

1501250 (Refugee) [2016] AATA 3323 (16 February 2016)

**DECISION RECORD**

**DIVISION:** Migration & Refugee Division  
**CASE NUMBER:** 1501250  
**COUNTRY OF REFERENCE:** China  
**MEMBER:** Tony Caravella  
**DATE:** 16 February 2016  
**PLACE OF DECISION:** Perth  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 16 February 2016 at 4:59pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## 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 applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of China, applied for the visa [in] April 2014 and the delegate refused to grant the visa [in] January 2015.

### Background, protection claims, and the delegate's decision

3. In his written protection visa application submitted to the Department [in] April 2014, the applicant declares he left China to avoid the harm by a powerful and corrupt neighbour. He writes that he has been physically harmed by the neighbour who has encroached the applicant's land. He claims that he fears harm by his neighbours and his neighbours' associates, and he fears being unable to claim the right of the land seized by his neighbours. In reply to the question as to who he thinks may harm or mistreat him if he returns to China, the applicant declares he fears his "powerful neighbours and their associates" will harm or mistreat him.
4. In reply to the question asking him why he thinks he will be harmed if he returns to the PRC, the applicant writes that the neighbours encroached his land and therefore they took the matter to court and obtained a judgement in their favour. He declares the judgement of the court ordered that the neighbours demolish a brick fence, however the neighbours have strong political connections with government officials. He declares that with the government officials' support, the neighbours have ignored the court order and never returned the land to him. He declares that before coming to Australia, he pulled down part of the fence and fought and was injured. He claims "My neighbours and their associates stormed my house and extorted us." He claims if he were returned to China he will pursue his rights to claim the land taken by the neighbours and in so doing he will be harmed.
5. In respect of whether the authorities in China can and will protect him, the applicant writes that although there is a court order against the neighbour, they are still unable to have the encroached land back as the authorities have been in support of the perpetrators. He concludes by writing that he will not be protected by the authorities if he returns to China.
6. [In] January 2015, the delegate refused the applicant's protection application. In the delegate's decision record, the delegate refers to the applicant's original protection visa application being refused [in] October 2008. The delegate also found the applicant unsuccessfully sought review of that refusal at the Refugee Review Tribunal (RRT) prior to the implementation of the complementary protection criteria in the Act on 24 March 2012. The delegate found that on 3 July 2013, the Full Federal Court handed down its judgement in *SZGIZ v Minister for Immigration and Citizenship* (SYG2530/2012), ("SZGIZ") finding that section 48A does not prevent a person from making another protection visa application on 'complementary protection' grounds where the first application was made and refused before the commencement of the complementary protection provisions on 24 March 2012. The delegate therefore found that in light of the decision in *SZGIZ*, section 48A of the Act does not apply to prevent the applicant from lodging a valid subsequent protection visa application on the basis of complementary protection claims.

7. As to the applicant's migration history, the delegate found him to be a [age]-year-old married male, PRC National, Catholic, born in Fuqing, Fujian province, People's Republic of China. The delegate found the applicant arrived in Australia [in] July 2008 as the holder of a [temporary] visa. That visa ceased [in] July 2008. The applicant lodged his initial application for a protection visa [in] July 2008. That application was refused [in] October 2008, and the delegate's refusal was then affirmed by the Refugee Review Tribunal (RRT) on 19 January 2009. The delegate's decision record also refers to the applicant being granted a Bridging Visa C [in] July 2008 until [February] 2009. The delegate found the applicant was unlawfully in Australia from [February] 2009 until [April] 2014 when he was granted a further bridging visa.
8. In his protection claims lodged [in] January 2008, the applicant claims his mother was a Christian and refers to it being illegal to hold underground church services in China. The applicant claimed he wanted to go to other countries so he could have religious freedom and claims he therefore went to [Country 1] [in] September 2006, but this was not successful because the local people in [Country 1] did not accept Christianity, and the applicant was not used to the food, weather, or language there. The applicant then claims he decided to travel to [Country 2] where he worked as a [occupation]. Several months after going to [Country 2] the applicant received news from China that his mother had passed away and he returned home to be told that his mother had been beaten to death by local police when she was holding a gathering at home with the applicant's [siblings]. The applicant claimed he could no longer tolerate living in a country without any religious freedom or human rights, and therefore departed China for Australia in July 2008. He claims to have attended the [name] Church in [Australia]. He claimed to fear persecution from the Chinese authorities on account of his Christian beliefs and practices. After the applicant failed to attend the scheduled protection interview with the delegate [in] September 2008, the delegate proceeded to consider all the evidence available at that time and was not satisfied the applicant had a well founded fear of persecution for any of the Convention reasons. The applicant applied to the RRT for a review of that decision and the RRT found that, amongst other things, the applicant was not a witness of truth. The RRT found, amongst other things, that he was prepared to embellish, if not entirely fabricate, material claims, where he believed it would enhance his prospects of being determined to invoke refugee protection obligations in Australia. The RRT did not accept that the applicant had a genuine fear of persecution in China, and pursuant to s.91R(3) it also disregarded the applicant's conduct of attending a church in [Australia] as it found that conduct was engaged in solely for the purpose of strengthening his protection claims. The applicant also claimed before the RRT that he was fined RMB 10,000 in China because his wife had breached the birth control policy of that country. However, the RRT found this incident occurred some 13 years prior to the Tribunal hearing, and after having considered all the evidence was not satisfied that there was a real chance that the applicant would be subject to any harm in China as a result of this, or as a result of any other claim he made.
9. In respect of the protection claims made by the applicant and submitted to the Department on [date] April 2014, the delegate summarises the applicant's reason for leaving China as being to avoid harm from powerful and corrupt neighbours who have seized part of the applicant's land. The applicant also claimed before the delegate that he had been physically harmed by his neighbours and is in fear of the neighbours and their associates. After the neighbours encroached on his land, the applicant took the matter to court and received a judgement in his favour which was a court order to demolish a brick wall that had been built on the applicant's land. However, the applicant claims the neighbours had strong political connections and ignored the court order. Prior to departing China for Australia, the applicant pulled down part of the brick wall and then fought with the neighbours. As a result of this fight, the neighbours and their associates subsequently stormed the applicant's house and 'extorted him'. At the protection visa

