

071660799 [2007] RRTA 337 (14 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071660799

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Lisa Ward

DATE DECISION SIGNED: 14 December 2007

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to have been born in Tibet, travelled to Australia on an Indian Identity Certificate. The applicant claims to be a former resident of Tibet (China) and India. The applicant arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa.

The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter. In refusing the visa application, the delegate found that the applicant had a right to enter and reside in India and that he had effective protection in India.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

MAIN ISSUE FOR DETERMINATION

The main issue before the Tribunal is whether effective protection is available to the applicant in India, given that he has resided there since the late 1990s and holds an Indian Identity Certificate.

RELEVANT LAW

Under s.65(1) of the Act a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, in this case 29 May 2007, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention relevantly defines a refugee as 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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not

satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

PROTECTION OBLIGATIONS

Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is now qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999 and provide as follows:

Protection obligations

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

The term "right" in subsection 36(3) refers to a legally enforceable right to enter and reside in a country: *Minister for Immigration & Multicultural Affairs v Applicant C* (2001) FCR 154. This means that where a non-citizen in Australia has a legally enforceable right to enter and

reside in a third country, that person will not be owed protection obligations in Australia if they not availed themselves of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

In short, under these provisions, Australia does *not* owe protection obligations to a person who:

- has a right to enter and reside in any other country - whether permanently or temporarily; and
- has not taken all possible steps to avail him/herself of that right; and
- does not have a well-founded fear of Convention based persecution in that country; and
- does not have a well-founded fear of refoulement from the other country to a country where they have a well-founded fear of Convention based persecution.

CLAIMS AND EVIDENCE

The documentary material before the Tribunal is contained in the Tribunal and the Departmental case file.

Primary application

The applicant arrived in Australia in the early 2000s and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa.

According to the Protection Visa application, the applicant is a male born in the early 1970s in Tibet. He claims to be of Tibetan ethnic group and of Buddhist religion. The applicant has been living in exile in India since the late 1990s and holds an Indian Identity Certificate.

The applicant provided the following documents with his primary application:

[Information amended in accordance with s.431 as it may identify the applicant]

- An Indian Identity Certificate issued in City A, with an expiry date of several years time. The certificate stated that the applicant was born in the mid 1970s in Country B.
- Applicant's Chinese identity card.
- A statement from a Government Department, stating that the applicant is a bona fide new Tibetan refugee who escaped from Tibet. He arrived in City C in the late 1990s via City D and City A.
- A statement from a Government Department, stating that the applicant was born in Tibet in the early 1970s. He was in a skilled profession in County E and he was involved in various political activities, which led to his imprisonment between the early and late 1990s. After his release he escaped to India and reached City C. He then worked in his profession in a government authority for several years.

The applicant stated that he sought protection in Australia so that he does not have to go back to Tibet. The applicant also provided a statement outlining the reasons why he could not return to China. [Information deleted s.431]. He believes that the Chinese authorities will harm and mistreat him if he returns to Tibet. He believes that he will be imprisoned in China for a long time.

The applicant's claims made in the statement may be summarised as follows:

- The applicant was a political prisoner who served several years in jail in China due to his political activities. Following his release from jail the applicant was not permitted to be involved in any political activity. The applicant then escaped from Tibet.
- The applicant visited his relative to retrieve materials he had left with him/her before he was imprisoned. He travelled frequently, and in secret, between his relative's house and his friends' house distributing materials. However he noticed that the Chinese police began to pay more attention to him and that they frequently asked him to go to the police station.
- The applicant then got help from his relative to plan and fund his escape to India.

The applicant attended an interview with the Department in the early 2000s. The interview was recorded on audio tape.

A short time later the applicant provided the Department with his curriculum vitae, which listed his political activity. He stated that he was a skilled professional.

The delegate decided to refuse to grant the visa as she found that the applicant had a right to enter and reside in India and that he therefore had effective protection in a third country, namely India.

Application for review

In the early 2000s the applicant provided a written submission and supporting materials to the Tribunal. In the submission the applicant claims that he has a fear of persecution in Tibet and China and that he has no right to enter and reside in India. Alternatively, the applicant has a well-founded fear of persecution in India because of his religion, ethnicity, nationality and political opinion as a Tibetan Buddhist.

The applicant claims that he obtained fraudulently an Indian Identity Certificate by paying a bribe, which states that he was born in Country B. The Indian Identity Certificate contains details which are incorrect like his birth date, father's name and birth place. The applicant claims that the Indian authorities could easily discover that the document is false as he speaks only limited Hindi.

