

**1114337 [2012] RRTA 509 (26 June 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1114337

**DIAC REFERENCE(S):** CLF2011/130383

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Naida Isenberg

**DATE:** 26 June 2012

**PLACE OF DECISION:** Sydney

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration 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), applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2011.
3. The delegate refused to grant the visas [in] December 2011, and the applicants applied to the Tribunal for review of that decision.

### RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.
6. 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.
7. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. 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.

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Member of the same family unit**

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a de facto partner and a dependent child.

### **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. In this decision 'the applicant' refers to the first-named applicant, unless otherwise specified. The second-named applicant is the de facto partner of the applicant and the third-named applicant is his dependent child.

## Background

22. In his application the applicant wrote that he left China [in] August 2006, in order to study in Australia. His hometown was [in a] Village, which is a mountain village located in [Town 1], Fujian Province.
23. At the time the applicant was born his [brother] was in poor health and his parents had to spend a lot of money to pay for his medical expenses. They asked a distant [relative], to look after the applicant from the time he was only a few months old. The applicant called [Mr A] "[Uncle A]" and [Uncle A] regarded him as his own son. He lived with him for 8 years until his [brother] died in [1996]. After that, he was very frequently in contact with [Uncle A] and often stayed at his home overnight.
24. [In] 2005, [Uncle A] invited him to have a dinner at his home to celebrate his [birthday]. At that time he learned of [Uncle A]'s belief in Yiguan Dao for the first time. [Uncle A] wished that the applicant would become a Taoist of Yiguan Dao like him in the future. From then on, the applicant began to follow [Uncle A] and studied the teachings of Yiguan Dao. Later he learned that Yiguan Dao is regarded as a "Reactionary Superstitious Sect and Secret Society" by the PRC authorities and is banned in China. [Uncle A] was imprisoned many years ago by the Chinese government for some years due to his belief in Yiguan Dao. As a result, he has never been married; and he did not have any children.
25. At that time, there was no temple of Yiguan Dao in his hometown, as Yiguan Dao had been banned by the PRC authorities for years and all of [Uncle A]'s Yiguan Dao books had been confiscated by the police. [Uncle A] wrote some Yiguan Dao material himself and asked the applicant to study those materials.
26. Not long after that, [Uncle A] changed one of rooms in his house to a secret Yiguan Dao temple. From then on, [Uncle A] led him in weekly worship of Yiguan Dao - in the evening every Sunday. He also instructed the applicant in celebrations every new-moon and full-moon. At the beginning, only [Uncle A] and the applicant practised Yiguan Dao there. Afterwards, [Uncle A] secretly spread Yiguan Dao to others and gradually recruited others. By the time the applicant left China in August 2006, there were 9 followers at [Uncle A]'s secret temple.
27. Before the applicant came to Australia, [Uncle A] told him that there is genuine freedom of religious belief in Australia and that there must be some temples of Yiguan Dao in Australia. [Uncle A] told him repeatedly that he should find the temple of Yiguan Dao to continue the practice of Yiguan Dao. However, he experienced many difficulties after he arrived in Australia and could not find a Yiguan Dao temple in Australia for some period.
28. In April 2007, he met a friend who was a Taoist of Yiguan Dao and eventually found [a] Taoists' Temple, which is a Yiguan Dao temple. Since then, he has attended [the Taoists'] Temple to worship every weekend, and has also attended the celebrations on every new-moon and full-moon.
29. Meanwhile, in around November 2006, a [neighbour] seized the applicant's family's farmland in order to build her family's new house. It was rare to have a piece of farmland in the mountain area, and the applicant's mother had to try her best to protect

the family's farmland. However, [Ms B's] uncle was an official of [Town 1] Government, and her family had good contacts with the government. With her uncle's official background, [Ms B] not only forcibly occupied his family's farmland but also bribed the police to frame his mother. [In] December 2006, the police arrested his mother, alleging she damaged the fence built by [Ms B's] family and had threatened [Ms B's] family's safety. His mother was then detained at the police station in [Town 1]. His father, who had been working elsewhere, immediately returned home. He spent a great deal of the money to bribe the police at the police station and the officials and [in] December 2006, the applicant's mother was released. His family, who is very poor, also had to agree to pay the compensation to [Ms B's] family and they spent all of their savings and went heavily into debt.