interview held [in] December 2014, the applicant was asked if his previous protection claims regarding his Christian religion were still part of his current claims and the applicant confirmed that his religion was still part of his current claims and religion was one of the reasons he could not return to China.

10. In the delegate's decision record (dated [in] January 2015) for the decision under review. The delegate first considers the applicant's claim in relation to being a Christian and sets out the questions and discussion that occurred in the protection visa interview. The delegate concludes by finding the applicant's present claims to be entirely inconsistent with the previous claims. Apart from this, the delegate found the applicant's claims to be inconsistent in various other respects, and lacking in plausibility and credibility. The delegate also notes that at the protection visa interview the applicant had said that he does not have a fear of returning to China based on his religion. The delegate ultimately rejects the applicant's claim of having followed the Catholic religion, or that he travelled to [Country 1] and [Country 2] to freely practice his religious beliefs, or that his mother was killed in the circumstances described, or that the applicant is a credible witness in relation to his claims of being a follower of the Catholic religion.
11. In respect of his land dispute claim, the delegate accepted that the applicant had a land dispute with his neighbour. However having found the applicant not to be a witness of truth, the delegate did not accept the applicant's claim in relation to any ongoing problems with his neighbour following this dispute. The delegate also refers to having considered such evidence as the applicant not departing the PRC until some six years after the court judgement in respect of the dispute with his neighbour.

#### **Application for review**

12. On 28 January 2015, the Refugee Review Tribunal received an application from the applicant for the review of the delegate's latest (ie [date] January 2015) decision to refuse the protection visa application.
13. *The Tribunals Amalgamation Act* (Cth) 2015 took effect on 1 July 2015. Transitional provisions of that Act had the effect that an application for review to the Refugee Review Tribunal (now abolished) is taken to be an application to the Administrative Appeals Tribunal.

#### **Tribunal hearing**

14. The applicant appeared before the Tribunal on 12 November 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
15. At the opening of the hearing, the applicant said that his migration agent would not be attending the hearing. He also said that he was comfortable to proceed with the hearing without his representative in attendance.
16. The Tribunal explained to the applicant that he had applied for a protection visa in July 2008, that it had been refused [in] October 2008, and that he had applied to the Refugee Review Tribunal which subsequently affirmed the decision. The Tribunal explained that there had been a change in the law brought about by the Federal Court's decision in *SZGIZ*, the consequence of which permitted him to apply and to have his claims considered under the complementary protection provisions of the Act.
17. The applicant confirmed his date of birth and that he was born in Fuqing, Fujian province. He confirmed that he holds a passport for the People's Republic of China and

that it expires in 2024. He confirmed that he recently renewed his passport without any apparent difficulty while he has been in Australia.