With respect to the applicant's right of residence in India, the applicant claims that Tibetans who arrived in India after the late 1970s are not issued with Indian Identity Certificates. Tibetans arriving more recently are required to pay money to obtain genuine Indian Identity Certificates which include false details. It is claimed that Tibetans in India have no legally enforceable right to reside in India. However, it is an accepted practice that India allows Tibetans to remain in India for extended periods.

Further, the applicant also submits that the Indian Identity Certificate contains false information and, as such, it does not constitute a legally enforceable right to enter and reside

in India. The Indian law provides for prosecution of those who provide false information with a view of obtaining a travel document and such travel document may be impounded or revoked. The applicant's presence in India is wholly at the discretion of the government and does not constitute a legally enforceable right.

The applicant also refers to the increasing discrimination against Tibetan refugees, especially those who are recently arrived. The applicant gives several examples of instances that he knows of where Tibetans have been discriminated against in India in recent years. Tibetans are regularly confronted by the police and are required to pay a bribe to avoid any further trouble.

Submissions from agent

The Tribunal received a facsimile from the applicant's agent submitting the following in summary:

- The applicant's DIAC file remains the subject of an outstanding request under the Freedom of Information Act.
- The applicant wishes to call a number of witnesses who can give evidence regarding the status and plight of newly arrived Tibetan exiles in India and their treatment by Indian nationals and Indian authorities.

The Tribunal received a facsimile from the applicant's agent submitting the following in summary:

- The applicant does not have a legally enforceable right to re-enter India as his Identity Certificate is a false document.
- As a newly arrived Tibetan exile the applicant is not entitled to a real identity Certificate or to re-entry or residence in India. People born to Tibetan families in India are entitled to residence status.
- The distinction between the treatment and status of Tibetans arriving in India after the late 1970s is confirmed by information provided to the Immigration and Refugee Board of Canada in the early 2000s.
- The applicant clearly fits within the latter category of newly arrived Tibetan refugees who do not have any legal status in India, but have obtained identity documents by fraud. The fraudulent assertion of a right to re-enter and reside in India does not amount to a legally enforceable right to re-enter and reside within the meaning of section 36(3).
- It is absurd to suggest that Australia does not owe protection obligations to a person because that person has the ability to misrepresent their status in another country.

Hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant's agent was present at the hearing. An interpreter was available for the applicant to use throughout the hearing. The applicant was given additional time to provide statements from the witnesses who can give evidence regarding the status and plight of newly arrived Tibetan exiles in India.

The applicant's sworn evidence at the hearing is summarised below.

- The applicant stated his real date of birth and said that he was born in Tibet. His birth date is correctly recorded in his documents, including those issued by a Government Department.
- He was educated in Tibet and China.
- He was imprisoned. Following his release from prison his political rights were taken away from him.
- He left Tibet in the late 1990s. His siblings remain in Tibet.
- He worked in India from the late 1990s until he arrived in Australia.
- [Information deleted s.431].
- He says that he could not return to Tibet as he would be imprisoned [information deleted s.431].
- He said that the Chinese authorities have visited his family in Tibet a few times to find out his whereabouts. He says that for this reason he did not make contact with his family while he was living in India.
- He said that as the Chinese government has occupied Tibet since 1951, he does not consider himself to be a national of any country.
- His Indian Identity Certificate was purchased for several thousand Rupiah. Without this document, he would not have been able to leave India. He has been looking for a chance to leave India His name is correctly shown on the certificate. His date and place of birth are not correctly shown. The applicant says that he did not provide these details. The people who provided the document to him gave the authorities these incorrect details. He did not apply to the Indian government for the Identity Certificate as he knew that it had changed its view about Tibetan refugees who arrived in India after the late 1970s, in that it no longer issued documents to them.
- He says that he told the DIAC that the details on the Identity Certificate were not correct.
- He has no right to return to India as the Indian police may find him without the required documents. If this occurred then he may be forced to leave India.

- He has a friend, Person G, whom the Indian authorities arrested in the late 1990s as he/she did not have the correct documentation. Person G was only released after money was exchanged.

The Tribunal received three statements from witnesses with respect to the status of newly arrived Tibetan refugees in India as follows:

[Information has been amended in accordance with s.431 as it may identify the applicant]

Person H

I, Person H, am a retired professional. I attended University I in the Country S, as well as University J in Country T, and the Education Institution K in City C, at which I studied Tibetan language, religion and culture intensively.

