

- was three months pregnant at the time of lodging the second application;
- feared that if she returned to the PRC before the birth of the child, she may be forced to have an abortion; and
- feared that if she returned to the PRC after the birth of the child, the child may be denied household registration, and that the child would be treated as a 'black child', falling outside the one-child policy.

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25 *Submission No. 62B,* Refugee Review Tribunal [Confidential], Reference N95/07004, Decision and Reasons for Decision, p. 20

26 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958,* 31 March 1999, Guideline 6.2

27 As noted at Chapter 8, this was standard procedure, but did not prevent an individual making a formal s417 request

28 See *Transcript of evidence,* Legal Aid Western Australia, p. 255 (3 February 2000). Legal Aid Western Australia stated that they did not make an application for the woman and ceased acting for her in early October 1995

29 *Migration Act 1958* (C'th), s48A and s48B

30 See *Migration Act 1958* (C'th), s48B

9.35 On 14 August 1995, the second application on behalf of Ms Z and her partner was ruled invalid by DIMA, and thus was not processed.[31] The application was invalidated on the basis that the issues raised did not come within Refugee Convention grounds, nor add new material to those grounds raised in the first application. Ms Z was determined by DIMA not to be a member of any social group having a recognisable existence separate from claimed acts of persecution.

9.36 In this respect the Department's argument was that:

> The law in Australia is that citizens of the Peoples Republic of China who, because of their actions, may possibly face harsh treatment in the Peoples Republic of China arising out of the general application of the PRC's fertility control policies or because of actions instigated by over-zealous local officials, although possibly facing persecution, are not facing persecution for reasons of membership of any social group having a recognisable existence separate from the persecutory acts complained of.[32]

9.37 The invalidity of her application meant that Ms Z had no access to the RRT. Nonetheless, she still had the right to make a s417 request at any time, seeking consideration on humanitarian grounds, rather than on Refugee Convention grounds. Humanitarian consideration by the Minister is available to take account of possible claims under other convention grounds (ie the CAT and the ICCPR).[33] Although Ms Z's advisors held little hope in respect of the argument for a Protection Visa on the basis of possible sterilisation or abortion in 1995, they commented that her only possible recourse was "to the Minister pursuant to s417".[34] The old Guidelines in operation at the time do state that appropriate factors for consideration of a s417 request would be that "the applicant faces inhumane or degrading punishment [if] returned to their country".[35]

9.38 LAWA noted that, although the terms of the IAAAS tender stipulate that the assistance that they are contracted to give ceases once the RRT's decision is handed down, they continued to assist Ms Z.[36] As explored earlier, there is no provision made under the tender for the lawyer to appear with the client before the RRT.[37] LAWA

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31 Department of Immigration and Multicultural Affairs Folder 23/8/99, Section 7

32 See the Department of Immigration and Multicultural Affairs Folder, 23/8/99, Section 7, Letter of 14 August 1995

33 See Chapter 8

34 *Submission No. 40*, Legal Aid Western Australia, p. 375

35 *Guidelines for Stay in Australia on Humanitarian Grounds*, Section 5 (iii) is entitled 'Persons facing serious mistreatment which while not Convention related constitutes persecution'

36 *Transcript of evidence*, Legal Aid Western Australia, p. 252 (3 February 2000)

37 See Chapter 3

pointed out that they did appear at Ms Z's hearing and, as a matter of course, they do appear at hearings, even if it is only by a phone hook-up.[38]

9.39 LAWA apparently continued to give advice to Ms Z, writing a letter requesting that Ms Z be allowed to stay until the birth of her first child and also providing assistance with the preparation of the second application.[39] No request was made to LAWA for her files by another organisation or representative after LAWA ceased to act for her in October 1995.[40]

The PRC one-child policy

9.40 Diverse material and evidence were provided to the Committee to prove that there is a systematic practice in the PRC of *forced* abortions at any stages of pregnancy.[41] Abortion, sterilisation and contraception are widely available and actively encouraged in the PRC as part of an extensive population limitation program.

9.41 In his written submission, Dr John Aird, former analyst on China to the United States Bureau of Census and expert witness to immigration hearings in the United States, described the nature of China's family planning program:

> The basic requirements of the program that result in persecution are three that were established as national policy in December 1982, vigorously enforced in 1983, and resumed during the current crash program of the 1990s. They demanded that women with one child have an IUD inserted, couples with two or more children be sterilized, and women pregnant without official permission undergo abortions. Chinese sources recognize two kinds of abortion; abortions in the first trimester, which involve the surgical removal of the embryo, and abortions in the second and third trimester, which usually involve administration of a drug that causes the pregnant woman to go into labor within a few hours. If the result of a late-term forced delivery is a viable infant, official policy requires that it be destroyed by the attending medical personnel…Such instances are tantamount to government mandated infanticide.[42]

9.42 A former Chinese gynaecologist, Dr Wong, gave a first-hand account of her experience of the program as carried out in the hospital where she worked in the PRC in the 1980's:

> Some have physical force, emotional force and psychological force applied… [p. 355]…If the couple have two children…one of them has to be

38 *Transcript of evidence*, Legal Aid Western Australia, p. 253 (3 February 2000)

39 Ayers Report (1999), Paragraph 101

40 *Transcript of evidence*, Legal Aid Western Australia, pp. 252-254 (3 February 2000)

41 See in particular the evidence of Dr Wong, *Transcript of evidenc*e, pp. 351-353; and Dr Aird, T*ranscript of evidence*, pp 666-668; and see also *Submission No. 78*, Dr Aird, p. 1218

42 *Submission No. 78*, Dr Aird, p. 1223

> sterilised, otherwise you cannot get medicare assistance or education assistance and accommodation….
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> If a woman has two children and she does not want to be sterilised, she has to make a promise in writing - and if the workplace trusts her - that she is using IUD or other methods. But she has to promise the government that if she gets pregnant, she has to have an abortion [p. 356].[43]

9.43 Dr Wong also had experience with late-term abortions. She explained:

> …many millions of women [are] forced into abortions [p. 351]…I did the maximum - the 7½ months abortion…we transferred a lot of women who were over 7½ months to the bigger hospitals…To support my tribunal case in 1994, I asked my workmate, who worked for a public hospital, to get a photo of a baby aborted [in] a bedpan…In that photo, you can see a 6½ - month-old baby [p. 352].[44]

9.44 Dr Wong testified that on a return visit to China in 1997-98, a gynaecologist and former workmate informed her that they were still doing late term abortions at that hospital.[45]

9.45 The Committee heard evidence about the one-child policy in PRC from a number of sources. Neither DIMA nor DFAT stated a specific opinion in respect of the one-child policy, noting that there was a range of information available,[46] and that this range was represented in the Country Information Service holdings. The selection and analysis of this contemporary data is crucial to the decision-making process. It is important that adequate weighting is given to the information, drawn from a number of sources, for a balanced interpretation of the facts when applications from asylum seekers are being assessed.