18. The Tribunal asked the applicant what he has been doing in Australia since the initial refusal of his protection visa, and the decision by the Refugee Review Tribunal to affirm the delegate's refusal decision. The applicant replied that sometimes he helps people doing [work]. The Tribunal asked the applicant if he has work rights to be doing this work at the present time. He said that he does not. The Tribunal asked him to indicate when he was last employed. He asked "do you mean at the moment?" The Tribunal repeated the question. He answered "a few weeks ago". He then replied that he could not remember exactly but that a few weeks ago he did some work. The Tribunal asked the applicant whether he has worked at all in the last 12 months and for an estimate of how many days he worked. He said on average he works one or two days a week. The Tribunal put it to the applicant that condition 8101 appears to apply to his bridging visa since [April] 2014 but that according to his evidence he had been working in breach of that condition. He said he wanted to get a work permit but did not know how to get it. He then said his [agent] had not arranged a work permit for him. The Tribunal reminded the applicant that it is his responsibility to comply with the visa conditions, not his agent's.
19. The Tribunal referred the applicant to the delegate's decision record which indicates he was an unlawful noncitizen from February 2009 until April 2014, that is a period of about five years. It asked the applicant if there was anything he wished to say about this. He replied the reason for this period of unlawfulness is that he could not go back to China. When asked why he could not go back to China, he said that his neighbours told him that they would hunt him down and beat him up. The Tribunal invited the applicant to provide more detail. He then said his neighbour built a fence on his property and the fence was not acceptable by law. He said this happened in 2002 and that at that time it was illegal to build that fence, but the neighbour had connections. He said his father sued his neighbour for building the fence. The Tribunal asked the applicant who owned the property, to which he replied that the property was in his father's name but his grandfather had built the house on the particular land. He confirmed that his father's name is [name], and that his father's name is also recorded as the plaintiff in the copy of a civil judgement issued by the Fuqing Municipal People's Court and which was submitted to the Tribunal by the applicant. The Tribunal asked, if the property was owned by his father, then why did the neighbour seek to harm the applicant. He said that the neighbour did not comply with the court judgement because he did not demolish the wall. The applicant then claimed that he actually began demolishing the wall himself when the neighbour refused to comply with the civil judgement. He said that after he had taken away some of the bricks, a fight broke out and his neighbour got some people after the applicant and that is why he is now hiding in Australia.
20. The applicant told the Tribunal that his neighbour is well connected to the "underbelly world", and to the police. He said his neighbour is [name]. Noticing that this is the same as the applicant's father's name, the Tribunal asked the applicant if the neighbour is related to his family. The applicant replied that in his village most people have the same surname. The Tribunal repeated the question asking the applicant whether the neighbour is related by family. The applicant then said he might be related to his grandfather's father.
21. The Tribunal asked the applicant what he fears would happen if he returns to the PRC and to his home. He said his neighbour will definitely break his legs. The applicant told the Tribunal that after he had tried to remove some of the fence, the neighbour gathered a lot of people to beat him up. He said the neighbour had told his father that he would break his legs.

22. The Tribunal asked the applicant if there was any other reason why he feared returning to the PRC. He said that apart from the fear of harm from his neighbour, he was also told that the police were after him. He said he does not know why the police are after him. He said they did have a fight but he does not know why the police wanted him and why the police do not want his neighbour. According to the applicant, the police went to his house late at night on two occasions. He said he managed to evade the police and did not dare stay at his home. He said he stayed at his [sibling]'s place which was 10 km away from his home in the next [town]. He said he stayed with his [sibling] for a few months but then he went to other places to work because he could not stay in one place without working.
23. The Tribunal expressed its concern to the applicant over his claim that this fence dispute with his neighbour occurred, according to him, in 2002, but he did not leave PRC until 2008. It put to the applicant that if there was a real chance of serious harm at the hands of his neighbour, it would anticipate the applicant would have either been seriously harmed, or that he would have left well before 2008 out of fear of serious harm. The applicant said that his father sent him to [Country 1] and then to [Country 2]. He said that he went to [Country 1] around 2005 and [Country 2] in around 2007.
24. The Tribunal referred the applicant to his first protection visa application where he claimed fearing harm on religious grounds and that in that first application there was no reference at all to a fence dispute with his neighbour. Further, there was no reference to him fearing harm as a result of a property or fence dispute in China. The Tribunal put it to the applicant that it might conclude that the omission of that property dispute claim in his first application seriously weakened the credibility of his present claims. The applicant responded by saying that what happened was his lawyer told him that he could only use one reason, or ground, in his protection application. He said that back then, the neighbour was annoyed and the police came over to his house. He said he explained all this to his lawyer, but his lawyer told him that he had to pick one reason to put into his protection application, that is, either the claim of fear of harm for reasons of religion, or the fence dispute claim. The applicant said that both things occurred, that is, he claimed he is at risk of harm for reasons of his religion and because of the fence dispute. The Tribunal expressed grave doubts that the applicant's lawyer would have told him to choose only one claim. He replied that he does not know why his lawyer did that, then he said maybe it was because including both claims meant there would be too much writing for the lawyer. He said that the fence dispute happened first, then there was the problem with the evening meetings of his church and the police targeting him for that. He repeated that he was told to pick only one ground for his application. He said his previous lawyer was a Mr [name] who is based in [city].
25. The Tribunal referred to the delegate's decision record where the delegate asked the applicant at the protection visa interview held in December 2014 if he would be harmed because of religion, and that the applicant had said he would not be harmed because of his religion. The Tribunal again put it to the applicant that this inconsistency raises very serious questions about the credibility of his evidence and that an important function of the Tribunal in reviewing the delegate's decision is to make a determination of the credibility of the evidence. It also put to him that the evidence indicating he had been an unlawful noncitizen for a substantial period of time, the evidence of working without permission in Australia, and the inconsistencies discussed at the hearing, suggests he is not a reliable or credible witness. It put to him, the Tribunal may not believe either his former claims, or his present ones, or any of them, given his apparent lack of credibility. The applicant responded by saying he would not dare return to China. He said he has now been in Australia for a few years and he likes it here and he is fearful and he wants to avoid any trouble by not returning to China.