I also lived at the University L in Country M, and also at University N in City O in the mid 90s. I first came to City C in the early 1970s to pursue my Tibetan studies, and have been coming here periodically since then I speak, read and write Tibetan. I have resided continually in City C for the past few years, and have known [the applicant] since my recent arrival back here a few years ago.

I met him at a cafe. I quickly established a warm and personal and continuing friendship with them him, and I was immediately taken with his intelligence and goodwill.

It is the policy (written or unwritten I am not sure), but it is the policy of the Indian government NOT to issue residential permits (RC) to recently arrived Tibetan refugees. Tibetans are routinely subject to being stopped and searched and fined on the spot here in City C for alleged infractions or irregularities in their paperwork. Tibetans are particularly subject to Indian police harassment after dark. I know this from direct personal experience while walking and conversing with my Tibetan friends.

[The applicant] does not have legitimate RC documents, for the above mentioned reasons. Yet, if he is sent back to City C and apprehended in India, I know, again from direct personal experience and observation, he will be arrested, held in confinement in India, deported against his will and sent back to Chinese occupied Tibet. There people are immediately arrested at the border, beaten severely, held for several months, and then sent for trial and face a long prison term of abuse and deprivation and torture. This has happened to several people I know.

[Information deleted s.431] Gentlemen, I assure you, if [the applicant] is sent back to India, it is only a matter of time until his documents are questioned and he is sent back to a future in a Chinese run jail

Tibetans, particularly the newcomers, live a life of tension and discrimination here in India There have been many mini-riots, with bottle throwing, hurled invective, hooliganism, etc. against Tibetans. These incidents have been documented extensively, with photos, in the local Hindi language newspapers. I read and write and speak Hindi and have read these articles carefully and with interest ...

Person P

[Information has been amended in accordance with s.431 as it may identify the applicant]

My name's Person P ... As I've lived in Town Q for most of the past few years and worked within the Tibetan community, I'm hoping this letter may help to clarify the difficulties that Tibetans face here.

[Information deleted s.431]

India, since the late 1950s, has allowed Tibetan refugees to come and live in India and has allowed the Dalai Lama and his Government-in-exile considerable freedom to manage their own affairs. However, although many Indian-born Tibetans have become well established here and enjoy most of the rights that Indians enjoy, it's a far less rosy picture for recently-arrived refugees ... Tibetan refugees coming to India now are no longer provided with paperwork giving them legal status here and this is a very uncomfortable situation for them. It means they are not allowed to leave City C without police permission, and are not officially recognised, even as refugees. Finding work outwith the Tibetan community is therefore all but impossible. Tibetans are also arbitrarily stopped by police in the streets and ordered to show their legal papers. Those who have no paperwork are threatened with arrest unless they pay substantial bribes. This has happened to ... on three occasions. Failure to pay the bribe results in detentions, and in many cases, beatings. So, while the Indian government does allow refugees to enter their country, they do not officially recognise them and it's very hard for them to become established here in any meaningful way.

It is also worth mentioning that there is considerable tension between the Tibetan and Indian communities here in Town Q There are frequent flare-ups and recently the situation has become worse, with rioting Indians running rampage, vandalising shops and bikes, and beating any Tibetan who gets in their way. A few months ago many people beat up a Tibetan and the two other Tibetans who tried to intervene on their behalf. This has led to greater hostility between the communities leading to curfews and a greater police presence in the town - not good news, of course, for recently-arrived refugees. This is an ongoing problem which is unlikely to improve ...

Person R

[Information has been amended in accordance with s.431 as it may identify the applicant]

My name is Person R and I am writing to you on behalf of ...and the applicant.

I spent several months in India in the early 2000s and a lot of that time was spent working in City C with the Tibetan community.

I would like to tell you about my experiences in City C in order to give you some recent information about what's it really like for a recently arrived Tibetan refugee there.

The Tibetan community in India has got a very good reputation, some of them indeed are doing very well for themselves but we need to understand that those are people who were born in India or whose family was amongst the first waves of refugees to arrive.

The situation is very different for people who are fairly recent arrivals, the situation in India has dramatically changed since the days when the Indian Government gave away huge tracts of land in South India for the Tibetans to build their own settlements.

City C is a poor area, the local Indian people there are struggling to make a living themselves, they have little education and have to deal with Tibetan refugees, Kashmiri refugees and Rajasthani beggars arriving there in droves in the belief that they will get a better life in City C.