30. As a result, in January 2007, he had to terminate his study in Australia, as his parents were unable to provide him with ongoing financial support. Initially he thought that he might be able to support himself and tried hard to look for jobs, without success. He was then around [age deleted: s.431(2)] years old, and did not have any particular skills or experiences, and it was therefore very hard to get a stable job and to earn a living.
31. In August 2009, he met [Ms C] and it was 'love at first sight'. They started living together in October 2009. Their daughter [Ms D] was born [in] 2010. Both [Ms C] and [Ms D] have become Taoists of Yiguan Dao.
32. After he came to Australia, he kept in contact with [Uncle A] for a long time and sent him some Yiguan Dao books in order to help his secret temple. He also learned that by April 2011 [Uncle A]'s secret temple had over 60 followers. [In] April 2011, he contacted [Uncle A] but after that he was unable to contact him. [In] May 2011, his father informed him over the phone that the family home had been raided by the police; and that his parents had been taken to the PSB, and that they both had been interrogated by the authorities. He then knew that [Uncle A]'s secret temple had been destroyed by the PSB, and that [Uncle A] and about 20 other Taoists of Yiguan Dao had been arrested by the police, and that the PSB eventually found that he was not only an active Taoist of Yiguan Dao but that he had sent some books of Yiguan Dao back to China. Since then, he has become the target of the PSB and believes that he would be arrested by the police and subjected to persecution by the Chinese authorities as soon as he returned to China.
33. In support of his application the applicant provided two statutory declarations [dated] September 2011 [and] October 2011 in which he reiterated the above contentions.
34. He also provided a letter from [Mr E] on a letterhead of [the] 'Taoist Temple' in which [Mr E] wrote that the applicant had been attending a temple for weekly worship since April 2007 and that [Ms C] had been baptised [in] December 2009 and that since then she also has been attending the temple. Their child was baptised [in] June 2011.

### **Departmental interviews**

35. The applicant was interviewed by a delegate of the Minister [in] October 2011 and again [in] November 2011. The Tribunal has listened to the audio recordings of the interviews and what follows is a summary of the applicant's oral evidence to the delegate.

- His parents are presently farmers. Previously his father worked in a [factory] for 15 years but stopped working there since the incident with the neighbour in 2006 when a neighbour acquired his family's land and his mother tried to protect their property. The neighbour's uncle was in the government and set a trap for his mother and she was detained.
- After the applicant came to Australia he has been in contact with his family every 1-2 weeks, or once per month. He is concerned that contacting them too frequently may have consequences for them.
- In January 2007, because of the property dispute, he did not have enough money to continue his studies in Australia and ultimately the Department cancelled his visa. He did not return to China then because he thought he would be arrested because he was a member of Yiguan Dao. He was known to authorities because he had posted a couple of books about Yiguan Dao to [Uncle A] in 2007.
- He had no other religion before he started practising Yiguan Dao. His parents have no religion and while they know he is a Yiguan Dao practitioner they have no view about that. He was attracted to Yiguan Dao because it meant he had to aspire to be a good person and do good things. He spoke of the concept of the whole universe and that believers can live forever in heaven. It consists of a 3 step process involving praying to heaven while respecting the earth. A person needs to have good morals, to respect parents and teachers, trust people, be a good person, and be polite. To join, one needs to be introduced by someone. When asked how Yiguan Dao differed from Taoism he said it is Taoism.
- As to how he practised his religion in China he said that on his [birthday] [Uncle A] asked him to light Chinese candles for the first time. He said that [Uncle A] lived in the same village, a couple of minutes away from the family home. [Uncle A] had a secret temple at his home. Everyone had a cushion and held a Chinese candle. As Yiguan Dao is not allowed in China, [Uncle A] had a secret temple in his home – at first it was used by only the applicant and [Uncle A], but it grew by word-of-mouth to about 60 people. At first he did not know of any other Yiguan Dao followers in China. Because it is forbidden, no one would discuss it unless they were very familiar with you.
- [Uncle A] had been arrested in 1983, and was detained for four years but was released for good behaviour. He remained under scrutiny and was arrested again [in] May 2011 when the authorities found his secret temple and destroyed it.
- He was unable to find a temple in Australia [until] April 2007. He did not just ask anyone because he was afraid of what might happen if he had to go back to China. He was introduced by [Mr E], a taxi driver, whom he met [in] April 2007, and who runs a temple from his home unit in [suburb deleted: s.431(2)] He described the layout of [Mr E's] home, where the living room is set up as temple. It has a Buddha and 3 wooden lights – one for god and one each for male and female. There are cushions to kneel on and there are books and materials on a shelf.
- He said he had sent [Uncle A] copies of books about Yiguan Dao he obtained from [Mr E] temple in about April 2007. He produced them to the interviewer. His father told