26. The Tribunal asked the applicant whether he had anything else to say about the two claims he was making. He said that the police came after him after the religious problem and after the property dispute. He then said, he did not refer to both of these because he thought it would look odd and that the Tribunal would not believe him.
27. The Tribunal again referred the applicant to the delegate's decision record and invited him to comment on why he told the delegate, on two occasions according to the decision record, that he would not be harmed going back to China for reasons of being a Catholic. The applicant replied that he does not remember saying that, and added that he is a Christian and not a Catholic. He added that in China if the police want to arrest a person then they will. When asked why the police would want to arrest him, he said the police were after him because of the fence dispute, and because of the house church, and that because maybe they were too noisy when conducting their church celebrations.
28. After a brief adjournment, the hearing resumed with the Tribunal inviting the applicant to comment on his earlier statement that he is Christian but not a Catholic. To this, the applicant responded that Catholics believe in Maria who is Jesus's mother, but Christians believe in Jesus. He said, it is not that they do not believe in Jesus's mother, but that everyone has their own religion and he said he does not know how to say it.
29. The Tribunal asked the applicant whether he attended church when he went to [Country 1] and [Country 2]. He replied that in [Country 1], he did not like it there and so he left after staying only a short time. He said in respect of [Country 2], he did not know the language there, so he could not go to church while there. He said he remained in [Country 2] for 10 months during which time a friend offered him a lift to church. He said he was taken to church on one occasion. The Tribunal put it to the applicant that he had told the delegate that he had been to church on two or three occasions in [Country 2] and invited him to respond. He replied that he had been promised to be taken to church more often, but his friend did not take him. He said that the person who took him to church is a nonbeliever, but he had a car and that is why he took him to church.
30. The Tribunal asked the applicant why he returned to China from [Country 2] if he continued to fear harm in China. He said his mother died so he had to go back. The Tribunal put it to him that it might not believe he had a genuine fear if he returned to China even though his mother had passed away. It asked the applicant how his mother died. He said it was because of the house church and the police would go around to her house. She said that on one such occasion, she was knocked down by the police and because of her age, she passed away. He added that she passed away for a number of reasons. He went on to say that in China, death is regarded as a major thing to happen in a family and so he returned at that time. He said he considered that because he did not commit any crime the police could not arrest him.
31. The Tribunal referred the applicant to the apparent inconsistency which was identified by the Refugee Review Tribunal's decision of 19 January 2009 where it found the applicant had claimed that his [age]-year-old mother was beaten to death for reasons of her religion. It put to the applicant that at the hearing before this Tribunal, as presently constituted, he had said his mother had been knocked down once but died of age and other factors. It put it to the applicant, that the Tribunal might find such an inconsistency, coupled with all the other inconsistencies in his evidence, may lead it to doubt the credibility of his evidence and the credibility of his claims. The applicant responded that there had been an altercation and the police caused his mother's death. The Tribunal put it to the applicant that it appeared he is giving two quite different versions and that it would decide which, if any, it might be satisfied is true. The applicant concluded that in his view if the police did not come to bother his mother, then she would still be alive.

32. The Tribunal invited the applicant to comment on anything contained in the delegate's decision record which he considered he would like to comment. The applicant claimed that the delegate's decision record may not have been sent to him, or that it may not have been delivered. In any event, he suggested that he did not receive it. The Tribunal confirmed the applicant's address and that he had been living there at the time of the delegate's decision. The Tribunal also checked the Department's records and informed the applicant it appears that the notification and decision was in fact sent to his address and had not been returned as unclaimed, or as undeliverable. The applicant then said that he believed he did not receive a letter, or that maybe someone else in his house had taken it. The Tribunal advised the applicant that notwithstanding it appeared the decision record had in fact been correctly dispatched to him, it would give him one week after the date of the hearing to provide any further written comment on the delegate's decision record. The Tribunal also handed the applicant a photocopy of the delegate's relevant decision record at the close of the hearing.

33. The Tribunal referred to the English translation of the *Statement of Civil Judgement* which was submitted by the applicant. The applicant confirmed that he knew the document. The Tribunal asked what mediation happened as part of this process since a reference is made in that document to mediation having been conducted in respect to the fence dispute. The applicant said that the mediation meeting was held, and his father was offered money instead of removal of the wall. He said his father refused to accept the money.