As a result, tensions have been building up steadily over the past few years and Tibetans find they are not as welcome as they expected. The central Government in City A may support their cause but local people certainly feel differently about it.

New arrivals find it impossible to get work and of course there is no social security system to fall back on. New arrivals also don't have the economic and emotional support of their family since they often had to leave their families in Tibet.

In the late 1970s the Indian Government decided not to accept anymore refugees, officially this is the situation but since Tibetans still flee to India every single year, local governments have decided to issue new arrivals with fake identity papers stating they were born in India. This might be helpful in some ways but on the other hand, it makes it very difficult for a person to seek refugee status in another country as they are supposed to be Indian born ...

Often, the police arrest a Tibetan in the street and demand to see his RC, this is an identity booklet issued by the Indian local government. These RCs have to be purchased at a high cost, at many thousand Rupees. The police officer will take someone in custody and then demand a bribe ...

Country information

The Tribunal notes and accepts that there is a large volume of information relating to the treatment of Tibetans in China by the state authorities. The Tribunal has also had regard to a range of documents relating to the treatment of Tibetans in India, including information and statements provided by the applicant.

In this case the following country information is particularly relevant to the applicant's claims and profile and it is set out below.

Treatment of Tibetans in China

According to the Annual Report 2006 of the Tibetan Centre for Human Rights and Democracy (TCHRD),

The plight of the Tibetan people came to the attention of the international community on 30 September 2006 when the world saw Chinese border police shooting indiscriminately upon fleeing Tibetans, resulting in death of at least two Tibetans at the Nangpa Pass in the Himalaya. Despite the shock and condemnation expressed by individuals, non-governmental organizations, governments and diplomats, status of the 32 arrested people remains unknown to date. It was even more disappointing that the Office of the UN High Commissioner for Human Rights (OHCHR) chose to remain silent over the tragedy signaling an apparent silence by the OHCHR not to antagonize China, a permanent member in the UN Security Council. While no official statement came out from the OHCHR at the time of writing this report, authorities in Tibet have vowed to "strike hard" on Tibetan escapees ... Tibetan nationalists who became the focal point of the campaigns are subjected to arbitrary arrest, detention and imprisonment, enforced disappearance and a host of other violations of rights enshrined in the international bill of human rights ...

A total of 2445 Tibetan refugees escaped into exile and reached Dharamsala this year. Of these, majority comprises of teenage Tibetans and novice monks and nuns who seek religious education that is banned in Tibet ...

At the end of 2005, a group of 18 Tibetan refugees were arrested on 28 November while crossing into Nepal and a separate group of four Tibetans have also been reported to be arrested. All the Tibetans arrested were later released from the Kathmandu Central jail on 8 December 2005 after a huge sum of monetary fines were paid by the Tibetan Refugee Reception Centre (TRRC) based in Kathmandu. Another group of 21 Tibetans were arrested by Nepal Police of Dolakha District on 21 July for illegally entering Nepal without any valid travel document.

Amnesty International's 2007 country report on China states that:

Tibetans in the Tibet Autonomous Region and other areas experienced severe restrictions on their rights to freedom of religious belief, expression and association, and discrimination in employment. Many were detained or imprisoned for observing their religion or expressing opinions, including Tibetan Buddhist monks and nuns. Excessive use of force against Tibetans seeking to flee repression in Tibet continued. In September witnesses saw Chinese border patrol guards shooting at a group of Tibetans attempting to reach Nepal. At least one child was confirmed killed.

- Woesser, a leading Tibetan intellectual, had her weblog shut down several times after she raised questions about China's role in Tibet.
- Sonam Gyalpo, a former monk, was sentenced to 12 years' imprisonment in mid-2006 for "endangering state security" after the authorities found videos of the Dalai Lama and other "incriminating materials" in his house. His family learned of his trial and sentencing when they tried to visit him in detention.