9.46 Statements have been provided to the Committee that there is no policy of coercion and that, if such coercion has occurred, it is not approved.[47] Evaluation of such statements by the Committee is difficult in the context of this inquiry as a range of sources and experts have opposing opinions. It must also be noted that, until the High Court ruled that the one-child policy could found a claim for refugee status for

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43 *Transcript of evidence*, Dr Wong, pp. 355-356

44 *Transcript of evidence*, Dr Wong, pp. 351-352

45 *Transcript of evidence*, Dr Wong, p. 352

46 *Transcript of evidence*, Department of Foreign Affairs and Trade, pp. 764-765; and *Submission No. 76A*, Department of Foreign Affairs and Trade, p. 1207

47 See Department of Foreign Affairs and Trade, Folder 1, Attachment B, p 24, Cable O BJ 17530; p. 26 Cable O.BJ 17592; p. 27, Cable BJ 17593; and see also *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 565

an unlawful 'black' child,[48] there was no 'view' by which DIMA or RRT officials could be bound[49] in respect of the Refugees Convention.

9.47 In his evidence to the Committee, Dr Aird identified "inadequate handling of country information regarding violations of human rights, especially those under the Chinese family planning program" as one of the "main deficiencies" in Australian procedure.[50]

9.48 In his submission, Dr John Aird pointed out that often descriptions of the China program were:

> …deliberately crafted to give a misleadingly mild impression of family planning enforcement in China….The…reports consistently fail to cite recent evidence from Chinese sources that coercion in the program is continuing.[51]

9.49 He added:

> …the problem is that in some matters - notably family planning in China - the information available is full of contradictions. Reliable sources on policies and practices are intermixed with disinformation that is contrived with deliberate intent to deceive. One cannot simply consult the documentary sources. Their content must be analysed and the truth sifted out.
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> The Chinese Government has consistently lied to foreigners about the nature of its family planning program, and foreign family planning advocates have often repeated these lies and even added embellishments of their own. An agency within the US Department of State has issued a series of documents for use by our immigration judges and INS attorneys which denied the seriousness of the coercion problem, quoting disingenuous claims by Chinese family planning officials while omitting references to domestic Chinese sources that openly admit that the program is inherently and intentionally coercive.[52]

9.50 and:

> …when any foreign government forcibly repatriates a Chinese woman with one child, who thereupon faces almost certain forcible IUD insertion, or a Chinese woman pregnant without the permission of her local family planning authorities, who faces the virtual certainty of a forced abortion

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48 *Chen Shi Hai v The Minister for Immigration and Multicultural Affairs [2000]* HCA 19 (13 April 2000) (http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html). See also Paragraphs 9.63 and following

49 See Chapters 1 and 2

50 *Transcript of evidence*, Dr Aird, p. 664

51 *Submission No.* 78, Dr Aird, p. 1220

52 *Transcript of evidence*, Dr Aird, p. 665

> regardless of duration of pregnancy, or a couple of childbearing age who already have two or more children, who face the strong probability that one or the other of them must be sterilized, the foreign government shares responsibility for what happens to these people in China. There is no excuse for not knowing what the risks are. The evidence necessary for a rational judgment in such cases is in the public domain and has been for years.[53]

9.51 The Jesuit Refugee Service commented that, although it is argued that there is no express law[54] requiring forced abortion in the PRC, that Chinese officials often deny that there is any coercion involved in the one-child policy, and that forced abortions are often attributed to over-zealous officials, the PRC should still be held responsible for the actions of these local officials. [55]

9.52 Such 'unauthorised' action is relevant in an application under the Refugee Convention, or under CAT. These Conventions refer either to the unlawful actions of an official government *or to actions which cannot be controlled by the official government*, as the basis of persecution or torture. As is noted in many cases, persecution, in respect of the Refugee Convention, must have "an official quality, in the sense that it is officially tolerated or uncontrollable by the authorities of the country of nationality".[56] 'Over-zealous officials', when used as a figure of speech, may be seen as 'official toleration'. The more significant difficulty for applicants like Ms Z, however, is that the nexus between 'persecution' and the five 'Convention reasons' must still be met. Put plainly, the persecution must be by reason of the person's race, religion, nationality, membership of a particular social group or political opinion.

9.53 Aird comments on the effectiveness of the so-called 'target management responsibility system' used by the central authorities to control the compliance of local authorities with the requirements of the family planning regulations.[57] Work units, rural villages and other jurisdictions have quotas based on a birth allocation from the central authorities. There are assigned documents linking the higher to the lower level authority guaranteeing that those quotas will not be exceeded and often specifying the penalties that local authorities will pay if they permit the number of births to exceed the specified quota. Aird explains:

> Exceeding the quota then invites a critical review, sometimes if it is not extreme the local authority's failure is publicised in a circular to cause public humiliation, which can be fairly strong force in China. But in extreme

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53 *Submission No.* 78, Dr Aird, p. 1224

54 The distinction between 'law' and 'directive' is also noted by Dr Aird, *Transcript of evidence*, p. 669

55 *Submission No. 54*, Jesuit Refugee Service, p. 450; and see also *Transcript of evidence*, Father Frank Brennan, Uniya, p. 494

56 See RRT, V98/09501, 31 March 1999, p. 2

57 *Transcript of evidence*, Dr Aird, p. 670

> cases they may suffer loss of bonuses, a loss of opportunities for promotion or dismissal from their jobs.[58]

9.54 Australian legal authority up to now has not recognised the desire for more than one child to be a political statement in itself, and, on at least two grounds (political opinion and particular social group), does not accept opposition to the one-child policy *per se* as a Refugee Convention related factor.[59]

9.55 In the decision on the case of Ms Z, it may be that the DIMA officer had taken note of the comments by the Full Federal Court, in the appeal from Sackville J, that:

> …even if the respondents were able to show that there was a law of general application in China that parents of one child must be sterilised, and forcibly if necessary, persons facing that fate would not be members of a particular social group[60]

9.56 In most instances, the basis of applications in respect of forced sterilisation has been based on the grounds that the applicant is persecuted as a result of being a member of a particular social group, a Refugee Convention ground. In Australia it has been determined that a range of people (parents who, having one child, want more; parents opposed to sterilisation/abortion, etc) are not considered a specific social group, thus they are not taken to be persecuted for a Convention ground.[61] It is argued that, to be a specific social group, and to be persecuted as a 'social group', the group must be something, rather than simply do something - that is, the group must owe its existence to factors such as ethnicity, race, etc: that is to factors over which group members have no control, rather than to actions which have created the group.[62]