him that when the books were found, [Uncle A], under torture, told the authorities that the applicant had posted them to him.

- He did not apply for a new passport because the authorities know him to be an activist.
- He attends [Mr E's] temple with his wife and child. As to how he practised the faith in his daily life, he said that every Sunday night, every Thursday and on the 15<sup>th</sup> day of the Chinese lunar calendar he goes to [Mr E] temple to pray. He has a calendar at home and marks it. He said that before the service he washes his hands and he sets up the room and puts away chairs and cushions. Some Chinese candles are lit signifying faith.
- He produced a letter from the temple which referred to his wife being baptised which means introduced and converted. Yiguan Dao is different to Tao. Tao is a general religion and is one of the 5 authorised religions. If he returned to China he would continue to practise Yiguan Dao. It is not a faith that a practitioner can leave – otherwise they will go to hell. His wife also said they dare not go back because they are followers of Yiguan Dao.
- Before meeting his wife the applicant knew of China's one-child policy. If they were to return to China their child will be unregistered as they have no marriage certificate because they were under marrying age. They cannot afford to marry here and also did not want to attract attention because their visas had expired. In China they will have to pay a penalty for their child which they also cannot afford. At the time of interview his wife was pregnant with their 2<sup>nd</sup> child and, he said, she would be forced to miscarry, which he said was normal practice in China. At the time of application they did not know his wife was pregnant. Neither pregnancy was planned.
- The applicant's wife said her father-in-law went to the family planning office and was told there will be a fine, the amount of which would be calculated on their return. She said it was the tradition to marry, otherwise people would look down on them. When it was discussed that country information about 'black children' was that they could pay a social compensation fee and that where there is severe hardship parents can be exempt from payment, she said that local officials are very corrupt. She doubted they could get healthcare if not registered and private hospitals cost 3 times government medical treatment. As to why they could not just marry, register and pay the fine she said she had heard of another couple who the government thought were wealthy and were fined RMB 200,000.
- Both their parents know of their relationship and of their grandchild. As to how their parents feel about a child out of wedlock, the applicant said they considered it was not following a tradition and was not good practice. They counselled them against having a second child because they thought they were too young.
- His wife's parents are also farmers. Her father had an [farm] for 5 years and, before it failed in 2009, the family was able to support his wife's studies in [Europe]. Her parents are not prepared to help them out financially and emotionally if they return to China because they no longer have any money and they still have a younger [siblings] at home.
- It is impossible for his parents to help financially and emotionally because they still owe a lot of money as a result of the property dispute. Because his family has debts he



would not ask to create more burden on the family. As to whether there were other relatives in China who could support them he said that if he had those relatives his parents would not have had to borrow to cover their own debts.

- Since his visa cancellation he has been doing casual work - working for an uncle's company doing [manual labour]. He has no skills. He makes about \$100- \$200 per week which pays for the rent of \$360 per fortnight and basic food. He is looking for a different job but is worried he might lose his present job if he takes on another one. He applied [for another job] but he was told he was not big enough. They have no savings and owe over \$14,000.
- When asked why he had stayed in Australia illegally for 4 years before he lodged his protection visa application, he said that he didn't want to use his belief in Yiguan Dao religion to achieve the goal; now he has a wife and child, he has no choice.