34. On 18 November 2015, the Tribunal received an email from the applicant. Relevantly, it states:

My profile is true, for Christianity I got hope and disappointment as well, I think only hard work make money to Chang (sic) my life, so there is no focus on Christianity.

Land dispute is true, I don't know how to say you can believe that, you can check the process of happening and names. I am very disappointed to Chinese society, so I want to leave China. I have fled China after 2002. I don't want to leave Australia which have human rights. there is 8 years I can't go back to China, how many 8 years can I have in the life. stay in Australia is the only thing I want. I will definitely contribute to the country.

## **RELEVANT LAW**

35. The relevant applicable law in the review of this matter is set out in summary form at Appendix A of this decision record.

## **CONSIDERATION OF CLAIMS AND EVIDENCE**

36. The issue in this case is whether the applicant meets the criteria for the grant of a protection visa pursuant to s.36(2)(aa) of the Act. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

### **Country of reference and third country protection**

37. Having regard to the documentary evidence submitted by the applicant to the Department, including a copy of a passport issued in the applicant's name, and issued by the People's Republic of China (PRC), the Tribunal finds the applicant is a national and citizen of the PRC.

38. Based on its finding that the applicant is a national of the PRC, it finds that the PRC is the country of reference for considering refugee protection claims pursuant to s.36(2)(a) of the Act, and the PRC is also the 'receiving country' for the purposes of



determining the applicant's complementary protection claims pursuant to s.36(2)(aa) of the Act.

39. There is no evidence before the Tribunal to suggest that the applicant has a right to enter and reside, whether temporarily or permanently, in any country other than the PRC. The applicant is therefore not precluded from Australia's protection by the operation of s.36(3) of the Act.

### Credibility concerns

40. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
41. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the applicant's claims. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.
42. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, 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 established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).
43. After reviewing all of the evidence before it in this case, the Tribunal formed the view that the applicant is an unreliable witness. It formed the view that he has fabricated part of his evidence and claims, and exaggerated critical aspects of his claims and his evidence for the purposes of bolstering his protection visa application. It finds, as was put to him at the hearing, that very significant aspects of his evidence were vague and/or inconsistent, while other parts of it were implausible, as will be explained in the following part of this decision record. It also found the applicant appeared evasive on important aspects of his sworn oral evidence, including for example when asked about his employment in Australia. The Tribunal formed the view that the applicant's credibility as a witness is unreliable when regard is had to his apparent disregard of his obligations under the Australian migration law, including the substantial period of time he was an unlawful non-citizen, and on the basis of his working while not having work rights to do so. The Tribunal considered the applicant's explanation of why he was working without work rights, where he claimed he asked his agent to get him permission to work.

However, the Tribunal is not persuaded by this claim. In any event, in the absence of any evidence that his agent was in any way responsible for failing to acquire a work permit for the applicant, the Tribunal rejects the proposition that the applicant can shift the responsibility for his non-compliance onto his agent. For all these reasons, the Tribunal found the applicant's evidence to be most unreliable.

### Assessment of claims

44. The Tribunal extracts the applicant's core complementary protection claims as being the claim that he fears significant harm at the hands of the Chinese authorities on the basis of his religion, and his claim to fear significant harm for reasons of a property dispute with a neighbour.
45. As put to the applicant at the hearing, the effect of the *SZG/Z* case permits the applicant to apply and to have his protection claims considered under the complementary protection provisions of the Act. These are considered in the following paragraphs.
46. Based on the evidence before it, the Tribunal accepts the applicant was born in Fuqing, Fujian province in the PRC. It also accepts that he holds a passport for the People's Republic of China and that it expires in 2024. It accepts his evidence that he renewed his passport without any apparent difficulty while he has been in Australia.

### Assessment of complementary protection claims under s.36(2)(aa)

47. In accordance with s.36(2)(aa) of the Act a person may meet the criterion for a Protection visa even if they do not meet the criteria for protection under the refugee provision in s.36(2)(a) of the Migration Act. Subsection 36(2)(aa) provides that the Minister, or this Tribunal upon review, must be satisfied that Australia has protection obligations to a noncitizen in Australia because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, PRC in this case, there is a real risk that the non-citizen (the applicant) will suffer 'significant harm'.
48. Subsection 36(2A) of the Migration Act defines significant harm as:
  - (a) the non-citizen will be arbitrarily deprived of his or her life; or
  - (b) the death penalty will be carried out on the non-citizen; or
  - (c) the non-citizen will be subjected to torture; or
  - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
  - (e) the non-citizen will be subjected to degrading treatment or punishment.
49. Subsection 36(2)(aa) of the Act provides that the relevant risk threshold in assessing complementary protection is that there are 'substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant's] removal, there is a real risk that [the applicant] will suffer significant harm if returned to the receiving country.' In *MIAC v SZQRB* [2013] FCAFC 33 (20 March 2013), Lander and Gordon JJ, stated (in part): In our opinion, the [real risk] test is as for s.36(2)(a) [of the Act] ... is there a real chance that SZQRB will suffer significant harm... were he to return to [the receiving country]. [246]
50. The applicant told the Tribunal that he fears he will be harmed if he returns to PRC because he fears he will be harmed by his neighbour, or his neighbour's associates due to the property/fence dispute. He also claims he fears he will be harmed for reasons of being a Christian.