9.57 The issue of 'particular social group' was considered by the High Court in 1997, in the context of forced sterilisation and the one-child policy.[63] The High Court

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58 *Transcript of evidence*, Dr Aird, p. 670

59 Thus, one might have to demonstrate a significant history of political opposition and activity in order to be seen as being discriminated against on grounds of political opinion. Further, the issue of being a member of a social group is generally seen as applying to a specific caste or ethnic group, although some commentators believe that various groups of parents, parents with one child etc in the Peoples Republic of China do constitute a 'social group' under the Refugee Convention

60 *Minister for Immigration v Applicant A and others* (1995) 57 FCR 309 at 325. See Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 7, Minute to Decision Support Branch, Folio No 139 on the extent to which the recent decision to overturn Sackville would affect the application (dated 11/07/95)

61 This situation of itself has not changed with the *Chen* case. See Paragraph 9.63 and following

62 See below, Paragraph 9.76, where it is noted that the High Court has stated that in at least some circumstances there is a 'social group' of 'black children' in the Peoples Republic of China who are discriminated against on the basis of their shared characteristics (and not on the basis of any action they may have taken)

63 *Applicant A and Another v Minister for Immigration and Ethnic Affairs* and Another (1997) 142 ALR 331

found that forced sterilisation,[64] although it might constitute persecution, was not persecution for a Convention reason - that is, those likely to be sterilised did not constitute a particular social group. Presumably the same reasoning would apply to the issue of forced abortion. In 1995, based on the decision of the Full Federal Court in *Minister for Immigration and Ethnic Affairs v Applicant A and others*, DIMA acted on the basis that it did apply.[65]

9.58 It has been submitted that the Convention ought to be interpreted in light of its purpose as presented in international law,[66] as a narrow legal interpretation may lead to refugee applicants being denied the benefit of refugee status. It is further submitted that; "each case ought to be considered on its merits in the light of the UN Charter which requires that 'human beings shall enjoy fundamental rights and freedom without discrimination'".[67]

9.59 Mr Tully pointed out that jurisprudence "may be cited to the effect that the right to procreate and the expression of that right may be analogized to other fundamental human rights sufficient of itself to establish a legitimate ground for asylum".[68] He noted that it has been held that "there can be little doubt that the phrase 'political opinion' encompasses an individual's view regarding procreation."[69]

9.60 The Human Rights and Equal Opportunity Commission has also argued that enforced abortion is a serious human rights violation:

> It violates the security of the person contrary to the ICCPR Article 9 and the prohibition on sex discrimination in the enjoyment of human rights in ICCPR Article 2 and is certainly inhuman treatment contrary to ICCPR Article 7 and the Convention against Torture.[70]

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64 Note: the judgment of the Full Federal Court in *Minister for Immigration and Ethnic Affairs v Applicant A and other*s (1995) 57 FCR 309 referred only to forced sterilisation. The Department's legal adviser believed it would also apply to forced abortions, see Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 7, Minute to Decision Support Branch, Folio No 139 11/6/95

65 Department of Immigration and Multicultural Affairs Folder 23/8/99, Section 7, Minute to Decision Support Branch, Folio No 139 11/6/95. See *Minister for Immigration v Applicant A and others* (1995) 57 FCR 309

66 *Submission No. 18*, Refugee Council of Western Australia, p. 103

67 *Submission No. 18*, Refugee Council of Western Australia, p. 103

68 *Submission No. 29*, Stephen Tully, p. 178. See also the dissents of Brennan CJ and Kirby J in Applicant A and Another v Minister for Immigration and Multicultural Affairs and Another (1997) 142 ALR 331; Mary Crock, "Apart from Us or a Part of Us? Immigrants Rights, Public Opinion and the Rule of Law", *International Journal of Refugee Law*, Vol 10, 1998, p. 49 at 65ff; and Catherine Dauvergne, "Chinese Fleeing Sterilisation: Australia's Response Against a Canadian Backdrop", *International Journal of Refugee Law*, Vol 10, 1998, p. 77

69 *Submission No. 29*, Stephen Tully, p. 178 who refers to *Guo Chun Di v Carroll et al*, 842 F Supp 858 at 872 (E D Va 1994)

70 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 533

9.61 The Commission claims that an enforced abortion performed at a date when the foetus would normally be able to survive outside the womb, is also arguably a violation of the 'child's' right to life contrary to ICCPR article 6 and the CROC Article 6. Article 7 of ICCPR imposes on State Parties the obligation not only to refrain from perpetrating inhumane treatment but also to refrain from placing a person at risk of such treatment in another country, including the country of origin.[71] However, it has also been argued by Mr Tully "that the term 'human being' in Article 6(1) of the ICCPR has been construed to mean 'a person in being' with the consequence that the international human rights rules may not be applicable to abortions."[72]

9.62 CAT excludes from the definition of torture those actions which are related to 'lawful sanctions'.[73] It could be argued that, while the one-child policy is official, forced sterilisation or abortion would not be a lawful sanction; nor would they be seen to be punishment inflicted by a person acting in an official capacity. It is noted that the Ministerial Guidelines for humanitarian consideration under s417, that operated prior to 1999, did not make specific reference to 'official' persecution or torture. However, the Minister is not limited to Convention grounds in making a decision.

Unlawful or 'black' children in the PRC

9.63 When considering whether 'black children' can be identified as a separate social group under the Refugee Convention a second case involving a Chinese child, Chen Shi Hai, is of interest.[74] Chen's parents also arrived unlawfully in Australia on the boat codenamed "Cockatoo" on 22 November 1994 and unsuccessfully applied for Protection Visas in 1995. Their appeal to the RRT was also unsuccessful. Chen's parents were in immigration detention at Port Hedland at the time of his conception and birth. Chen was born on 11 July 1996 and did not acquire Australian citizenship by reason of being born in this country.

9.64 Chen's father lodged an application on 23 May 1997 for refugee status on behalf of his son, based on the fact that the child was born in contravention of the one-child policy in the PRC. The application was unsuccessful and an appeal was lodged to the RRT.

