

1212633 [2013] RRTA 152 (27 February 2013)

DECISION RECORD

RRT CASE NUMBER:	1212633
DIAC REFERENCE(S):	CLF2012/4418
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Sue Raymond
DATE:	27 February 2013
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2012.
3. The delegate refused to grant the visa [in] July 2012, and the applicant applied to the Tribunal for review of that decision.
4. The Tribunal has before it the Department's file, CLF2012/4418, relating to the applicant.
5. The applicant appeared before the Tribunal [in] January and [in] February 2013 to give evidence and present arguments. The Tribunal hearing on each occasion was conducted with the assistance of an interpreter in the Fuqing and English languages. The application was originally scheduled for hearing [in] November 2012 but was rescheduled to [a date in] January 2013 to ensure an appropriate interpreter was available. The first hearing was conducted via video link and the second hearing was held as a face to face hearing in Sydney.
6. The applicant was represented in relation to the review by her registered migration agent. The representative did not attend the hearing on either occasion.

RELEVANT LAW

7. 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) of the Act. That is, the applicant is either a person in respect of 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 in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

8. 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 Refugees Convention.

9. 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.
10. 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.
11. There are four key elements to the Convention definition and in the context of the current application are as follows:
12. First, the applicant must be outside her country.
13. Second, the 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.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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.

CONSIDERATION

Application Form

19. According to the information provided in her application form the applicant is a Chinese National born in Fujian Province, China in [month and year deleted: s.431(2)]. She claims to be Catholic. She indicates that she married [in] 1992. The applicant claims to have come to Australia [in] March 2007. She departed China legally using a Chinese passport in her own name. She entered Australia on a TU Student [visa] issued on [date deleted: s.431(2)] which expired [in] December 2008. She stated that she was a [occupation deleted: s.431(2)] in Fuqing City from 1985 to March 2007.
20. In a statement attached to her application [the applicant] indicated that her son came to Australia to study [in] 2006 and she came on a [visa] [in] March 2007. The statement was stated to be written by the migration agent based on information she provided as she is illiterate. She said that the statement was read to her and she signed it. She gave evidence that the statement is accurate.
21. She recounted her marriage to [Mr A] and that she had a daughter born in [year deleted: s.431(2)] and a son in [year deleted: s.431(2)]. In this statement the applicant described an incident where her husband fell down a ditch but he ultimately recovered. The applicant believed that God gave him a second life and that it was a miracle. Her husband became Catholic after he was saved. After the applicant married her husband, his family believed in God and the applicant believed in God too. He talked to her about the goodness of God and Jesus. His health became better and later he opened a [factory]. He had that business for a few years and business was good. Her husband told her that all that goodness was from God.
22. She indicated that there were many villagers who believed in God and they had underground house church gatherings. Her family lived in the countryside. They were not willing to go to the public Catholic Church in the city as they believed that the public church was controlled by the Chinese government. She believed that they did not put God first. The underground house church was persecuted by the government and the police so they held gatherings in secret. Sometimes she went to the house church gatherings with her husband. She states that she is illiterate and only listened to their speech and sang psalms with them.
23. In her statement she indicated that after a few years attending the gatherings she gradually understood their belief and got some knowledge about "Catholics". She believed that they will have eternal life if they believe in God. She also learned to read Rosary beads of "15 duan." In August 1997 she was baptised in an underground church

member's home and she became Catholic. After she was baptised she felt she had peace and joy in her heart and had God to look after her. She had no fear. She was very happy. She knew that Catholics should follow "three things Believe, Hope and Love. It is the condition to get eternal life. I also believed there is a devil in this world. I believe in Heaven and Hell".

24. Her statement recounts four different incidents where the police came and detained the applicant's husband and one incident where she was detained. The following are the salient parts of that statement.
25. The first was in May 2002 when she states that her husband was caught by the police while he was attending a house church gathering.