### Hearing

36. The applicants appeared before the Tribunal May 2012 to give evidence and present arguments. The Tribunal also received oral evidence from the second applicant, the applicant's de facto wife, [Ms C] and [Mr E]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin language.

37. The applicants were represented in relation to the review by their registered migration agent.

#### *The [applicant]*

38. At the hearing the applicant said that what he had written in his application form and what he had told the departmental interviewer was true.

39. He told the Tribunal how he had come to live with the person he described as [Uncle A]. One of his elder brothers was very ill and his family needed to spend a great deal of money for his medication and his parents were unable to afford to care for him, the applicant, so, as a baby, he was given to another farmer who lived nearby, and who was a distant relative - [Uncle A] - with whom he remained for eight years. He said his parents were unconcerned to leave him with a person who had previously (in 1983) been arrested and detained for four years. When his family's financial circumstances improved somewhat he was able to return to them, but he had developed a deep affection for [Uncle A] and was reluctant to go. In the following years he remained close to [Uncle A].

40. During the time he lived with [Uncle A] there was no discussion of Yiguan Dao. It was on the night of his [birthday] that [Uncle A] told him that he was a follower of Yiguan Dao and encouraged him to do likewise. From that time on he regarded himself as a practitioner and there was a gradual accumulation of knowledge about the faith. His parents did not object because they knew he had a deep relationship with [Uncle A]. [Uncle A] had converted a room in his home into a temple. By August 2006, when he left for Australia, [Uncle A] had attracted about nine people from the village to his temple.

41. By April 2011, when he last had contact with [Uncle A], there were more than 60 followers at [Uncle A]'s Yiguan Dao temple. Some of these had come from other villages. It had got too large and could no longer be kept secret and [in] May 2011 the temple was raided and destroyed. His parents were taken in for questioning because they had been thought to be followers of Yiguan Dao also. In all, more than 20 were arrested, including [Uncle A] who he has not heard from since. He worries about what happened to [Uncle A]. He has told his parents to let him know if there is any news about [Uncle A], but there has been nothing to report. He said it was unsurprising if there has been no information about arrests because the meetings are held in secret.
42. He said that he met [Mr E] by chance, when one day – which he remembers to be [in] April 2007, when his boss was not able to give him a lift home from work - he met [Mr E], who was the taxi driver. They chatted in the taxi and he told [Mr E] he was having some problems and that he burnt incense. He thought [Mr E] sensed he might be interested and told him about his temple. Yiguan Dao was not specifically mentioned but as soon as he went there and there was the hand-cleaning procedure at the door he knew he it was familiar. The rituals were exactly as they had been in China. His initiation was [in] April 2007 in front of about 40 or 50 others and [Mr E] was his guarantor.
43. [Mr E] owns the unit on the top floor of a [multi-storey] building. The lower floor is where they wash their hands and eat. There is a big room set up with the Buddha and that is where they kowtow.
44. As to the nature of the faith he said that there is one law for both heaven and earth. Earth would not exist if there was no Yiguan Dao. As to initiation practices he said a person chooses a date to be received into Yiguan Dao and a 'guarantor' introduces them on that day and they enter the temple. As a result they are presented with a membership card. There were no such cards in China because of the need for secrecy. Every time they attend the temple they wash their hands at the entrance in a basin because the temple is a clean place. He said there are three treasures of heavenly secrets which cannot be revealed. Worshipping occurs on a full moon, the new moon and on Sunday nights. New members are taught to wash their hands, to kowtow and about incense. He described the kowtowing to the buddhas, and that different parts of the service are conducted by different people.
45. He said that if he had not met [Mr E] he would have continued to kowtow and worship in his home.
46. He was asked as to why he had not previously wanted to rely on his belief in Yiguan Dao for the purposes of a protection visa. He said that his belief is most important to him and he thought it would protect him and keep his family safe. He did not want to take advantage of his belief to achieve a personal goal, namely to remain in Australia. Now that he has a wife and children, he has no option.
47. The applicant was asked why he had not continued his studies, after his arrival in 2006. He said that neighbours took away the family's farmland and his mother and father had to pay compensation. That meant all their savings were taken and they still had to borrow more money. His family therefore was no longer able to support him. He said that initially he thought he could earn a living and then study again. He quickly found out that he was unable to earn enough for both living and tuition, and in 2007, when the

school asked for tuition fees, he was unable to meet them and he stopped studying. He was asked why he had not returned to China then and he said that by that time the Chinese government would have known that he was a supporter of Yiguan Dao because he sent [Uncle A] some Yiguan Dao books. When the Chinese government found out that [Uncle A] had received books, [Uncle A] confessed that he, the applicant, had sent them to him. He contacted his parents and they advised him against returning to China.