9.65 The RRT, on 3 September 1997 refused Chen a Protection Visa as it found no intention on the part of the PRC to persecute 'children'. The Tribunal had to decide whether the applicant fell within the definition of a refugee and found that the legal

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71 *Submission No. 51,* Human Rights and Equal Opportunity Commission, p. 533

72 *Submission No.* 29, Mr Stephen Tully, p. 175

73 See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A1, which refers to pain or suffering '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'

74 Facts set out in paragraph 2 of judgement by O'Loughlin and Carr JJ in Mfor 18 MA Chen Thi Hai [1999] FCA 381 at website: http://www.austlii.edu.au/au/cases/ Jn Camera], p. 6, Paragraphs 21ff

requirements in the Refugee Convention recognising persecution 'for reasons of' membership of that social group had not been established. The Tribunal considered whether the likely persecution of the applicant could be said to be 'for reasons of' his being a 'black child'. The Tribunal concluded that:

> …for persecution to be 'for reasons' of membership of a particular social group it had to be motivated by or involve some element of 'enmity and malignity' towards, in this case, the respondent.[75]

9.66 The Tribunal observed in its reasons that:

> It cannot be said with any plausibility that the unfortunate consequences which may well befall Chen Shi Hai upon return to the PRC would result from any malignity, enmity or other adverse intention towards him on the part of the authorities there. The evidence all suggests that the authorities intend to penalize those who have children outside the approved guidelines, i.e. the parents, not the children themselves.
>
> …the disadvantages which will probably accrue to him will not…result primarily from the direct action of the authorities, but will be an indirect consequence of the financial situation of his parents.[76]

9.67 On 5 June 1998, on appeal to the Federal Court, the RRT decision was set aside.[77] French J held that, for the purposes of the Convention, there was no need for persecution to be motivated by 'enmity' or 'malignity'. His Honour found that it was sufficient that:

> …it be motivated by "possession of the relevant Convention attributes". And given the Tribunal's unchallenged findings with respect to "persecution" and "member[ship] of a particular social group", it was in error, his Honour held, "in failing to conclude that the necessary connection between the persecution and the child's membership of [the] particular social group was made out".[78]

9.68 The Court directed that the child was entitled to refugee status and referred the matter back to the RRT to be dealt with on the basis that the appellant was entitled to refugee status.

9.69 An appeal by the Minister for Immigration and Multicultural Affairs to the Full Federal Court on 26 June 1998 argued that, following the decision in *Applicant*

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75 *Minister for Immigration & Multicultural Affairs v Chen Shi Hai [1999]* FCA 381 (13 April 1999) at Paragraph 5 (see www.austlii.edu.au)

76 *Minister for Immigration & Multicultural Affairs v Chen Shi Hai [1999]* FCA 381 (13 April 1999) at Paragraph 5 (see www.austlii.edu.au)

77 *Chen Shi Hai (an infant) by his next friend Chen Ren Bing v Minister for Immigration & Mulitcultural Affairs [1998]* 622 FCA (5 June 1998)

78 *Chen Shi Hai (an infant) by his next friend Chen Ren Bing v Minister for Immigration & Mulitcultural Affairs [1998]* 622 FCA (5 June 1998) at Paragraph 9 (see www.austlii.edu.au)

A,[79] 'black children' could not be a particular social group for the purposes of the Convention. The Minister's appeal was upheld by the Full Federal Court on 13 April 1999.

9.70 The majority judgement allowed the appeal on three grounds:

- firstly, the applicant did not face persecution by reason of being a member of a social group comprising 'black children', by reason of his parents' conduct in having a child outside the policy;
- secondly, that, where the applicant was dependent on his parents' fear to establish such subjective fear of persecution, the applicant could not succeed unless the parents had a claim in their own right; and
- thirdly, although the majority accepted the Tribunal's finding that 'black children' were a social group, they held that such children could not be said to be a social group for purposes of the Refugee Convention, because the group was defined by the persecutory conduct liable to be suffered by its members.[80]

9.71 In dissent Justice Nicholson commented that:

> The Convention is to be applied to beings in existence…It seems to me to beg the question to say he is only subject to the persecutory conduct 'by reason of his parents having conceived him in knowledge of the policies of the PRC'.[81]

9.72 Justice Nicolson requested that the matter be remitted back to the RRT for further consideration. The case was appealed to the High Court.

9.73 In the appeal in the High Court each of the findings were challenged by the applicant.[82] The appeal was argued in favour of Justice Nicholson's view that the Convention is to be applied to beings in existence. It was also submitted that:

> The findings of the Tribunal, as to whether the disadvantages feared by the applicant amounted to persecution were substantially based on the Tribunal's research of the country information as to the treatment of "black

79 *Applicant A and Another v Minister for Immigration and Ethnic Affairs* and Another (1997) 142 ALR 331

80 *Chen v Minister for Immigration & Multicultural Affairs P21/1999 (6 August 1999)*, High Court of Australia Transcripts

81 *Minister for Immigration & Multicultural Affairs v Chen Shi Hai [1999]* FCA 381 (13 April 1999) Paragraph 65

82 *Chen v Minister for Immigration & Multicultural Affairs P21/1999 (6 August 1999)*, High Court of Australia Transcripts; and *Chen v Minister for Immigration & Multicultural Affairs P41/1999 (20 October 1999)*, High Court of Australia Transcripts

> children" in China. If that evidence is examined, there is a causative link between being a "black child" and the persecution.[83]

9.74 It was argued that it followed that:

> …an implication could be drawn that the disadvantages directed against that child may impact on the child without any necessary effect on the parents.[84]

9.75 The High Court decision was handed down on 13 April 2000 in favour of Chen. The Court considered the following issues to decide the case:

> (1) Whether the Tribunal erred in deciding that the phrase "for reasons of" (membership of a particular social group) imported the consideration of the subjective motivations of enmity or malignity on the part of the authorities in the PRC towards a person such as the appellant?…
>
> (2) Whether the Tribunal and the majority in the Full Federal Court erred in law in classifying the "reason of" the fear of persecution on the part of the appellant as no more than a consequence of the application to his parents of certain laws of general application adopted by the PRC, rather than the appellant's membership of the particular social group of "black children"?…
>
> (3) Whether the majority Full Federal Court erred in concluding that in the particular case, because both parents sought but were refused refugee status, "it must follow as a matter of logic, that if the parents cannot claim refugee status, then their child (who … is dependent upon their fear for his status) cannot succeed in a claim for refugee status"?…[85]

9.76 The High Court ruled that Chen be granted refugee status and set aside the orders made by the Full Federal Court on 13 April 1999. The High Court found that:

> The Federal Court had erred in holding that "black children" could not constitute a social group for the purposes of the Convention, and also, in holding that the adverse treatment which the appellant was likely to experience in China was not by reason of his being a "black child" but because his parents had contravened China's "one-child policy".[86]