"He was detained by police for 7 days and nights. He was violently beaten by the police. He was fined RMB 3000. At that time, my mother-in-law was sick. My father-in-law went to visit my husband; he was amazed at the bruises on my husband. Since then, my father in law became very sick. He died in [date]. My husband had a Catholic funeral for my father-in-law. Many people came. Some were Catholics. The Local police came too. They claimed that my husband was against the Government in public. They also claimed that my husband spread superstitions at the funeral. The police arrested my husband and detained him for three days. He was released after he paid a fine RMB 5000. My mother in law saw the bruises on my husband's body; she told us many times not to hate the police as they were ignorant. If the police knew about God and how powerful and good he was they would not persecute Catholics or Christians. After [time period], my mother-in-law closed her eyes and went to heaven. ...

As my husband... spread gospel to others and he became one of the heads in the underground church. On [date]/12/05, we held house church gatherings at home. There were other Brothers and Sisters too. The police came. They held us against the wall. They searched our home and took us to local police station. They interrogated us separately. Three or four police asked me questions. They were very frightening I had a fear in my heart. I prayed to God for help. They detained me for a day and fined me RMB 5000.

My husband [Mr A] was detained for a month. The police charged him for being the organiser of the illegal underground church, holding cult meetings and being a danger to the government. He was fined RMB 10,000. [Mr A] told me later that in Detention Centre, police tortured him and asked him to study books about the communism. The police wanted him to give up the Catholic belief. But [Mr A] held belief firmly. After he was released, the police threatened him, if he was found to be in illegal gathering, he would be sent to prison.

There is no religious freedom in China. [Mr A] told me the police often came to my home and his factory to harass him. The police would monitor him. He did not want us to live in fear My husband [Mr A] decided to send my son and I overseas. In [month] 2006, we spent money and gained a visa for my son's[sic] to Australia. My son came to Australia in [month] 2006. The next year, I got visa to Australia in [month] 2007.

.....

On [date]01/2008, I called my husband in China. I couldn't find him. My daughter told me that he was in prison. He was sentenced for 3 years in prison, because he was attending illegal house church gathering in March 2008 and caught by the police. Our factory was forfeited by the local government because my husband was using factory money to support illegal underground church. Now my daughter lived with her grandparents.

When I heard what had happened to my husband I was so sad, I was speechless. I lost everything. I worried about my husband [Mr A]. Our factory was lost, so I lost an income to support my son and me. What could I do? I prayed to God again and again. I prayed to Mary again and again. God gave me power. I must live for my husband and my two children. I wanted to go back to save my husband and look after my daughter, but I am frightened to go back as I might be put in prison too.

I did not go back to China. I miss my husband in prison. I lived in fear too. All I could do is pray and worship God at church. I asked God: God, please save me and my family.

In January 2011, my husband was released. He asked me to stay in Australia. He might be put in prison again. He did not want to live in fear. Now he is in other province to spread the Gospel.”

Supporting Documents

26. On the departmental file there is an uncertified copy of a Baptism Certificate which states that the applicant was baptised [in] August 1997 at [location deleted: s.431(2)] of [details deleted: s.431(2)].
27. The departmental file also contains documents supplied at the departmental interview which took place [in] June 2012;
 - namely a letter from [Priest B] of the [institute deleted: s.431(2)] (folio 62). The letter claims that the applicant has been attending [Church 1], NSW since her arrival in Australia in March 2007. [Priest B] notes that the date of the applicant’s first attendance at the Church was given to him by the applicant.
 - Photocopies of photographs produced to the Department stated to be of her husband being arrested, her wedding ceremony, their factory being demolished, and her religious study group.

Delegate’s decision

28. The delegate interviewed the applicant. In his written decision he did not accept that the applicant was of Catholic faith but in any event did not accept that Catholics in Fujian province are subject to persecutory treatment by the Chinese authorities. He also was not satisfied that the applicant genuinely feared persecution in China for her “alleged Catholic beliefs”.

Is the applicant outside her country of nationality?