48. Since he has ceased studying he has had to support himself. However he has no skills or work experience and so works [as manual labour]. He works 1 to 3 days per week earning about \$100 per day cash, and averages about \$400 per fortnight. That is enough for the rent and some food. In order to travel to the worksite his boss picks him up because he has no car. If he could find a better job he would do so and he has tried to get something better. He is unable to go for a work trial because he could not risk losing his present job. He went for a one day trial [in another job] but he was said to be too puny.
49. He said he met [Ms C] on 2 August 2009. She was living at the same accommodation as him and they gradually developed a relationship. She had come to Australia on a tourist visa.
50. He said his parents know about their relationship and consider they are old enough to make decisions for themselves. It only matters that she is a good person. He said they know he now has two children. He said that when [Ms D] was born his parents were concerned that they were so young and would not know how to rear a child. When his wife became pregnant with their second child his parents were really worried, especially because they are unable to help financially. His parents are being pressed to repay the debts they owe which exceed RMB300,000. He said they still own some farmland. He said he is unable to help his mother, just as she is unable to help him. He said that his wife's family also owe money although her family's financial situation was somewhat better than his. In 2004 they had [a farm] but in 2009 the business failed when the price of [the goods] dropped.
51. The Tribunal asked why they had not married and he said that this requires money and also they do not have a visa here. He was afraid that if he went to the Department he would be arrested. He said he wanted to marry his wife. He knew that if they returned to China it would be bad for his wife to have had a child out of wedlock and she would be under pressure. Even if they married in China they would have to pay a fine for the children. He has debts, as do his parents and they could not pay the fee either. He did not know where he could get any money. His parents are telling them not to come back to China because no one can help them. If the children are unregistered that will be treated as illegal. They could only go to a private school and obtain private medical treatment and that also was unaffordable. His wife also has no employable skills – she cannot even cook.

*The applicant, [Ms C]*

52. [Ms C] gave evidence that she had attended college for two years in [Europe] during 2007 and 2008. Her parents supported her education but her father's business failed in 2009.

53. She met the applicant very shortly after arriving in Australia in August 2009 when they were both living with a friend of hers. She said that her parents had no opinion about her relationship with the applicant, provided she is happy. They are happy for her to have had two children but are worried because she and the applicant are so young, and without support, and they worry about how they can take care of the children.
54. She was concerned that if she had to return to China, she would be known as having had two children out of wedlock and would have to pay a fine, which they could not afford. She said that they would be able to marry now in China but would still have to pay a fine. She said neither she nor her husband has any skills and they could not pay the fine because they had no money and they also have debts. If the children cannot be registered there is no basic education or medical treatment and they would be deprived of a happy life and will receive threats. As to the extent of their debts she said that, as a result of the second baby, they owe \$16,000. When they had the second child their rent was increased, and they needed nutrients, especially as the second baby was three months premature and there were significant expenses associated with that. They can expect no financial support from her family, who, in addition to having debts, are supporting a [brother] who was studying.
55. She said that she also is a Yiguan Dao follower and if she had to return to China she would be unable to attend a temple and would go to hell. She was asked about her interest in Yiguan Dao. She said that [in] December 2009 she went with her husband and obtained her membership card. She said the initiation involved cleaning her hands and going upstairs to a table where there was incense and worshipping. She attends with her husband on the new moon, full moon and on Sundays.