### **Risk of significant harm for reasons of his religion**

51. In respect of his claims to fear harm for reasons of his religion, the Tribunal considered the inconsistency of the applicant's claims in this respect and finds that inconsistency seriously undermines his overall claim. For example, and as put to the applicant at the hearing, when the delegate asked the applicant at the protection visa interview in December 2014 if he would be harmed because of religion, the applicant told the delegate that he would not be harmed because of his religion. At the hearing before this Tribunal, the applicant responded by saying he could not recall saying that to the delegate. Further, he responded that he would not dare return to China and that he has now been in Australia for a few years and he likes it here. The Tribunal is not persuaded by these arguments or submissions, having regard to all of the evidence in this case. The Tribunal accepts the applicant might not recall saying to the delegate that he did not have a fear of harm for reasons of his religion, however it finds this is not determinative of the issue. In the circumstances of this case, and having regard to the doubtful credibility of the applicant, the Tribunal considers that he in fact did indicate to the delegate at that particular protection visa interview that he did not hold a fear of serious or significant harm for reasons his religion if he returned to China.
52. The Tribunal also considered the inconsistency in the applicant's claims where he omitted to refer at all to a fear of harm for reasons of religion in his most recent claim for protection. That is, in the claim which the Tribunal presently reviews. It finds this omission to be significant and it considers the applicant would have included reference to religious harm in this most recent claim had he a genuine fear of it. The Tribunal considered the applicant's claim that he was advised to include only one Convention ground or only one claim in his protection visa application. The applicant asked the Tribunal to rely on his sworn oral evidence in this matter. However, in light of the negative credibility assessment which the Tribunal has made of the applicant's evidence in this case, and having regard to the implausibility of the proposition, it rejects that he was in fact told by his lawyer or agent that he could only put up one claim or ground. In other words, the Tribunal does not believe the applicant's claim that he was told that he could only put up one ground for protection. Nor does it believe that because of that, he chose the religion ground in his original claim, and then switched and chose the property dispute in his second application for protection. In arriving at this view, the Tribunal considered all the evidence, including the vagueness and inconsistency of important parts of his evidence.
53. In respect of his claim to fear significant harm for reasons of his religion, the Tribunal also considered the relevant country information published by the Department of Foreign Affairs and Trade (DFAT)<sup>1</sup> where it explains that the conditions governing the establishment of religious bodies and religious sites, the publication of religious material, and the conduct of religious education and personnel are outlined in the Regulations on Religious Affairs (RRA) which came into effect in 2005. At the national level, the CCP's United Front Work Department, State Administration for Religious Affairs (SARA), and the Ministry of Civil Affairs provide policy guidance and supervision on the implementation of the regulations. Local authorities, including provincial religious affairs bureaux, have significant discretion in implementing the regulations.
54. The same DFAT report also states:

The Chinese government limits religious practice to five religions (Buddhism, Taoism, Islam, Catholicism and Protestantism) and members are required to register with the government's

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<sup>1</sup> DFAT Thematic Report – Unregistered religious organisations and other groups in the People's Republic of China (3 March 2015)

Patriotic Associations mentioned above. These organisations are overseen by SARA and are required to adhere to the principles of independence and self-governance from foreign associations.

55. The same DFAT report states:

2.11 Broadly speaking, DFAT assesses religion in China can be practised within state-sanctioned boundaries, as long as such practices do not challenge the interests or authority of the Chinese Government. Religious adherents are therefore subject to a range of restrictions that vary in extent and intensity according to local conditions. Given this, it is difficult to generalise about religious practice in China but basic assumptions can be made according to whether people exercise their faith in registered or unregistered institutions, whether they practice openly or privately, and whether or not religious expression is perceived by the government to be closely tied to broader ethnic, political or security policies.

56. In respect of unregistered Christian groups in China, DFAT reports:

3.1 SARA permits friends and family to hold small, informal prayer meetings without official registration. This, combined with the controlled nature of religious worship amongst registered Christian institutions, has led to the proliferation of a sizeable unregistered Christian community in both rural and urban China. Known as "house" or "family" churches (for Protestant organisations), and "underground" churches (for Catholic organisations) these bodies are private religious forums that adherents create in their own homes or other places of worship.