29. On the basis of a copy of a Chinese passport¹ issued to the applicant on [date deleted: s.431(2)] and in the absence of any evidence to the contrary, the Tribunal accepts that the applicant is a national of the People's Republic of China. The Tribunal finds that the applicant is outside her country of nationality. She gave evidence that she does not hold any other passport and, in the absence of any other evidence, the Tribunal finds that the applicant does not have a legally enforceable right to enter and reside in any country other than her country of nationality. The Tribunal finds that the country of reference for the assessment of the applicant's claims to be a refugee is the People's Republic of China (PRC).
30. The People's Republic of China is also the receiving country for the purpose of the complementary protection provisions of the Migration Act.
31. The Tribunal finds that the applicant came to Australia [in] March 2007 entering Australia legally on a passport in her name. The Tribunal finds that she came to Australia on an Australian [visa] which was granted [in] 2007 and allowed her to remain in Australia until [a date in] December 2008. This visa subclass is known as a [visa details deleted: s.431(2)] and she came to Australia because her son was studying here. She has not returned to China since coming to Australia and the Tribunal finds that the applicant lodged an application for a Protection visa [in] January 2012.

Does the applicant fear persecution?

Is the applicant a Catholic?

32. The Tribunal is satisfied that the applicant is of the Catholic faith and practised that faith when she was in China prior to coming to Australia [in] March 2007. In forming a view as to whether the applicant was of Catholic faith the Tribunal was mindful that the applicant is illiterate in the ability to read and write in either Mandarin or English; that she has no formal education and is from a rural farming community. Consequently the nature of the questions asked of her by the Tribunal was consistent with her background and mindful that she was not born into a Catholic family. The Tribunal's satisfaction about the applicant's Catholic faith was demonstrated by her understanding the sign of the cross, the pictures of Mary and Jesus and the cross which she described as hanging on the walls of her home in China and one of Mary in her home in Australia, her description of her use of the holy water and her description of the rituals at the funerals of her parents-in-law.² The Tribunal formed the view that she valued and used the rosary beads which she had with her at the hearing. The Tribunal determines that her demonstrated understanding of her faith is consistent with someone who is illiterate and from a rural community in China. In reaching its conclusion the Tribunal also had regard to her regular attendance at church in Australia which is discussed further below.
33. The Tribunal is satisfied, based on the applicant's oral evidence, that she attends a Catholic Church in [suburb deleted: s.431(2)], New South Wales, and attends service

¹ Folios 3 and 4 of DIAC file

² The Tribunal was mindful of comments of Dr Richard Madsen, in the book "China's Catholics", where he cautions against applying knowledge of the Catholic Church in the West directly to Chinese Catholicism.

regularly on Sunday morning. That service includes part of the service being conducted in Mandarin. The applicant gave evidence that she has attended at that church since shortly after she came to Australia. She found out about the church by asking her son. The Tribunal notes that there is a letter on the Tribunal file from [Priest B]. The letter supports the applicant's statement that she is attending church and notes that she has been regularly attending the time Mass celebrated every Sunday in [Church 1]. Although the letter indicates that the date of first attendance at the church, March 2007, was given to [Priest B] by the applicant the Tribunal is satisfied that she attended church from shortly after her arrival in Australia. The Tribunal notes subsection 91R(3) of the Act which indicates that in determining whether a person has a well-founded fear of being persecuted any conduct engaged by the person in Australia should be disregarded unless the person “*satisfies the Minister [or in this case the Tribunal standing in the Minister’s shoes] that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee...*”

34. The Tribunal accepts that the applicant is of Catholic faith and has been so since at least August 1997 when she was baptised. The Tribunal is satisfied based on her evidence that she did not intend to make a [Protection] application when she came to Australia and yet attended church regularly from the time of her arrival in Australia. The Tribunal is satisfied that her attendance at Church in Australia is consistent with her following her Catholic faith and was not undertaken to strengthen her claim for protection in Australia. The Tribunal is satisfied that her attendance at church in Australia was otherwise than for the purpose of strengthening her claim to be a refugee. Consequently her conduct in attending church in Australia is not to be disregarded by the Tribunal.
35. However the Tribunal is not satisfied that the applicant holds a well-founded fear of persecution if she returns to China. There are several reasons for the Tribunal holding this view which will be outlined hereunder.