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83 *Chen v Minister for Immigration & Multicultural Affairs P21/1999 (6 August 1999)*, High Court of Australia Transcripts, page 3 of 9 (see www.austlii.edu.au,)

84 *Chen v Minister for Immigration & Multicultural Affairs P21/1999 (6 August 1999*, High Court of Australia Transcripts, page 3 of 9 (see www.austlii.edu.au,)

85 *Chen Shi Hai v Minister for Immigration & Multicultural Affairs [2000]* HCA 19 (13 April 2000) (http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html) at Paragraph 59

86 *Chen Shi Hai v Minister for Immigration & Multicultural Affairs [2000]* HCA 19 (13 April 2000) (http://www.austlii.edu.au/au/cases/cth/high_ct/2000/19.html) at Paragraph 38

The Section 417 Discretion

9.77 Section 417 of the *Migration Act* provides the Minister with a non-compellable and non-reviewable discretion whereby the Minister may intervene to substitute a more favourable decision for the applicant where it is in the 'public interest' to do so. The Ministerial discretion in s417 is discussed further at Chapter 8 of this Report.

9.78 Currently, the only avenue for those who may not ultimately fit within the tight definition of refugee status is to apply for the exercise of the Minister's discretion under s417. The discretion enables the provisions of CAT and the ICCPR to be taken into account in an application for a Protection Visa.

9.79 Article 3 of CAT states:

> 1. No State shall expel, return ('*refouler'*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.

9.80 Article 13 of the ICCPR states:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

9.81 Individual cases can be brought to the attention of the Minister in any of three ways.

- Firstly, when a negative decision is received from the RRT, the DIMA case officer is required to consider the case against the guidelines, and either bring the case to the Minister's attention or make a file note to the effect that the case does not fall within the ambit of the guidelines.[87] This is an automatic operation which does not require a request from the applicant.

87 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, March 1999, Guideline 6.2

- Secondly, an applicant who receives an unfavourable decision from the RRT may personally appeal to the Minister requesting him to exercise his discretion.[88]
- Thirdly, it is possible for members of the RRT to refer cases through the DIMA case officer to the Minister's attention, however the Minister has made it clear that this should not be done in the context of an RRT judgement.

9.82 The Minister is not obliged to exercise his discretion and may make a decision on any grounds. Thus, the Minister may make a more favourable decision for any reason.

9.83 No witness suggested that changes in the Ministerial Guidelines for a s417 request in March 1999, subsequent to Ms Z's case, would have impacted upon her claim, even though in 1997 the Guidelines were less clear.

Ms Z's experience with s417

9.84 There appear to have been no formal requests made by or in respect of Ms Z and her first child to remain in Australia under s417 of the Act.[89] Although material available in the DIMA files suggests that Ms Z expressed concern about returning to the PRC while pregnant with a second child as early as 30 April 1997,[90] these concerns were not recognised as a request for Ministerial intervention under s417.

9.85 It was noted in evidence to the Committee that, had Ms Z made a written request under s417, the request would have been immediately faxed from the Centre in Port Hedland to Canberra for a response.[91] However, it appears that Ms Z was not advised to put her concerns in writing. It also appears that there is a worrying lack of awareness, and for those who are aware, a difference of opinion with regard to s417 requests, although this difference may not have been made clear until the Ayers Inquiry.[92]

9.86 No evidence has been given to the Committee to indicate that Ms Z understood, or was aware of, the procedure involved in making a request for consideration under s417.

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88 *The Ministerial guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345/351/391/417/454 of the Migration Act 1958*, March 1999, Guideline 6.4

89 Ms Z's legal representatives (Legal Aid Western Australia) did write on her behalf in 1995 to request that she be allowed to remain in Australia until after the first child had been born. It is unlikely that this request would have been met, but various factors prevented the return of the "Cockatoo" passengers for another two years from the date of the letter. This letter was not regarded as a s417 request by Legal Aid Western Australia which specifically noted that it made no s417 application on behalf of Ms Z: Department of Immigration and Multicultural Affairs, Folder 1/9/99, Folder 1, Item 4, Correspondence between Legal Aid Western Australia and Department of Immigration and Multicultural Affairs, October 1995; and *Submission No. 40*, Legal Aid Western Australia, p. 375

90 Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 5, pp. 77/107

91 Ayers File (1999), p. 33

92 See Ayers File (1999), Item 42, memo from Australian Government Solicitor, 24 June 1999

9.87 There is no doubt that Ms Z had the right to make a s417 request at any time after the failure of the RRT review. LAWA was closely involved in the application and review procedures of Ms Z's claims for refugee status. Their representation is said to have ceased some time after the second application was ruled to be invalid. It is not clear why they did not advise Ms Z to proceed with a s417 request.[93]

9.88 The Committee believes Ms Z was not aware of her right to make a s417 request.

How s417 requests were identified at Port Hedland

9.89 A DIMA officer working in the department during 1995-1997 commented on the lack of material available to staff, including guidelines and information on procedure for processes such as a s417 request.[94] He advised that it was necessary to make direct contact with DIMA staff in Canberra to clarify details of these policies and procedures.

9.90 The Committee was advised that, when a detainee at the Port Hedland IDC sought to make a s417 request, the detainee would be asked to put this in writing (in English or the language of the applicant).[95] These s417 requests were sent to DIMA in Canberra and responses came back to the detainees by fax or as a letter.

9.91 It would appear that Ms Z's continued requests to remain in Australia were not recognised as s417 requests, and she was never advised to put her requests in writing. It should be questioned why Ms Z was also not encouraged, or at least made aware that she had the opportunity to make a request in writing for s417 reconsideration, prior to departure, given her expressed fears.[96] Given that there seems to have been no obligation to put such a request in writing, and that the Minister could make a favourable decision in respect of an individual regardless of any request at all, DIMA may in fact have imposed limits on Ms Z's rights to access s 417 prior to her removal on the 14 July 1997 by advising the Minister, on the 10 July 1997, that none of the members of the group had claims which would fall within the ambit of the Ministerial Guidelines.[97]

9.92 The Committee notes that there are now more detailed Guidelines in operation, but that these are primarily a means of assisting departmental officers to make assessments. The Guidelines do not proscribe verbal 'requests' or advice to the Minister about particular circumstances, even if, practically speaking, this would be

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93 *Transcript of evidence*, Legal Aid Western Australia, pp. 252-254 (3 February 2000)

94 *Transcript of evidence* [In camera], p. 172

95 *Transcript of evidence* [In camera], p. 173

96 Department of Immigration and Multicultural Affairs. Folder 23/8/99, Section 5, p.77/107

97 See Ayers File (1999), Memo from Australian Government Solicitor to the Department of Immigration and Multicultural Affairs, 24 June 1999; Department of Immigration and Multicultural Affairs Folder 23/08/99, Section 3, Minute to the Acting Minister 10/07/97; and *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 631

difficult to manage on a regular basis. Administrative processes appear to have dominated in 1997, to the exclusion of other factors.[98]

9.93 The Committee therefore conclude that a better system needs to be put in place. All detainees must be advised of their right to make a s417 request regardless of the opinion DIMA officers as to whether the detainee's situation meets the Guidelines.

