

**0901671 [2009] RRTA 473 (2 June 2009)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	0901671
<b>DIAC REFERENCE(S):</b>	CLF2008/153185
<b>COUNTRY OF REFERENCE:</b>	China (PRC)
<b>TRIBUNAL MEMBER:</b>	Patricia Leehy
<b>DATE:</b>	2 June 2009
<b>PLACE OF DECISION:</b>	Sydney
<b>DECISION:</b>	The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal for review of the delegate's decisions.
5. 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 applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

6. Under s.65(1) 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 although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection 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 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

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

11. 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.
12. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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.

### **CLAIMS AND EVIDENCE**

20. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
22. The first named applicant is the wife of the second-named applicant. The third-named applicant is their son, born in Australia. Only the first named applicant has put forward her own claims to be a refugee, the others relying on their membership of her family. The first-named applicant will generally be referred to in this decision as "the applicant".
23. The applicant was born in China. She and the applicant husband married in Australia. She came to Australia on a temporary visa. Her parents are currently resident in China, where she has a brother. The applicant says that she lived at a residential address in City A from the late 1990s. She was educated to high school level in China. She has not been employed. She applied for a Protection Visa.
24. The applicant attached a statement to her Protection Visa application. In her statement she says, relevantly:
  - She and the applicant husband were classmates at school;
  - The applicant was born into a traditional farming family which had very negative attitudes to females; the applicant husband's family, in which he is the only son, is very superstitious; they wanted him to marry into a rich and powerful family to benefit their business operations; the applicant's husband's grandfather wanted the applicant to study abroad to bring honour to the family;
  - The applicant's husband's family were opposed to the relationship and forced the applicant and her future husband to separate; they arranged a marriage for the applicant husband which he did not want, but agreed to, on condition that he was allowed to study abroad prior to marriage;
  - The applicant's parents, who had great debts, decided to marry the applicant to an overseas Chinese who was much older; they forced her to live with this old man but the applicant could not accept it; she was locked in a room and her food was restricted; she was then sent to live with the old man for a few days; she said she

would marry him after she returned from overseas studies if he paid for her studies and helped her parents with their loan repayments;

- The applicant found out that the old man to whom she was promised had connections with Mafia-like gangs; however he financed her study abroad;
- The applicant and her husband did not tell their families about each others' overseas study arrangement; when they told their family about their cohabitation in Australia they rejected them and quarrelled with them; the applicant's pregnancy was an accident, and when they told their parents about this they were very angry and stopped their financial support; the applicant's parents wanted her to go back;
- The applicant took her baby back to China thinking that her parents would forgive them; however her parents treated her child indifferently and still wanted her to marry the old man; they had serious arguments and she left her parents' home after three days; her parents did not give her any financial support, and the money for her air ticket and expenses was all borrowed from friends;
- The applicant and her husband live together in Australia; because they have not reached the legal age for marriage in China, their marriage will not be accepted by the Chinese authorities, society, or their parents;
- The applicant decided to marry her husband in Australia to give them and their child legal status and as an expression of their genuine love; however their marriage cannot be acknowledged in Chinese law or by the society or their families;
- The applicant did not receive any assistance from the government when she returned to China with her child; during her stay in China, her husband's parents did not visit her and the baby; neither of the couple's parents gave them any financial support, nor did the government;
- The applicant and her husband do not meet the legal marriage age therefore their marriage would not be recognised and the baby would not be registered in their family household register; they will be punished by the government, and the applicant is worried that their child will not be accepted for kindergarten and school; the applicant and her family would not have welfare benefits from the government; she will be penalised in study and employment; she would be discriminated against at all levels by government policy relating to those who violate the family planning rules;
- The applicant and her husband faced serious financial difficulties in Australia, with their parents asking them to return the money to them which they had provided; the old man who supported the applicant's overseas studies has looked for her and forced her parents to return the money he gave her; he has said that he would come to Australia to get even with her or send someone to kill her; she has been worried about her own and her parents' safety;
- The applicant's current situation is very desperate; they rely on borrowing from friends and have lots of debts;

- The applicant decided to go to Church in Australia when she was told this would help her; she had had some contacts with Christians when she was in China; but the churches there are controlled by the government and are not genuinely religious;
- They are very fearful of returning to China because they will be discriminated against.