*[Mr E]*

56. [Mr E] gave evidence that he has lived at [address deleted: s.431(2)] since November 2006. He has a [multi-]bedroom unit, with a large living room which he has made into a [Yiguan Dao temple]. He said that about 40 to 50 followers attend, but not all attend at the same time. The first thing they do on arrival is to wash their hands at the lower level. On the new moon and full moon they come early for a vegetarian meal. They sing songs and talk about the Scriptures.
57. [Mr E] said he met the applicant in April 2007 when the applicant was a customer in his taxi. The applicant did not speak English and they talked in Mandarin. He felt that he was well-educated and well-behaved. He asked the applicant if he wanted to learn the truth and invited him to the temple. It was then that the applicant told him that he had worshipped in China. He agreed that it was a very personal conversation but said that it had started out quite generally but by the end of the 20 minute journey he "saw that it was good". He said that at the temple, he observed, from the outset, the applicant was very familiar with the rituals. [Mr E] said that the applicant attends on the full moon and new moon and on most Sundays.

## **INDEPENDENT COUNTRY INFORMATION**

### **Yiguan Dao**

#### *Beliefs and Practices*

58. Roughly translated, Yi Guan Dao means unity way or the way of pervading unity and it claims to unite “the world’s five great religions’: Buddhism, Taoism, Confucianism, Islam, and Christianity”<sup>i</sup>.
59. Yi Guan Dao operates secretly in China, so there is limited information on its beliefs and practices. Furthermore, due to the variety of traditions and the lack of any central authority ruling on religious matters (Yi Guan Dao is described as consisting of closely related yet autonomous branch associations), local temples and their committees can innovate and reinterpret rituals and beliefs. As a result, a variety of beliefs and rituals may co-exist within one area.<sup>ii</sup>
60. Much of Yi Guan Dao belief and ritual is borrowed from popular religion and Yi Guan Dao members worship all gods.<sup>iii</sup>
61. While secrecy dominates the nature of this religious sect ensuring a diverse range of practices, some common elements can be identified. Practices of the Yi Guan Dao include:
- Temples – temples are located on the top floors of private homes and believers are organised in temple cells of eight to 10 core followers per temple. Temples are organised in districts under the loose leadership of a master. The master presides over initiation ceremonies and guides the activities of the district faithful. He is treated with great respect. Due to the Yi Guan Dao being organised as a secret sect, its members seek converts discretely.<sup>iv</sup>
  - Ceremonies – ceremonies are only open to initiated members. Initiation involves new members being taught the *Three Treasures* which is the core secret of the sect. The Three Treasures are a mantra, a hand position and the symbolic opening of a door in the body so the soul may depart from the proper exit and not from one of the body’s other orifices.<sup>v</sup>
  - Rituals – There are five rituals common to Yi Guan Dao gatherings<sup>vi</sup>:
    1. The Ritual of Saluting and Taking Leave of the Honourable Presence
    2. The Ritual for Presenting Incense
    3. The Ritual for Presenting Offerings
    4. The Ritual for inviting Spirits to the Altar
    5. The Ritual for Transmission of the Way/ The Rite of receiving the Way
  - Prayer/Kowtows – Religious activities include morning and evening prayer sessions but only the most devout carry them out daily. Believers are expected to attend at least on the full and new moon. Yi Guan Dao praying involves very rapid kowtowing in a kneeling position while a cantor on the right announces the names of gods and a cantor on the left counts out the kowtows.<sup>vii</sup>

#### *Treatment of Practitioners in China*

62. No reports of arrests or detention of Yi Guan Dao practitioners by the Chinese authorities since 1995 have been found. The most recent reported instances of Yi Guan Dao being adversely treated in China were the arrests of Yi Guan Dao believers and destruction of Yi Guan Dao temples in Fujian in 1993 and 1994. The Chinese Government does of course have the authority to crackdown on any unauthorised

religious activities and according to one expert (Professor Philip Clart, Department of Religious Studies, University of Missouri-Columbia) writing in 2007, authorities do “crack down” on Yi Guan Dao groups when they are discovered.<sup>viii</sup>