Likely success of a late request under s417

9.94 In 1997 there was a request for Ministerial intervention in respect of another pregnant woman who was returned to the PRC on the same flight as Ms Z. LAWA made the request on the grounds that the woman feared a forcible abortion. In this instance, the Minister decided not to consider exercising his powers to intervene.[99] The relevant Minute states that the Minister [that is, presumably, Minister Ruddock]:

> …has recently considered a similar case from the same boat group and decided not to intervene.[100]

9.95 The Acting Minister for Immigration and Multicultural Affairs, Senator Vanstone, was briefed on Saturday 12 July 1997 on the details of "Operation Ox" (the codename given to the removal of a number of persons, including Ms Z, to the PRC on a charter aircraft on 14 July 1997). The Minister was not briefed that a returnee on that flight, Ms Z, was in the late stages of pregnancy.[101] The Committee was told that, as Senator Vanstone had not been involved in such an exercise before, she sought a briefing about the processes and the legal basis on which the return was to take place.[102] The Acting Minister was informed that:

> …people would have only been on the list for removal because they had become available for removal under the Migration Act, what the purpose of the special purpose visa was, why a delegation was needed, and those sort of things.[103]

9.96 The DIMA officer responsible for the briefing added that:

> …a careful process was always undergone before removal of looking to see who was available for removal, whether they were medically fit to travel and those sorts of questions. I was aware that that would have been done in

98 See Chapter 8

99 Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 3, Item 1, Paragraph 11, Minute to the Acting Minister, 10/7/99

100 Department of Immigration and Multicultural Affairs, Folder 23/8/00, Section 3. Item 1

101 See Ayers Report (1999), Paragraphs 33 and 35

102 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p.630

103 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 631

> this case. Therefore, there was nothing … that would make it particularly relevant to draw this particular case to [the Minister's] attention.[104]

9.97 It would seem that DIMA chose not to consider Ms Z as a person unfit to travel due to the late stage of her pregnancy.

9.98 Prior to the departure of the planeload of removees on July 14 1997, a general statement was made by the Acting Minister, Senator Vanstone, in respect of the persons being returned: that the Acting Minister would not consider exercising her power to intervene under s48B (to make another Protection Visa application) or s417. The intention of this statement seems to have been to forestall any attempts to delay the trip by a last-minute request by any member of the group.[105]

Fitness to travel while pregnant

9.99 The policy of fitness to travel was mentioned briefly in 1995, when LAWA wrote to DIMA requesting that Ms Z be allowed to stay in Australia until her (first) child was born.[106] Ms Z received a response that pregnancy *per se* was not a reason for not being removed; however, medical fitness to travel was relevant.[107] In July 1997, a similar point was made in regard to a person not being allowed to stay in Australia simply to have a child.[108]

9.100 DIMA records show that, prior to the removal of the group of which Ms Z was a member, an officer at Port Hedland did receive confirmation from DIMA in Canberra that the policy for travel of pregnant women was 35 weeks at the latest.[109]

9.101 Where people are to be removed a substantial distance, it could be expected that the same standards of fitness to travel would apply as on any aircraft travelling internationally. It is noted that Qantas accepts women for international travel until the end of the 36th week of pregnancy, and Ansett considers them "unsuitable for international air travel after 35 weeks of pregnancy".[110] Mr Ayers stated in his Report to the Minister that Royal Brunei, the carrier for the removal in July 1997, would have wanted a medical certificate if a person was between 28 and 35 weeks. There are some differences of opinion about the expected date of birth of Ms Z's baby, but evidence

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104 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 631

105 See Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 3; and also Section 5, for the signed copy of the statement

106 Department of Immigration and Multicultural Affairs, Folder 1/9/99, Folder 1, Section 4, Item 2

107 Department of Immigration and Multicultural Affairs, Folder 1/9/99, Folder 1, Section 4, Item 2; and see also the Department of Immigration and Multicultural Affairs "Answers to Questions on Notice of 29 July 1999", Part B, Answer to Question 3

108 See Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 5, Medical records, Item dated 13/7/99

109 Department of Immigration and Multicultural Affairs, Folder 23.08.99, Section 5, Message 26.06.97

110 Ayers Report (1999), Paragraphs 52 to 55, Memo from Allan Hawke, then Secretary of Department of Transport and Regional Services, 16 June 1999

suggested an expected date of delivery of 12 August 1997. Thus, on 14 July 1997 Ms Z would have been at least 36 weeks pregnant when she was removed from Australia.

9.102 No medical certificate or certification of fitness to fly was provided to Ms Z but special arrangements were made, because of her late stage of pregnancy, to transport her to Port Hedland airport by car rather than bus.

Sedation

9.103 On 21 June 1999 Mr Ayers provided the Minister of Immigration and Multicultural Affairs with a Preliminary Report relating to the allegation of sedation of Ms Z during her removal from Australia to the PRC. This allegation had been raised by Senator Quirke in a Senate Legal and Constitutional Estimates Committee hearing on 2 June 1999. Having interviewed a number of people involved in the removal of Ms Z from Australia on the 14 July 1999, Mr Ayers concluded in a preliminary Report that there was no substance to the allegation of sedation of Ms Z during her removal.[111] The Committee also heard evidence from DIMA staff at Port Hedland at the time of the removal which supported this conclusion.[112]

9.104 Mr Ayers' Preliminary Report was tabled in the Parliament and released publicly. The matter of sedation of Ms Z was not specific to the Committee's terms of reference but is related to Term of Reference (l) dealing with removals. The Committee notes that further allegations of sedation of removees has recently been raised in an ABC television "Four Corners" program, which was screened on 13 March 2000. This program did not deal with Ms Z.

Events following

9.105 The returnees were transported to Port Hedland Airport by bus. Ms Z, her daughter, and her *de facto* husband were transported separately by car because Ms Z was so far pregnant and she was distressed.[113]

9.106 What happened to Ms Z after her return to the PRC is narrated by Ms Z in a video recording made in China, apparently in March 1999,[114] and brought to Australia. The contents of the video tape were the subject of a number of questions in the Senate Legal and Constitutional Estimates Committee hearings on 4 May 1999 by Senator Harradine. Senator Harradine gave DIMA a copy of the video, which had been given to him by Ms Marion Le, President of the Independent Council for Refugee Advocacy (ICRA).