25. The first-named applicant was interviewed by the Department.

26. Information provided at the hearing included, relevantly:

- The applicant agreed that she and her husband were married contrary to their parents' preferences; she agreed that they fear that they will have trouble with their parents if they return to China;
- When asked whether there were other reasons for her fear of returning, she said that because of the society in China, if parties are under age they are not allowed to be married according to Family Planning Law; their children will not be allowed to have household registration; there is also discrimination by society against people who marry under age;
- When asked why she thought they would be discriminated against, she said that her experience on her return to China indicated the discrimination they would experience; they would look down on her and her family;
- The applicant agreed that she had been to church in Australia; she had gone 3 or 4 times in a named suburb; most recently at Christmas; she had gone to church because she heard the local people saying that if she believed in Jesus Christ, He would be able to help her; she had not been since Christmas because of her children, and there were few buses going there; the applicant was not baptised; they just sit and listen to the preaching;
- The Delegate put to the applicant that since she was not a baptised Christian, he did not think she was at risk of persecution in China; he also did not think that she was at risk of being persecuted by her parents in China; Australian law also indicated that those subjected to the One Child policy in China were not considered to be Convention refugees;
- In response, the applicant said that the Chinese government policy would not allow them to be there and people would discriminate against them because she had had a child before being married; she had already sought the help of the village committee but they did not help her;
- The applicant said her parents when she last returned to China would not acknowledge her marriage; when they take their baby to hospital for checks, they are not allowed to go to a hospital because the baby is not registered; they had to go to a private clinic, but the doctor there looked down on them; when asked how she paid for the private clinic, she said that in China the private clinics charge less than official hospitals, they are quite cheap.

27. The applicants attended a hearing. The applicant husband was absent from the hearing room while the first-named applicant gave evidence.
28. The applicant said that her parents were living with her younger brother. She said that she spoke to her parents on the phone probably a number of months ago. She said that they rang her and asked her to marry the man with whom they had arranged a marriage for her.
29. The applicant was asked what she was afraid of if she returned to China. She said that she was afraid her parents would force her to marry the man they had chosen for her. She said that she and her husband were not legally married according to Chinese law, and her baby could not be registered. She was asked what were the consequences of her not being married and her baby not being registered. She said that her child could not go to a public hospital for treatment. Treatment would have to be obtained at a private clinic. She was asked whether this happened when she returned to China with her baby. She said that it did. She had approached the government for help but they would not do anything for her. She was asked who she spoke to. She said she went to the two village leaders and to the Women's Union. She said that she was made to wait a long time before she could speak to anyone. Then she was asked where her parents lived and what they did. She said that they were not interested in her. She said that the relationship with her parents had broken down and that she needed help. They said to her that she was not worth helping because she had not complied with the law. They said that people like her can be subjected to sterilisation. She was asked whether they spoke to her about paying a fine. She said that they did but she had no money, so she found an excuse and left with the baby. She said that they discriminated against her and the baby, and treated them with contempt.
30. It was put to the applicant that everyone was subject to Family Planning regulations in China, and that any punishment that might be given for not complying with the regulations would not be carried out for a Convention reason because the regulations applied to everyone. The reason for any harm that might be done to her and her child was therefore not one of the five Convention reasons. The applicant said that they had discriminated against her and looked down on her and her baby and they could not live in China.
31. The applicant said that her husband's family did not approve of their marriage. Her parents refused to give them any help. She said that she had no friends in China who could help her.
32. The applicant was asked about her parents' request to her to marry the man they had chosen. She was asked whether her parents knew about her marriage in Australia. She said that they did, but they thought she should leave her husband and child and marry the man. He is a wealthy person. The applicant first met the man at a festival just before she came to Australia. Her parents told her it was traditional to have a trial marriage and she stayed with the man as his wife. She told him she wanted to study overseas and said she would marry him when she returned. He paid for her study in Australia. The applicant said she had not spoken to this man since she had left China to study in Australia. He paid study fees in advance, and did not send any more money. The applicant said she did not see the man when she returned to China. Her parents intended to lock her in the house and bring the man to her, but she used the excuse that the baby was sick and left. While she was in China she went to stay with a friend, but the friend's parents disapproved of her, so she stayed in a cheap hotel while she was there.