The UK Home Office Country Information report (released August 2007) states in part that:

23.14 As reported by WRITENET (writing on behalf of the UNHCR) in its paper on the situation of the Tibetan population in China, published in February 2005:

"We can summarize Chinese policy towards Tibet in the following points:

- China has exercised zero tolerance for separatist movements.
- It has striven to bring about rapid economic growth, including raising the living standards of the people, believing that prosperity will make the Tibetan people more willing to stay within the PRC.
- It has maintained a limited autonomy, including a degree of religious and cultural freedom, but tried actively to increase Chinese control and cracked down on any signs that Tibetan culture poses a threat to the Chinese state.
- These policies are actually quite similar to those towards other ethnic minorities in China, but separatism and threats to the Chinese state are not major problems other than in Tibet and Xinjiang.” [32e] (p10)

23.15 This report also stated, “The main group at risk in the Tibetan areas is active political dissidents, especially those seeking Tibetan independence. Activities attracting prison terms are those classified as endangering state security or promoting separatism, but they range from espionage and even bomb blasts through distributing leaflets advocating independence to possessing the Dalai Lama’s picture or reading the Dalai Lama’s works. Among the dissidents the majority belong to the clerical order.” [32e] (p28)

Treatment of Tibetans in India

With respect to the right of Tibetans to reside in India, the information before the Tribunal indicates the following:

As of 28 December 2006, India’s official policy according to the Deputy Chief of Mission, UNHCR, Carol Batchelor is that:

All the information held by the UNHCR indicates that there is no forced return of any Tibetans for any reasons, regardless of status in India. Ms Batchelor stated that while there can always be exceptions to the rule, in principle, India provides protection to Tibetans, once in India.

This information was supported by Mr Tempa Tsering, Representative of His Holiness the Dalai Lama, DLO, who stated that it is not/not Indian policy to return Tibetan monks who have no residency status and/or legal documentation. Mr Tsering said that in the last forty seven (47) years, the Government of India has never returned a Tibetan monk and that there have been no/no changes to asylum conditions. If a Tibetan monk without residency status arrives in India he will be given a Special Permit at the point of entry and he can apply for his Registration Certificate before the expiry of his Special Permit.

The Protocol Officer, FRRO, advised that a Tibetan monk who departed India on an Indian travel document (Identity Certificate), would be allowed to re-enter and settle in India as a refugee if they enter India on an Indian travel document. Such refugees are given refugee status and they can stay and work in India. In an instance where a Tibetan monk did not hold an Indian travel document, they could approach the nearest Indian diplomatic mission and obtain one to leave that country. The FRRO

representative stated that there has been no/no change to the rules applying to the asylum conditions of such monks. Tibetan refugees who depart India on travel documents other than Indian documents are not/not accepted by the Indian government as refugees.

The Protocol Officer, FRRO, advised that minor discrepancies in background details occur in Identity Certificates of some Tibetan refugees but that major discrepancies do not occur because the certificates are issued only after a thorough vetting by Tibetan community representatives of the DLO in the locality of the applicant. The FRRO representative stated that in the event of a major discrepancy, including through intentional fraud, the Office of the Dalai Lama reported the matter to Indian authorities. In the opinion of the Protocol Officer, FRRO, such cases are not seriously pursued by the Indian authorities.

The FRRO representative said that the FRRO questioned each Tibetan applicant thoroughly before granting a Registration Certificate and that if the information provided by the applicant was inconsistent, the applicant was liable to be deported back to Tibet. The FRRO representative noted, however, that in actual practice, deportations were rare and were conducted only if there was adverse intelligence information about the applicant. The FRRO representative added that deportation did not occur if there were only minor discrepancies in the information furnished by the applicant (such as the wrong date of birth or the wrong place of birth).

This information was corroborated by the Representative of His Holiness the Dalai Lama, who stated that there have been errors in applicants' documents through ignorance, negligence and sometimes deliberate acts. He stated that the Government of India has been very generous in this regard and applicants have been given opportunity to provide the reason for error, and they have never been detained or returned to China.

Other information indicates that in practise newly arrived Tibetan refugees experience some difficulty obtaining identity documents from the Indian government.

For example see the 2006 World Refugee Survey for India, by the US Committee for Refugees and Immigrants which states that the Indian government recognised Tibetans from China as refugees and “issued them identity documents”. However, “newly arrived Tibetans had difficulty obtaining them” (US Committee for Refugees and Immigrants (USCRI) 2006, *World Refugee Survey 2006 – India* , 14 June <http://www.refugees.org/countryreports.aspx?subm=&ssm=&cid=1588>).

Another example of the above change in policy is set out at www.newkerala.com The article states that as of 31 December 2006, “the Indian government will stop issuing exit permits to [Tibetan immigrants] and that:

A large number of Tibetans have been entering India through Nepal on the basis of special entry permits (SEPs) and then seeking exit permits from the Indian government to move to western countries for better prospects.

Since Tibet is not recognised as a country, Tibetans coming into India are issued SEPs at the Kathmandu-based Indian embassy to travel to India.