3.2 House churches can be found across China and vary in size and religious practice. Gatherings of 30 to 40 people are generally tolerated, although DFAT is aware of cases where gatherings of fewer people have attracted negative attention by authorities. On the other hand, there are also some house church congregations that number in the thousands and are able to operate with little to no interference from local authorities. A number of house churches are known to restrict their own size and activities so as to avoid official attention.

3.3 Members of both unregistered and registered religious organisations can face adverse attention by authorities when: they are perceived to have links with foreign influences (either through personnel or funding); are critical of the government or advocate for issues considered political or sensitive by the government; belong to large and potentially influential networks; are engaged in other criminal activities; or are operating in provinces or local settings where corruption is prevalent, and the potential for extortion and running afoul of local authorities' favour, is potentially higher. Occasionally, anti-crime campaigns with quotas for a certain number of arrests can also prompt local officials to crack down on Christian activities that had previously been tolerated.

57. The Tribunal considered the applicant's claim where he gave evidence to the Tribunal that he is Christian and not a Catholic. The Tribunal notes that in the delegate's decision record, a copy of which was included by the applicant in his application for review, the delegate states the applicant claimed at the protection visa interview he feared harm for reasons of his Catholic religion. The delegate remarked on this as being considerably different to the applicant's claims made in 2008 and 2009 where he described his religion as 'Christian'. When this was discussed at the hearing before this Tribunal, the applicant said he is Christian but not a Catholic. He elaborated, quite unsatisfactorily in the Tribunal's assessment, that Catholics believe in Maria who is Jesus's mother, but Christians believe in Jesus. He then said, it is not that they do not believe in Jesus's mother, but that everyone has their own religion and he said he does not know how to say it. On this evidence, the Tribunal notes the applicant appears to now resume his original claim, that is he fears significant harm for reason of following a Christian religion in the PRC.

58. Having regard to the changing evidence on the question of what religion he follows, and to his confused and vague explanation of the distinction he sought to make between Christianity and Catholicism, and to the evidence overall, coupled with its assessment of his unreliability as a witness, the Tribunal does not accept the applicant is a practising Christian, or a practising Catholic. Further, it does not accept that he would practise either such as to attract the attention of anyone with the intention of harming the applicant should he return to the PRC.
59. The Tribunal considered the applicant's claim that his mother's death was caused as a result of her mistreatment at the hands of the police in PRC. The Tribunal put to him at the hearing that he had previously claimed, before the Refugee Review Tribunal, that his [age]-year-old mother was beaten to death for reasons of her religion. However, before this Tribunal, that is, the AAT, he claimed she had been knocked down once but she died of age and other factors. When this inconsistency was put to the applicant, he responded by saying that there had been an altercation and the police caused his mother's death and that if the police did not bother his mother, then she would still be alive. The Tribunal finds the applicant's evidence in respect of his mother's death to be unreliable. It is not satisfied that her death is attributable to her religious beliefs, or to mistreatment at the hands of the Chinese authorities. It considers the applicant has sought to embellish this aspect of his claim to strengthen his own protection claim.
60. Having regard to the above country information, the Tribunal accepts that the practice of religion in the PRC is more constrained and limited than what it is in other countries, including Australia. However, having regard to the evidence before it in this case, the Tribunal is not satisfied that he is a practising Catholic or Christian, and therefore finds there is not a real risk of significant harm for reasons of the applicant's religion if he returns to PRC. Further, and based on the evidence before it, the Tribunal does not accept his claim that in China if the police want to arrest him they will simply arrest him without any reason. Having regard to the evidence before it, the Tribunal finds no reason why the police would want to arrest him if he returns to PRC on the basis of his claimed religious beliefs or activities, or for any other reason. On the evidence he has submitted, the Tribunal also does not accept that the police want to arrest him because his house church service was too noisy, and finds this to be a concocted claim without basis.
61. Having regard to these considerations, and to all the evidence the Tribunal does not accept the applicant is a practising Christian, or a practising Catholic, or that he would practice in a religion which might attract the adverse attention of the authorities in PRC. It makes this finding based on all of the evidence, but in particular on the Tribunal's assessment of the unreliability of the applicant as a witness, and on the evidence of his apparent willingness to abandon his religion claim, in favour of his property dispute claim, when he perceived such a change of claim might possibly advance his prospects of securing a protection visa.
62. Nor does the Tribunal accept as truthful the applicant's claim that the police in PRC came after him after the religious problem and after the property dispute. It rejects his claim that he did not refer to both of these in his subsequent claims before the Tribunal on the basis he thought they would "look odd".