33. The applicant was asked what her parents said to her when they contacted her. She said that they told her she had two options, one being to marry the man and have the family's debts paid off, or to work and return all the man's money to him, and then the relationship would be terminated.
34. It was put to the applicant that she said at the beginning of the hearing that she was afraid that she would be forced to marry the man whom her parents had chosen for her. She said that her other fear was that Chinese society would discriminate against her and her baby and put great spiritual pressure on them because of their cold eyes and strange looks. The applicant was asked whether she was afraid of the man she was supposed to marry. She said that she was afraid because he is powerful and could be regarded as the head of some gangsters. It was put to her that he had not approached her for a long period. She said that he often threatened her family, telling them to surrender the applicant or repay their debts. It was put to the applicant that it seemed that even if this man were to do her harm, it would not be for a Convention reason but for personal reasons, for example that her parents owed him money, and that she herself had promised to marry him but did not do so. She said that she cannot stand the repression of Chinese society. She could not tolerate it. It was explained to the applicant that in order to be found to be a refugee, not only did she have to have a well-founded fear of persecution in China, but the persecution had to be for a Convention reason, and it did not appear that this was the case.
35. The applicant was asked to talk about her claims relating to Christianity. She said that after her baby was born, her family was depressed and cut off from any financial support. The relative with whom they were living said they could go to church for comfort. The applicant went and sat and listened to what was said. The applicant became very interested and would like to join the church. She went to the Church with the relative on many Sundays since the birth of the baby. She last went at Easter. She is preparing to take instruction in Christianity and be baptised with the baby later in the year. The relative is not a blood relative, but a friend who is Chinese.
36. It was put to the applicant that it seemed unlikely that she would be persecuted in China because of her Christianity since she had not been a practising Christian in China, and had not been baptised as a Christian. She said that her parents had no religious faith so she was not allowed to have an interest in Christianity in China.
37. The Tribunal took evidence from the applicant husband. He said that his parents were living in China and he has a sister there. He said that he told his parents about the birth of his child and about his marriage, but they disagreed with him and told him to abandon his wife and child. He said he had spoken on occasion to his mother, but his father did not speak to him. His mother wanted his father to give them money, but his father won't do this and wants him to return as soon as possible.
38. The applicant husband said that he had never met or spoken to the applicant's parents. He was asked what he thought would happen if they went back to China. He said that he was very concerned about the personal safety of his wife, because her parents owe a lot of money to "that man". He said that nobody is sympathetic to them. In their home country money rules, so they do not stand a chance. He said that his wife had suffered greatly. He had hoped to take up his responsibilities as a father. But it is too difficult for him to do that in China or in Australia. They have been together for more than two years.



39. It was put to the applicants that it was difficult to see on the evidence presented that they would come within the legal definition of a refugee: any punishment for transgressing the Family Planning legislation would not be done for a Convention reason; any harm that the man her family wanted her to marry might do to her might not be done to her for a Convention reason, and it did not appear that her activities as a Christian would put her at risk of serious harm if she returned to China. It was suggested to the applicants that they seek free legal advice on their options, and they were given time to respond to the Tribunal's adverse comments.
40. The applicant wife wrote to the Tribunal stressing that her family, especially herself and her child, have been repeatedly rejected by her parents, and that this has caused her serious psychological harm. She says she is homeless in China and unable to survive there. She says that she is particularly concerned about her Australian born child, who was discriminated against when she visited China and will lack legal recognition and access to proper education, social welfare and human rights. The applicant wife says that she has been mentally and psychologically persecuted by the Chinese authorities. She and her family in Australia are under great stress because they are in debt and have ongoing financial difficulties. She says that she and her family have been going to a Christian church, and that they will not be free to practise their Christianity in China. She asks that the Tribunal support their appeal for Ministerial intervention in their case if the Tribunal cannot decide in their favour. Attached to the applicant's letter is a dated letter signed by Father X of a Catholic Community stating that the applicants and their child have been attending Mass celebrated at a Church in Australia since they arrived in Australia.

#### *Country Information*

41. The US State Department in its Country Report on Human Rights Practices 2008 (published February 2009) for China reports on China's population control policy as follows:

The country's population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures. Those who violated the child limit policy by having an unapproved child or helping another do so faced disciplinary measures such as social compensation fees, job loss or demotion, loss of promotion opportunity, expulsion from the party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of private property. In the case of families that already had two children, one parent was often pressured to undergo sterilization. The penalties sometimes left women with little practical choice but to undergo abortion or sterilization.

In order to delay childbearing, the law sets the minimum marriage age for women at 20 years and for men at 22 years. It continued to be illegal in almost all provinces for a single woman to have a child.

42. The Population and Family Planning Regulations of Fujian Province set out a range of penalties for contravention of the regulations. These include substantial fines (*Population and Family Planning Regulation of Fujian Province* (Promulgated 26 July 2002, Effective 1 September 2002), UNHCR website).