The SEPs are issued for pilgrimage (one month), education (one year) and other categories. Many Tibetans take the longer SEP and then apply for a registration certificate (RC) once they reach Dharamsala or any other Tibetan settlement in India.

The RC later entitles them to apply for an identity certificate (IC), which is similar to a passport. They then seek an exit permit to go to other countries (Sarin, J. 2006, 'India halts Tibetans' 'go-west' plans', newKerala.com website, 12 December <http://www.newkerala.com/news4.php?action=fullnews&id=65216>).

FINDINGS AND REASONS

The Tribunal accepts that the applicant was born in Tibet and, as such, he is a citizen of China. The Tribunal has considered the claims and evidence of the applicant, including the country information set out above. The Tribunal found the applicant to be an honest and credible witness. Having regard to the entirety of information and supporting evidence presented by the applicant, the Tribunal accepts that the applicant's background and his activities in China, as stated by the applicant, are true.

The Tribunal accepts that the applicant was politically active in Tibet, and continues to be so, and that he was persecuted in China by reason of his political opinion (whether express or imputed). The Tribunal accepts that the Chinese authorities imprisoned him for his political opinion. The Tribunal accepts that the applicant left China illegally and that he has lived and worked in India since the late 1990s.

Based on the independent country information cited above, the Tribunal finds that if the applicant were to return to China, he is likely to be subject to severe limitations on his ability to express his political opinion and that this could include his arrest and imprisonment. Based on the applicant's evidence and the country information before the Tribunal, the Tribunal finds that there is a real chance of him coming to the attention of the Chinese authorities if he were to return to China and of him being subject to persecutory treatment in the reasonably foreseeable future in China.

The Tribunal finds that such conduct constitutes serious harm amounting to persecution within the meaning of s 91R.

The Tribunal finds that the harm that the applicant may be subjected to in China is for a Convention ground – a combination of religion and political opinion in that he is a Buddhist and a Tibetan by birth. Overall, the Tribunal finds that the applicant has a well-founded fear of persecution in China for reasons of a Convention ground.

Section 36(3) of the Act – effective third party protection

The main issue before the Tribunal is whether protection is available to the applicant in India, given that he has resided there since the late 1990s and that he holds an Indian Identity Certificate.

By way of background, section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that

right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. The word 'right' in subsection 36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154.

In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country, namely India, either temporarily or permanently; whether he has taken all possible steps to avail himself of that right; whether he has a well-founded fear of being persecuted for a Convention reason in India; and whether there is a risk that the third country will return the applicant to another country where he has a well-founded fear of being persecuted for a Convention reason, such as China.

Evidence before the Tribunal indicates that the applicant holds an Indian Identity Certificate with a valid Indian visa. However, the applicant claims that this document was obtained using false information, namely his birth date and birth place. The Tribunal notes that the applicant claims that the Indian Identity Certificate is a genuine document issued by the government of India. However, the document was issued based on false information. The applicant claims that he told the delegate at his interview that the information in the document was false. The Tribunal has listened to a recording of the interview and accepts that this was the case.

Accordingly, the Tribunal is satisfied that the Indian Identity Certificate was issued based on false information and therefore the document cannot be considered valid. The applicant claims that the false information contained in the document is far more than a 'minor discrepancy'. This is not a case where a typographical error has occurred in the document, which may be easily rectified by the authorities. Based on the information set out above, and on the statements provided by the applicant from several independent witnesses, the applicant was not entitled to an Indian Identity Certificate as he was a recently arrived Tibetan seeking refuge in India. He obtained the document through the payment of money not because he was entitled to it.

In the Tribunal's view it is not necessary for it to consider in further detail how the Indian Identity Certificate was obtained. For the Tribunal's purposes it is sufficient for it to have found that the applicant's Indian Identity Certificate is invalid and therefore the applicant cannot use it to legally enforce the rights which it purports to confer, namely the right to enter and reside in India.

Therefore the Tribunal finds that the applicant does not have a presently existing right to enter and reside in India within the meaning of s 36(3) of the Act.

As a result of the above finding, it is not necessary for the Tribunal to determine whether the applicant's claims with respect to subsections 36(4) or 36(5) are substantiated, namely a well founded fear of persecution in India and a well founded fear of refoulement from India to China.

CONCLUSION

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant satisfies the criterion set out in s.36(2) of the Act for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is subject of a direction pursuant to section 440 of the *Migration Act 1958*

Sealing Officer's I.D: ntreva