***Risk of significant harm for reasons of the fence dispute***

63. The essence of this claim is that the applicant's neighbour will hunt him down in PRC because of the fence dispute. He claims his neighbour built this and the dispute

occurred in 2002 and that there was litigation and a judgement was won in his father's favour. The Tribunal accepts that the court judgement ordered the applicant's neighbour to demolish the wall, however, the applicant claimed the offending neighbour refused to demolish the wall. This led the applicant to take matters into his own hands and he began demolishing part of the wall himself, only to be set upon and beaten by his neighbours and his associates.

64. The Tribunal is unable to positively dismiss the existence or occurrence of the property dispute and proceeds on the basis that it occurred in 2002. This is supported by the *Statement of Civil Judgement* which the Tribunal is willing to accept reflects the judgement of the relevant court. Further it accepts the applicant may have travelled to [Country 1] and [Country 2] as claimed, however, it finds there was still very ample opportunity for the neighbour, or the neighbour's associates, to inflict serious harm on the applicant from 2002 until the applicant travelled to Australia [in] July 2008, if the neighbour, or his associates, had intended to seriously harm him. That is, even after making allowance for his absences in [Country 2] and [Country 1], the applicant was still either living with his parents in the house neighbouring that of his neighbour, or living with his [sibling], at a place that was only 10 km away, for a significant period of time. The applicant claims that he was set upon and beaten by his neighbour, yet he continued to live next door, or in relatively close proximity. The Tribunal does not accept the applicant was in fact seriously harmed by his neighbour, or his neighbour's associates and also rejects his claim that he was 'extorted'.
65. The Tribunal finds the omission of the reference to a property or fence dispute of any kind in his previous claims for protection before the delegate, and before the RRT, seriously undermines the credibility of his claim to have grave fears for his safety for reasons of the property dispute. It considers that the applicant would have articulated this claim either before the delegate, or at least to the RRT, had he in fact a genuine fear of harm. However, he did not. The applicant presented no credible evidence that circumstances had changed in such a way that would have now rekindled the dispute such that his neighbour would wish to seriously harm the applicant now or in the reasonably foreseeable future. When this omission of reference to the fence dispute was put to the applicant at the hearing, his response was to blame his previous advisor who he claimed told him that he must limit his claim to one ground only. Indeed, the applicant declared at one point in the hearing, words to the effect that perhaps his lawyer found having more than one ground meant it was too much writing for the lawyer. The Tribunal rejects this proposition is being quite implausible and a concoction manifested by the applicant to shore up his undermined claims.
66. The Tribunal considered the applicant's claim when asked at the hearing whether there was any other reason why he did not want to return to the PRC, and said he was told the police were after him. He went on to claim that he does not know why the police are after him, but that they went to his house on two occasions late at night and this required the applicant to take up residence for a few months at his [sibling]'s place which was 10 km away from his home in the next town. The Tribunal considered all the evidence, and finds inconsistency and implausibility in this case, and in particular finds it does not accept the applicant is at risk of harm for a fence dispute and on the basis of these findings it rejects that the police have an adverse inference in the applicant for the reasons of the fence dispute, or for any other reason.
67. Having considered the evidence before it, and having regard to the negative credibility assessment which the Tribunal has formed in respect of the applicant, while it extends the benefit of the doubt as to the existence of a property fence dispute, it rejects that there is a real risk of the applicant facing significant harm at the hands of his neighbours, or his neighbour's associates, or anyone else, if he returns to the PRC.

68. The Tribunal also considered the delay in the applicant raising the current claim of the property dispute. It finds he raised the property dispute claim almost 6 years after first arriving in Australia in July 2008. It finds this delay seriously undermines the applicant's claim to have a grave fear of harm as a result of the fence dispute with his neighbour if he returns to the PRC.
69. Accordingly, the Tribunal is not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal, there is a real risk that he will suffer significant harm if returned to China.
70. The Tribunal considered the applicant's written post hearing submission received by email on 18 November 2015. It finds in this respect the applicant essentially repeats parts of his claims without adding or advancing them substantially.

*Cumulative consideration*

71. Having considered the applicant's complementary protection claims individually, the Tribunal then considered the applicant's claims that that it has accepted cumulatively. After doing so, the Tribunal still does not find the applicant has a real risk of suffering significant harm in PRC. Neither is there any issue, squarely raised by the evidence though not articulated, that has satisfied the Tribunal the applicant faces a real risk of suffering significant harm in PRC.

*Conclusion*

72. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
73. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
74. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

**DECISION**

75. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Tony Caravella  
Member

## APPENDIX A

### RELEVANT LAW

76. The criteria for a protection visa are set out in s.36 of the Act and 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 in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

#### Refugee criterion

77. 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 in respect of 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).

78. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

79. 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.

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

81. 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)). Examples of 'serious harm' are set out in 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.

82. 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.

83. 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.

84. 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 '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.
85. 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.
86. Whether an applicant is a person in respect of 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**

87. 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 in respect of 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').
88. '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.
89. 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.

### **Section 499 Ministerial Direction**

90. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.