43. In relation to religion, the US State Department Report states:

The constitution and laws provide for freedom of religious belief and the freedom not to believe, although the constitution only protects religious activities defined as

"normal." The government sought to restrict legal religious practice to government-sanctioned organizations and registered places of worship and to control the growth and scope of the activity of both registered and unregistered religious groups, including house churches. To be considered legal, religious groups must register with a government-affiliated patriotic religious association (PRA) associated with one of the five recognized religions: Buddhism, Taoism, Islam, Protestantism, and Catholicism.

## **FINDINGS AND REASONS**

44. On the evidence before it, including the evidence of the applicants' passports, the Tribunal accepts that they are Chinese nationals.
45. The Tribunal formed the view that the applicants were reliable witnesses at the Tribunal hearing. The Tribunal therefore accepts that the applicant husband and wife met in Australia and had a son. They married months later. The Tribunal accepts that neither adult applicant was of a legal age to marry in China, according to the country information. The Tribunal accepts on the evidence before it that the applicants' child was born out of wedlock, and it was therefore illegal in China for the applicant wife to have a child, according to the country information.
46. The Tribunal accepts that the applicants have contravened Chinese population control policies, and that they are therefore subject to penalties, some of them harsh in terms of their psychological effect on legal "offenders". It accepts that the applicant child, in particular, will be subjected to a number of restrictions and to discrimination. However, it is well established that the enforcement of a generally applicable law does not ordinarily constitute persecution for the purposes of the Convention, and this has been found to be the case specifically in relation to China's one child policy (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225). There is no evidence before the Tribunal in this matter that the enforcement of Chinese population control policies would be discriminatory in the case of the applicants. The Tribunal therefore finds that any punishment to which the applicants might be subjected in China for violating the laws concerning population control or family planning would not constitute persecution in a Convention sense.
47. The Tribunal accepts that the parents of the applicant wife wished her to marry another man for financial reasons, and that they continue to reject the applicant's marriage and the child of the marriage. The applicant has stated that she fears retribution from her parents and from the man her parents wished her to marry for not going through with the marriage as planned. While the Tribunal accepts that the applicant has a subjective fear as claimed, it does not accept that there is a real chance that the applicant will be seriously harmed either by her parents or by the man she was to marry. She returned to China for several weeks and was not physically harmed by anyone, even though her parents refused to help her. No contact has been made with her by the man to whom she was promised in marriage since she left China initially, even though the man has approached her parents for the return of his money. Even if the applicant were to be seriously harmed if she returned to China, which the Tribunal finds to be a remote possibility, the Tribunal finds that any harm done to her would not be done to her for any of the five Convention reasons, but rather for personal reasons. There is no evidence before the Tribunal that the applicant would fail to receive state protection against any criminal assault of this kind.

48. The applicant has claimed that she and her husband have attended a Catholic church since they have been in Australia, a claim supported by a letter from a Catholic priest. The Tribunal accepts this claim. However, the Tribunal finds that the applicants are not baptised Christians, nor have they ever practised Christianity in China. The practice of Christianity is not illegal in China, though it is officially regulated according to the available country information. While the applicant has expressed concerns about the government's control of churches in China, she has had no association with any underground church or cult activity there, and the Tribunal does not accept that she has a commitment to such activity now, such that there is a real chance that she will be persecuted for this reason if she returns to China in the foreseeable future.
49. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicants will face Convention-based persecution in China, if they return there within the foreseeable future. It is not satisfied that the first-named applicant will be persecuted in China within the meaning of the Convention.
50. The applicants have requested by implication that the Tribunal refer the case to the Department for consideration by the Minister pursuant to s.417 of Act which gives the Minister a discretion to substitute for a decision of the Tribunal another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so.
51. The first-named applicant in particular is in a very fragile psychological state, and the penalties likely to be imposed on the applicant and her Australian-born son under the family planning law in China are likely to cause exceptional hardship. In the Tribunal's view, compassionate circumstances regarding the psychological state of the applicants may be such that a failure to recognise them might result in harm and continuing hardship for them.
52. The Tribunal has considered the applicant's case and the ministerial guidelines relating to the discretionary power set out in PAM3 'Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)' and will refer the matter to the Department.

## **CONCLUSIONS**

53. The Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
54. The other applicants applied on the basis of their membership of the first named applicant's family. The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant does not satisfy the criterion set out in s.36(2)(a), it follows that the other applicants cannot satisfy the relevant criterion set out in s.36(2)(b) and cannot be granted the visa.

## **DECISION**

55. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>.                      PRRRNM</p>
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