Delay in applying for protection visa and

Delay between visa application in China and departure from China

36. The applicant arrived in Australia [in] March 2007, and did not apply for a protection visa for approximately 5 years, until [a date in] January 2012. The reasons she gave for this delay were not convincing. She says that she did not know what was going on, and she did not know what to do. The Tribunal accepts that she is illiterate but this does not explain the delay satisfactorily when she has lived here for a period of nearly five years before making the application.
37. The Tribunal understood the applicant to be saying that she conveyed to the Catholic community who could see her suffering as she had not seen her husband and daughter and she was told about the Protection visa then. She said that when she saw police here she was scared.
38. The Tribunal asked the applicant whether when she first came to Australia she wanted to stay in Australia because of fear [to return to China] and her response was to the effect that the first purpose was to look after her son and also because Australia is a “freedom country” and she has freedom to go to church, to pray and to worship. The Tribunal canvassed whether the fear of going back to China was there when she first came to Australia and her response was to the effect that she is very happy when she came here and felt God embracing her. The Tribunal concluded that she came to

Australia to look after her son which is consistent with her passport being applied for at the same time he came to Australia in 2006. At the second hearing the Tribunal specifically put the delay between her passport being [issued] and coming to Australia [in March 2007]. She confirmed that when she left China she was not concerned about herself but only her son and husband. The Tribunal concludes that the applicant did not have any fear of persecution for herself when she left China.

The applicant's fear of returning to China

39. Nevertheless the Tribunal has considered whether there are multiple reasons for her not wanting to return to China and whether any fear has arisen since her departure from China. The applicant gave evidence that she wanted to return to China last year but was advised against it by her husband. She indicated that last year she had planned to go home as she worried about her husband and daughter. She spoke to her husband and in recounting his response she said that he said "don't come home", and conveyed words to the effect that he is running everywhere, he has 'no money' and that if she comes back "you will be more suffering than you are in Australia". Later in response to a question from the Tribunal about what is stopping her going back to China she said that she told her husband that she wants to go home and that he responded, "I even run out of money to feed myself how can I look after you when [you] come home."
40. Her answer to this question was telling in that she referred first to the economic difficulties that would be suffered if she returned. It was only after the Tribunal asked explicitly whether she was in fear to return or whether not going back because husband had said that there was no money. In her response to this question the applicant said that every time she sees police she has "fear in my heart" She explained that her fear comes from being caught by police in 2005. In response to a specific question about whether she thinks anything will happen to her if she returns to China she indicated that her husband had told her that the police will catch her as well 'so don't come home' and in answer as to why the police would want to catch her she said because her husband is the leader of the church and she is his wife. The Tribunal asked specifically whether she fears returning because the police might catch her or because her husband can't feed her. She responded "both".

Incidents which are alleged to have occurred in China

41. The Tribunal considered the evidence the applicant gave about the four occasions on which she said the police came to detain her husband. There were inconsistencies with this evidence such that the Tribunal is not satisfied that it can rely on the accounts as accurate-for example in oral evidence the applicant indicated that on the first occasion, in May 2002 that her husband was not harmed by the police but in the written statement it records that he "was violently beaten by the police" and further that her father-in-law went to see him and "was amazed at the bruises on her husband" She indicated that she was not at the house when he was detained the first time in 2002 and that she did not know where he was but he returned home after one week. In her oral evidence she said that she asked her husband did the police do anything and he said not that time happened and he was only asked, words to the effect "don't believe in this this religion anymore" When the inconsistency was raised with the applicant at the hearing she did not explain it and when it was put to her as a specific inconsistency later in the hearing in the context of whether this is an accurate account and whether the Tribunal can believe her, she indicated that her memory is not that clear.