63. Regarding the situation and treatment of Yi Guan Dao practitioners in China, RRT information indicated in 2007, in general, that the religion is:
  - a proscribed religion in the People’s Republic of China, and was radically stamped out by the Communist government in the 1950s.
  - Yiguan Dao groups outside China (principally in Taiwan) try to make converts in the People’s Republic and re-establish the religion there. The province of Fujian is a centre of such activity due to the strong presence of Taiwanese-owned companies and joint ventures in this area.
  - The Chinese authorities do crack down on such cells when they are discovered.
64. The religion remains banned in China: *The Transformation of Yiguan Dao in Taiwan: Adapting to a Changing Religious Economy* by Yunfeng Lu (Lanham: Lexington Books, 2008), p.710.
65. The Department of Foreign Affairs & Trade in its Report 1274, dated 16 May 2011, reported that the post did not have definitive information about how the Chinese Government would assess the children of the Yiguan Dao followers. However, as Yiguan Dao was banned in mainland China in the 1950s and there has been no information to suggest that this ban had been lifted, the post would consider that Chinese authorities would regard Yiguan Dao followers along the same lines as other banned religious sects. Based on the post’s understanding of Chinese laws and local authorities’ behaviour, authorities are likely to seek ways to protect the children in question from what they regard as the harmful effects of Yiguan Dao. Provisions in China’s Law on the Protection of Minors may apply.
66. The post noted that the PRC’s authorities’ treatment of unauthorised religious activities differed depending on the province and city, and it is difficult to assess how Chinese authorities would deal with individual cases of this largely unknown religious sect. The post noted that Yiguan Dao’s origins as a secret religion with an organised structure would raise the suspicion of authorities if Yiguan Dao followers were known to exist in mainland China.

## **FINDINGS AND REASONS**

67. The first and second named applicants traveled to Australia on passports issued by the People’s Republic of China and claim to be nationals of China. Copies of their passports have been provided to the Department and the Tribunal. The Tribunal accepts that the first and second named applicants are nationals of China. The Tribunal has, therefore, assessed their claims against China as their country of nationality.
68. The third named applicant (the applicant baby) was born in Australia in [2010]. The Tribunal accepts, on the basis of the birth certificate which names the applicant and the second named applicant as the parents of the applicant baby, ??????. The Tribunal finds that the third named applicant is not an Australian citizen because neither of his parents was an Australian citizen at the time of his birth. The Tribunal finds, pursuant to Article 5 of the *Nationality Law of China* 1980, that as both her parents are Chinese

nationals, that the applicant baby is also a national of China. Accordingly, the Tribunal has assessed the applicant baby against China as his country of nationality.

69. The applicant claims that he fears persecution by the Chinese government because he is a follower of Yiguan Dao. He also claims that he and his wife and child will be persecuted because the child was born out of wedlock and because they now have a second child in breach of China's one-child policy.
70. When assessing claims made by applicant the Tribunal needs to make findings of fact in relation to those claims. This usually involves an assessment of the credibility of the applicant. When doing so it is important to bear in mind the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence it must proceed to assess the claim on the basis that it might possibly be true: see *MIMA v Rajalingam* (1999) 93 FCR 220. However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out: *Randhawa v Milgea* (1994) 52 FCR 437 at 451; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 and *Kopalapillai v MIMA* (1998) 86 FCR 547.
71. In the present case, the Tribunal formed a positive impression of the applicant's credibility. The Tribunal found the applicant to have given his evidence at the hearing in a clear and straight-forward manner. The Tribunal also notes that the applicant has provided to the Department and the Tribunal a number of detailed accounts of his experiences in China, including during his Department interview, throughout which his claims have remained generally consistent. The Tribunal notes that the applicant's claims regarding Yiguan Dao are generally supported by relevant country information.
72. The Tribunal accepts that the applicant is a genuine and continuing Yiguan Dao practitioner and that the applicant has been formally admitted into the faith. Throughout the course of his evidence the applicant conveyed to the Tribunal a depth of his religious convictions. The applicant's evidence was spontaneous and forthright and responded largely accurately to questioning regarding Yiguan Dao. The Tribunal accepts the applicant's evidence in relation to his Yiguan Dao's beliefs, based on his knowledge, which largely accords with the documentary evidence cited above. The Tribunal also finds that the applicant would remain a member of Yiguan Dao if he were to return to the PRC.
73. On the basis of [Mr E]'s evidence that [Ms C] was baptised [in] December 2009 and that since then she also has been attending the temple and that their child was baptised [in] June 2011, the Tribunal also accepts that they are also followers of Yiguan Dao.
74. The Tribunal also finds that Yiguan Dao is a proscribed religion in the People's Republic of China, and was radically stamped out by the Communist government in the 1950s. The applicant's home province of Fujian is a centre of such activity. The Chinese authorities do crack down on such cells when they are discovered and the religion remains banned in China. The Tribunal further finds that the harm feared by the applicant is for one or more Convention reason, namely his religion.