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111 Department of Immigration and Multicultural Affairs, "Preliminary Report released" – Immigration Media Release MPS 99/99, Thursday 14 June 1999; and Department of Immigration and Multicultural Affairs, "Preliminary Report" - Immigration Media Release MPS 99/99, 21 June 1999

112 *Transcript of evidence* [In camera] p. 189

113 Ayers Report (1999), Paragraph 46

114 *Transcript of evidence*, Ms Marion Le, p. 719

9.107 In the video interview Ms Z states that, shortly after her return to the PRC, she was forced to have an abortion because she was in contravention of official policy. Ms Z said that, as her daughter was an unauthorised child, household registration could not be obtained for her.[115] This meant that Ms Z would incur expensive school fees and health costs for the child which she could not afford.

9.108 This claim of forced abortion is disputed by information from the PRC Ministry of Foreign Affairs. Two medical officers at the hospital, and the *de facto* mother-in-law of Ms Z, *claimed* that the abortion was voluntary.[116] According to the hospital records, the 'mother-in-law's' thumbprint appears on the consent form.[117]

9.109 On 27 May 1999, Ms Z, her daughter, and a camera crew from the Channel 9 TV program "60 Minutes", entered the Australian Consulate-General offices in Guangzhou. Ms Z, in a taped interview, repeated her statement of a forced abortion and expressed fear for her own and her daughter's safety in the PRC. The journalists said that they had come to the PRC on another mission but had met Ms Z in Guangzhou by chance. (The Committee was advised at an *in-camera* hearing that this was not the case).[118] They were accompanied by an interpreter who had come with the "60 Minutes" crew from Australia and who had known Ms Z when she had been in detention in Australia.[119]

9.110 Ms Z and the camera crew initially refused to leave the offices, but were eventually persuaded to do so. Ms Z and her daughter were accommodated at a hotel in the same building as the Australian Consulate office.

9.111 An interview with Ms Z was screened on the Channel 9 programme, "60 Minutes" on 6 June 1999. The statement of the forced abortion was repeated and Ms Z reiterated that she had pleaded to remain in Australia until her baby had been born. Following the visit to the Consulate, an Australian national (a person who gave evidence to the Committee at an *in-camera* hearing) travelled to the PRC, at the request of ICRA in Australia. The role of this person was to stay with Ms Z and become an advocate on her behalf.[120]

9.112 However, the Chinese authorities in Beijing raised concern with the Australian Embassy in Beijing that the ICRA representative accompanying Ms Z was acting in breach of her visa.[121] After 12 days the advocate was informed that the Australian Ambassador to the PRC had been advised by the Chinese authorities that

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115 Ayers Report (1999), Paragraph 61

116 Ayers Report (1999), Paragraph 110, xix

117 Department of Foreign Affairs and Trade, Folder 1, Attachment C, p. 36

118 *Transcript of evidence* [In camera], pp. 200-201

119 Ayers Report, Paragraph 65

120 *Transcript of evidence* [In camera], p. 75

121 *Transcript of evidence*, Department of Foreign Affairs and Trade, p. 760

she was to leave the country. The ICRA representative was accompanied to the border by an official from the Australian Consulate-General's office, where she left the PRC.

9.113 There was also concern on the part of the Australian Consulate-General's office in Guangzhou that the type of action undertaken by Ms Z (ie the probable lack of a permit to visit Guangzhou and the fact that she was not personally registered at the hotel) and the journalists (ie the conditions of their visas) in Guangzhou could attract the attention of the authorities and cause difficulties or even danger to Ms Z in her own country.[122]

9.114 The Australian Consul-General in Guangzhou offered to send someone to Beihai with Ms Z to obtain ID for her and her daughter.[123] Ms Z made contact with a person in Beihai who, it was claimed, held these ID papers on her behalf.[124] The Beihai Ministry of Foreign Affairs informed the Australian Consul-General in Guangzhou that apparently Ms Z had changed her name, date of birth and residency status before she left Beihai for Australia.

Monitoring

9.115 Once detainees are removed, official monitoring by Australia rarely occurs. Ms Z herself maintained contact with persons she previously knew in Australia while in detention. Ms Z told these people, by letter, that she had been forcibly aborted, her *de facto* husband had left her and she was homeless, unemployed and destitute.[125]

9.116 Different reports about Ms Z from the PRC raise the issue of whether it is possible for monitoring of persons removed from Australia to be effective or undertaken in a systematic way in their home country.[126] The jurisdiction of a sovereign State within its national territory is an undisputed principle of international law. Direct monitoring by Australia in another country, to ensure the proper administration of that country's domestic law, could constitute an affront to this universal principle.[127]

9.117 DIMA comments, with regard to monitoring, that the migration legislation confers no jurisdiction or authority on immigration officers outside of Australia in respect of persons removed from Australia.[128] When DFAT has particular concerns about a government's observance of human rights in relation to an individual, overseas posts are tasked to make representations to relevant officials. However, care

122 Ayers Report (1999), Paragraphs 65-67 and 91

123 Department of Foreign Affairs and Trade, Folder 1, Attachment C p 63

124 This person was the above-mentioned "Big Brother"

125 Ayers Report (1999), Paragraph 76-78; see also *Transcript of evidence*, Ms Marion Le, p. 728

126 *Submission No. 51*, Human Rights and Equal Opportunity Commission, p. 534

127 Monitoring is discussed in more detail in Chapter 11 of this Report

128 *Submission No. 69*, Department of Immigration and Multicultural Affairs, p. 840

must be taken not to put the individual in a position of difficulty or possible danger as a result of these representations.

New application

9.118 On 10 June 1999, with the assistance of Ms Marion Le (ICRA), Ms Z applied for a permanent visa on refugee or humanitarian grounds for herself and her daughter under the 'Woman at Risk' class, to the Australian Consulate-General's office in Guangzhou.

9.119 The processing of this application was transferred to the Director of the Humanitarian offshore program, because the staff of the Consulate-General had been directly involved in negotiating with Ms Z and her representatives over claims that Ms Z made about her situation in the PRC. The application is still being processed.

Conclusions

9.120 The Committee is able to conclude that Ms Z was an unlawful non-citizen in Australia who applied unsuccessfully to remain in Australia as a refugee, and that the decisions on Ms Z's refugee and review applications are not disputed by her former legal advisers, LAWA.