42. On the occasion in December 2005 she indicated that her mother-in-law had told them not to hate the police. The Tribunal asked whether her parents-in-law had passed away by then and the applicant acknowledged that her husband's parents had passed away in [year deleted: s.431(2)].
43. Even allowing for some confusion about dates of the incidents and what incident was being asked about the Tribunal regards as significant the inconsistency about the first incident.
44. On the only occasion the applicant was taken to the police station in 2005 the applicant gave evidence that she was not mistreated but her husband was treated roughly and she was sent home after a day. She also had to pay a fine of RMB 5000.
45. She gave no evidence to suggest that she had been mistreated at all by the police but was taken to the police station for one day and had to pay a fine. There is no evidence to suggest that she holds any leadership role in the church and she did not assert that to be the case. At the second hearing she confirmed that she did not have a leadership role in the church.
46. In relation to the occasion in 2008 when she states that her husband was detained she was in Australia. She indicated that his arrest followed an incident when the [factory] owned by her husband was smashed/demolished by the police. Her husband told her that this occurred because [the police] said words to the effect –“you don't follow what we say and keep preaching-that is why we break the business”.
47. There are copy photographs on the DIAC file³ of some broken buildings and the applicant said that these photos were taken by her husband after the buildings were damaged and before he was detained in 2008. At the second hearing the Tribunal put the copy photographs to her and indicated that the overgrown grass in the photographs did not indicate that the photographs were taken close to the time the building was demolished. It looked as though it was taken sometime afterwards. She asserted that they were taken soon after the incident and said in explanation about the overgrown grass said that perhaps her husband had not had a chance to mow the grass.
48. The Tribunal at the second hearing also put to the applicant a copy photograph⁴ which she had indicated was a photo taken secretly of her husband being arrested in 2008 outside her home in China. The Tribunal indicated the difficulty it had in accepting that the photograph was taken secretly at the time of arrest. She indicated that it was taken by her brother's son who was 'accidentally' home that day and also said that police were so fierce that they had to take a photograph. The Tribunal does not accept that the photograph depicts the arrest of the applicant's husband and regards it as contrived.
49. Given the inconsistencies in the evidence and the Tribunal not accepting the photographs as evidence of what is depicted, the Tribunal is not satisfied that each of the incidents as described by the applicant occurred. The Tribunal is not therefore satisfied that the applicant's husband has been detained or mistreated as described and does not accept that he had a profile as head of the underground church as claimed.

³ At folios 57 and 58

⁴ Folio 61 DIAC file

Country Information about Catholics in China

50. The Tribunal has analysed country information relating to Catholics in Fujian province in the People's Republic of China and draws the following conclusions from the source material:
- There are two Catholic churches in China: the official (registered) church and the unofficial (unregistered or underground) churches.⁵
 - The official Catholic church enjoys legal protection of its practices whereas the unregistered churches do not.⁶ The Government does not permit proselytising in unregistered places of worship or in public.⁷
 - Chinese authorities have shown increased tolerance in recent years for unofficial activity which does not challenge the authority of the state but levels of tolerance vary depending on the location.⁸ Underground Catholic churches which are small and discreet are less likely to be targeted.⁹
 - The policy of the right 'to meet at home for worship, including prayer and Bible study without registering with the government' is applied unevenly within PRC. ["Since 2005 the State Administration for Religious Affairs (SARA) has publicly acknowledged that family and friends have the right to meet at home for worship, including prayer and Bible study without registering with the government. This statement has been posted on SARA's website at various times. Respect for this policy at the provincial, county, and local levels was uneven, and there were several reported cases of local officials disrupting religious meetings in private homes."¹⁰]
 - The Tribunal notes that the 2011 US Department of State International Religious Freedom Report for 2011 noted that the government's respect for and protection of the right to religious freedom had deteriorated over the year.
 - Fujian is generally regarded as one of the provinces that is said to have applied regulations on religion more liberally than others.¹¹ Police and officials have sometimes arrested underground Catholic priests and although not recently, police and officials have arrested parishioners and demolished churches.¹²
 - There are few recent reports of problems for Catholics in Fujian. The most recent is in March 2010¹³ and reports the arrest of an underground Catholic priest. This involved an activity of being involved in organising a camp for university students. Another

⁵ Madsen.R 2003, "Catholic Revival during the Reform Era", *The China Quarterly*, vol.174, pages 472-474.