75. Given that the agent of persecution feared by the applicant is the Chinese government, that there is no part of the PRC to where the applicant can reasonably be expected to relocate safely from the threat of harm feared by him.
76. Overall, the Tribunal finds that the persecution which the applicants fear clearly involves 'serious harm' as required by section 91R(1)(b) of the Migration Act in that it involves a threat to their lives or liberty, significant physical harassment, and physical ill-treatment.
77. The Tribunal finds that the applicants' religion, the Yiguan Dao religion, is the essential and significant reason for the persecution which they fear, as required by section 91R(1)(a) of the Act. Having come to that view it was unnecessary to consider the claim in relation to the child born out of wedlock and now a second child in breach of China's one-child policy.
78. The Tribunal finds that the persecution which the applicants fear involves systematic and discriminatory conduct, as required by section 91R(1)(c), in that it is deliberate or intentional and involves their selective harassment for a Convention reason.
79. The Tribunal has considered s.91R(3) of the Act and it is satisfied that the applicants engaged in their Yiguan Dao conduct in Australia otherwise than for the purpose of strengthening his claim to be a refugee. The Tribunal finds that the applicants engaged in Yiguan Dao activities in Australia because they are genuine Yiguan Dao practitioners.
80. The Tribunal is not satisfied that the applicants have a legally enforceable right to enter and reside in any country other than his country of nationality, the PRC. The Tribunal therefore finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act.
81. Considering all of the claims of the applicants related to their Yiguan Dao practice, both specific and general, the Tribunal is satisfied that the applicants face a real chance of persecution should they return to China now, or in the reasonably foreseeable future.
82. Accordingly, the Tribunal is satisfied that the applicants are refugees.

## **CONCLUSIONS**

83. The Tribunal is satisfied that the applicants are persons to whom Australia has protection obligations. Therefore the applicants satisfy the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

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



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<sup>i</sup> Bosco, J. 1994, 'Yiguan Dao: "Heterodoxy" and Popular Religion in Taiwan' in Rubenstein, Murray R, 1994, *The Other Taiwan: 1945 to the present*, East Gate, NY, p.424

<sup>ii</sup> Clart, P. (n.d.), 'Way of Former Heaven (Hsien-Tien Tao) sects', Overview of World Religions, PHILTAR (Division of Religion and Philosophy, University of Cumbria)

<sup>iii</sup> Bosco, J. 1994, 'Yiguan Dao: "Heterodoxy" and Popular Religion in Taiwan' in Rubenstein, Murray R, 1994, *The Other Taiwan: 1945 to the present*, East Gate, NY, p.433

<sup>iv</sup> Bosco, J. 1994, 'Yiguan Dao: "Heterodoxy" and Popular Religion in Taiwan' in Rubenstein, Murray R, 1994, *The Other Taiwan: 1945 to the present*, East Gate, NY, p.425

<sup>v</sup> Bosco, J. 1994, 'Yiguan Dao: "Heterodoxy" and Popular Religion in Taiwan' in Rubenstein, Murray R, 1994, *The Other Taiwan: 1945 to the present*, East Gate, NY, pp.424-425

<sup>vi</sup> Jordan, D.K. & Overmayer, D.L. 1986 'The Flying Phoenix: Aspects of Chinese Sectarianism in Taiwan' Princeton University Press p. 227

<sup>vii</sup> Bosco, J. 1994, 'Yiguan Dao: "Heterodoxy" and Popular Religion in Taiwan' in Rubenstein, Murray R, 1994, *The Other Taiwan: 1945 to the present*, East Gate, NY, p.435

<sup>viii</sup> Clart, P. 2007, Email to Research & Information 'Re: Yiguan Dao in China', 13 October)