9.121 In the case of Ms Z, there is no issue concerning the RRT procedure. The hearing was detailed and gave Ms Z ample opportunity to present a case. The RRT ruled that she had not made adequate claims under the Refugee Convention.

9.122 Under Term of Reference (g) of the inquiry the Committee is able to conclude that Ms Z gave birth to one child in Australia and she was more than 8 months pregnant with her second child at the time of her removal from Australia.

9.123 The Committee concludes that Ms Z was removed from Australia on 14 July 1997 and her second child was aborted at the Peoples Hospital of Beihai on 21 July 1997. It is noted that, without the opportunity of a personal meeting with Ms Z and other principals in the PRC, the Committee cannot adjudicate conclusively on the matter of whether the abortion was voluntary or by force. However, the Committee believes that, on the balance and weight of information available to the Committee, it was more likely that the abortion was forced rather than voluntary.

9.124 The Committee found that the circumstances of Ms Z's removal from Australia and the subsequent abortion she suffered in the PRC could put Australia in breach of our obligations under CAT. The Committee refers to the Term of Reference (h) in this Report and Australia's responsibility under international law and found that insufficient safeguards were in place to prevent such a possible breach occurring.

9.125 The Committee has confirmed with DIMA that the Acting Minister was not advised of any pregnancies amongst the passengers to be removed from Australia under "Operation Ox". The central office of DIMA did not consider that this had been in error.

9.126 The Committee concludes that the Acting Minister should have been told about Ms Z's condition during the briefing that was provided two days before Ms Z's removal. The Committee does not agree with the DIMA officer responsible for the briefing that, as it was assumed a careful process had already been undergone to see who was available for removal, it was only necessary to provide the Acting Minister with information about the processes and the legal basis on which the return took place.

9.127 The Committee was told that, as Senator Vanstone had not been involved in such an exercise before, she sought a briefing about the processes and the legal basis on which the return was to take place. The Minister was not briefed that any returnee on that flight was pregnant, let alone in the very late stages of pregnancy, as was Ms Z.[129]

Recommendation

Recommendation 9.1

The Committee **recommends** that policies and practices be developed by DIMA to ensure the Minister is made aware of all relevant facts about detainees prior to their removal from Australia.

Recommendation 9.2

The Committee **recommends** that, in respect of removals from Australia, a protocol on the 'fitness to travel' of pregnant women (especially those in later stages) be developed as a matter of urgency.

Recommendation 9.3

The Committee **recommends** that pregnant women subject to removal should be given special consideration by the Minister, or a senior delegate, to remain in Australia until after the birth to ensure that no woman is returned pregnant to a country in circumstances where there is a risk the woman will be coerced to undergo an abortion.

9.128 Term of Reference (j) questions why cases such as that of Ms Z are not picked up early enough by DIMA and the RRT. The Committee has previously concluded that the first application and the RRT review are not in question.[130] No issue was then identified which had any connection with subsequent events.

9.129 However, a number of problems have been identified in respect of the s417 request process that may have limited Ms Z's opportunity to have a request considered. The Committee notes that Ms Z's claims for protection on other grounds

129 *Transcript of evidence*, Department of Immigration and Multicultural Affairs, p. 631; and see Ayers Report (1999), Paragraphs 33 and 35

130 See Paragraph 9.121 above

arose after her first pregnancy. The Committee is concerned by the lack of any training on s417 Departmental procedure amongst certain staff for a s417 request.

9.130 The DIMA central office in Canberra did not appear to encourage queries, in relation to the administration of s417 procedure and policy, from other DIMA centres and offices. The Committee also identified a lack of communication between DIMA officers and detainees with regard to this process. DIMA officers at Port Hedland did not perceive a verbal statement to be a s417 request.

9.131 Ms Z, on a number of occasions, expressed concern for her own, and her baby's safety upon their return to the PRC. These pleas were not acknowledged as requests for s417 consideration by DIMA personnel at the Port Hedland IDC, and therefore no more formal s417 request was made by or on behalf of Ms Z.

9.132 Even if the plea made by Ms Z in the few days before removal had been accepted as a s417 request, it was unlikely that there would have been ministerial intervention given the general statement made by the Acting Minister for Immigration and Multicultural Affairs on 10 July 1997. This statement announced that the Acting Minister had not considered, nor proposed to consider, whether to exercise the s417 power to intervene in respect of persons in the group to be removed from Australia on 14 July 1997. However, had the DIMA officers decided that Ms Z's pleas should be forwarded to the Acting Minister, or that the Minister should have been briefed on Ms Z's circumstances, after the statement of the 10 July 1997, and before the removal of the group from Australia, a s417 intervention could have been considered. The Minister should have been briefed and it would have been in the 'public interest' for the Minister to have intervened to make a decision.

9.133 While there is little information available on day to day management of s417 requests, the Committee is concerned about the evident confusion and lack of awareness with regard to the process. Ms Z's second application was ruled ineligible against the Refugee Convention. However, any s417 consideration could have taken into account Australia's international legal obligations to consider humanitarian grounds for protection under other conventions such as the ICCPR and CAT.

9.134 Other factors contributing to deficiencies in the s417 request process include insufficient attention, on the part of DIMA, to cultural and language problems for some persons seeking protection. These problems can contribute to a lack of awareness of possible opportunities and procedures for claiming protection. It could also be argued that there is limited appropriate advice available about the process, rather than lack of legal advice.

9.135 A request was made for s417 Ministerial intervention in respect of another pregnant woman who was returned to the PRC on the same flight as Ms Z. This request was made on the grounds that the woman feared a forcible abortion.[131] No

131 Department of Immigration and Multicultural Affairs, Folder 23/8/99, Section 3, Item 1, Paragraph 11, Minute to the Acting Minister, 10/7/99

similar request was made on behalf of Ms Z. LAWA informed the Committee that it was funded to assist Ms Z up to the RRT decision. However, LAWA continued to provide assistance with the second application and also, in October 1995, wrote to DIMA seeking to delay the departure of Ms Z from Australia until after the birth of her first child.[132] The Committee notes the limited resources available to the organisation for application assistance.

Recommendation

Recommendation 9.4

The Committee **recommends** that, until such time as better procedures are developed, persons with possible humanitarian claims in Australia should be advised of the procedures available to them under s417 for Ministerial consideration on humanitarian grounds. Claimants with English language difficulties should be provided with appropriate assistance.

Recommendation 9.5

The Committee **recommends** that all steps be taken and put in place to ensure that the situation of Ms Z never occurs again in Australia.

132 Ayers Report (1999), Paragraph 101