⁶ US Department of State 2011, "Legal/Policy Framework", *International Religious Freedom Report 2010* (July-December), 13 September

⁷ US Department of State 2012, *International Religious Freedom Report 2011 China*, 30 July, Executive Summary

⁸ See footnote 6

⁹ Human Rights Watch 2006, "China: A Year after New Regulations, Religious Rights still restricted", 1 March

¹⁰ US Department of State *International Religious Freedom report*, November 2010, Status of Religious Freedom, Legal/Policy Framework and similar comments were expressed in the Report for 2011

¹¹ Lambert, Tony 2006 *China's Christian Millions*, Monarch books, Oxford, page 241

¹² "Another underground priest arrested in Fujian" 2010, *Asia News*, 24 March

¹³ "Another underground priest arrested in Fujian" 2010, *Asia News*, 24 March

priest involved in the camp is reported to have been arrested and released after 15 days imprisonment.

- Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.

51. When the Tribunal put the relevant country information about Fujian to the applicant and suggested that the latest report related to priests being detained she disagreed that it is only priests who are targeted. The Tribunal accepts that parishioners may have been detained in the past but nevertheless the Tribunal concludes there is no recent country information report, of which it is aware, which indicates detention or adverse attention from the PRC authorities of someone, such as the applicant, who is a member of an underground church in Fujian but who does not hold a leadership position in the church

SUMMARY

52. In the final analysis the Tribunal does not accept that the applicant fears persecution in China. The Tribunal understands that the relevant question for it to ask is whether the applicant has a present fear of a risk of harm in the future. The Tribunal also appreciates that a past lack of fear does not necessarily preclude a well-founded present fear of future harm. The Tribunal is not satisfied that the applicant “owing to well-founded fear of being persecuted for reasons of ...religion..., and is unable or, owing to such fear, is unwilling to avail ‘herself’ of the protection of that country [namely, the People’s Republic of China]. Rather the Tribunal concludes that the applicant has wanted to return to China but her husband has indicated that he cannot support her there and asked her not to come.
53. The Tribunal is mindful that it is assessing the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future. It is also mindful that a fear could have arisen since she left China and not been in existence at the time she departed from China in 2007¹⁴. The Tribunal has taken into account the applicant’s illiteracy and lack of education in assessing her responses but also notes that in answering about her reasons for not wanting to return to China her responses did not suggest to the Tribunal a fear of persecution. Whilst the Tribunal notes that she says that she fears the police she has not alleged mis-treatment by the police in China. The Tribunal formed the view that she does not fear persecution and her fear in this regard was only raised after initially making reference to the economic circumstances.
54. The Tribunal has already accepted that the applicant is of Catholic faith and in China worships in an underground church. However the Tribunal does not accept that the events of arrest and detention described in the applicant’s statement occurred as described. There was one significant material inconsistency in her oral evidence in relation to the first incident of arrest of her husband. In addition in describing an arrest which took place in 2005 she made reference to a conversation with her parents-in-law who she later conceded had passed away in [year deleted: s.431(2)].

¹⁴ Known as a refugee ‘sur place’.

55. It concludes that the significant delay in making the visa application against a backdrop of her coming to Australia to look after her son; coupled with her initial response about why she did not wish to return to China to support its conclusion in that regard.
56. The Tribunal finds that the applicant does not face a real chance of persecution, now or in the reasonably foreseeable future. The Tribunal finds that her fears are not well-founded.

Complementary protection criterion

57. 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').
58. '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.
59. The Tribunal is not aware of information which would suggest that the applicant's attendance at [Church 1] in Australia would place her at real risk of significant harm if she returns to China. In this regard the Tribunal notes that there is information from Department of Foreign Affairs and Trade about asylum seekers returned to China. The Tribunal notes that it would be likely that Chinese authorities would interview failed asylum seekers and 'might keep them under surveillance and detain them for a short period.'¹⁵ The Tribunal is not satisfied that if this were to occur that it amounts to "significant harm" within definition in sections 36(2A) of the Act and the other definitions defined in section 5(1) of the Act which are outlined above. Returnees with a higher profile in Australia may be treated more severely by the authorities¹⁶. There is no information suggesting that the applicant's activities in Australia, or as a practising Catholic attending an underground church in China, are such that she faces a risk of significant harm on return to China.

CONCLUSIONS

60. 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).
61. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not

¹⁵ [reference deleted: s.43192)]

¹⁶ CX 174138 --March 2007

satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

62. 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. The applicant confirmed that her son does not hold a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

63. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.