1318113 [2014] RRTA 433 (28 May 2014)

DECISION RECORD

RRT CASE NUMBER:	1318113
COUNTRY OF REFERENCE:	China
TRIBUNAL MEMBER:	Christian Carney
DATE:	28 May 2014
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant is a [age] Chinese citizen who arrived in Australia [in] June 2012 on a Student visa. He claims that if he returned to China he would be forcibly sterilised because he and his wife have tried to have more than one child in contravention of the family planning laws.

3. The Tribunal must consider and decide whether the applicant has a well-founded fear of being persecuted in China for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China, there is a real risk that he will suffer significant harm. In considering these issues, the Tribunal has applied the law set out in Appendix 1.

CLAIMS AND EVIDENCE

4. The applicant presented his claims and other personal information in his application for the Protection visa. He was invited to attend an interview with the delegate but he did not respond to that invitation or attend the scheduled interview.

5. According to the information in his application forms, he was born in Gaocheng, Hebei [on date]. He speaks, reads and writes in Chinese and has received [a number of] years of education. He was married [on date] and his wife gave birth to their first daughter [date] and a second daughter on [date]. He worked as a cook in two different restaurants in Gaocheng City from 2000 to April 2012.

7. His claims are set out in a hand-written statement in Chinese which was translated into English by an accredited translator. He states that his parents told him that because he was their only son he must also have a son in order to keep the family name and to have someone to rely on when he gets old. His in-laws also encouraged he and his wife to have a son and told them not to worry about the family planning policy. His wife became pregnant in December 2011 and an ultrasound confirmed it was a boy. In fear, she would be subjected to a forcible termination, his wife went to stay with her parents at their house which was 100 kilometres from his home.

8. [In] 2012 the family planning officials came to his home and told him that his wife had to attend the local clinic for an examination. He told the officials that he and his wife had had a fight and that they were going to divorce and that she had left their home after he hit her. He told them that her family did not know where she was and they were going to put a missing person advertisement in the newspaper. However, the officials were suspicious of him and did not believe his story.

9. [Later in] 2102 the family planning officials called him on the phone and told him to go to the hospital and pick up his wife. When he arrived at the hospital he saw his wife crying; her pregnancy had been terminated. According to the policy, he would be next to undergo surgical sterilisation, which would mean that he and his wife could not have another child.

The families decided that his wife and daughter would go to live with her family and he would go and live overseas until there was a change in the family planning laws in China. He asked an agent to arrange his travel and he came to Australia as a student. He fears he will be subjected to a forcible sterilisation if he returns.

Evidence to the Tribunal

10. The applicant appeared before the Tribunal on 18 March 2014 and gave evidence through an accredited Mandarin interpreter.

11. He confirmed the content of his application for the visa, including the details of his identity and previous address in [location], Hebei, where he lived with his parents, wife and two daughters, who were born [in dates]. He confirmed the details of his wife and their marriage. He confirmed that the information in the application was all true and correct and that there is nothing he wanted to change. Two friends who spoke Chinese and English helped him to complete the forms, and it was all read back to him before he signed it. He wrote his statement himself in Mandarin and had it officially translated into English.

12. The Tribunal noted that the dates of his children's births [dates] in the application forms, were different to his evidence today. In response, he said that the dates may have been incorrectly recorded due to the differences between the solar and lunar calendars. The Tribunal noted that the dates are five and a half months apart for his second child. In response, after a pause, he said people in China had only recently started using the lunar calendar, which has caused a lot of confusion. The Tribunal asked him if he had any independent, documentary evidence with regard to their dates of birth. He said he did not have any evidence here but could obtain a copy of his Hukuo.

13. He confirmed he worked as a chef in China for four years as the [name] Restaurant and for five years at the [name] Restaurant. The Tribunal noted those periods were different to his written application, and he said his current evidence is correct and the other was a mistake. His wife does not work. His parents stopped working in about 2012, when he left. His sister supports their parents.

14. He confirmed that a migration agent helped him to complete his Student visa application to come to Australia. He only studied here for a few days as he did not have enough money to continue and he needed to work, because he needed to support his family in China. He had paid fees for eight months but only went to school here for a few days. He has sent A$2,000 to his family on two separate occasions.

15. He said he applied for his passport in 2010 because he wanted to go overseas and work and have fun. He applied to go the [another country] but his application was refused. Apart from his application to come to Australia, he did not make any other visa application. The Tribunal noted that his passport was issued soon after the date he claims his daughter was born, and it asked him to explain why he was thinking of going overseas for work and fun at that time. He said his child was sick and he wanted to leave so he could have a better mood. When asked what his wife thought about that, he said that his wife had no thoughts about it. She was not going to go away with him.

16. He said that his visa to Australia took a long time to arrange. He was not initially aware that it had ceased in February 2013, but at around that time he contacted a lawyer who checked and told him that his visa had expired. He told the lawyer he wanted to stay here but the

lawyer told him he would help him apply for a visa but it would cost money and the applicant did not have enough money. He did not tell that lawyer about his real problems in China. He decided to just stay here and keep working here and wait for the family planning laws in China to change.

17. He is afraid to go back because of the family planning officials. They will ask him to have a sterilisation and he does not want to have that operation because he wants to have a son. The Tribunal asked him if he applied for a permit to have a son. He said he had not. He said they were allowed to have a second child because their first was a girl and they did not have to pay a fine. After the birth of their second daughter, when his wife got pregnant for the third time, the officials told him that he had to have the sterilisation.

18. His wife got pregnant for the third time in December 2011. It was accidental as they had not dared to try and have another child, even thought they had always wanted a son. They never used any contraception. The officials do regular checks which is how they discovered his wife was pregnant again.

19. The Tribunal asked him to provide details of what happened, but he said he did not want to. After a long pause, he said he missed his family. The Tribunal noted that it was important for him to explain what had happened so the Tribunal could understand what had happened. He said he was confused. When asked what he was confused about, after a long pause, he said he did not know. He then said that they took his wife away and performed an abortion of their baby and he is sad about that. That happened in [early] 2012. The foetus was three months old. They used to give his wife a check-up once every month and when she did not report for one, the officials got suspicious and came to the house. When asked, he said that the monthly check-ups had begun after the birth of their second daughter. When asked, he said that he never went for a check-up at the clinic, it was just his wife.

20. He said that he had been told that he needed to have the sterilisation procedure after the birth of their second daughter. The officials asked him to go to the clinic a number of times but he ignored it and did not go. Then in [early] 2012 they came to the house and took his wife away. When asked, he said that they never sent him a letter asking him to go to the clinic, but they passed the message on. He confirmed that, despite being asked to go to the clinic for the sterilisation procedure a number of time before [early] 2012, he ignored the requests and nothing happened to him and no action was taken. The officials had come to their home in [early] 2012 but his wife was in hiding at her mother's house at that time.

21. He said the family planning officials in their area are very active. He said that the officials found his wife at her mother's house, and that they had not gone to his house and found her. The Tribunal asked him if he complained about the forced abortion. He said there was no point. They did not contact the police or complain to any government office about it. Things like that happen all the time in Hebei.

22. The Tribunal asked him to explain what occurred after the termination. He said they decided that his wife would go to stay with her mother and he would leave the country and wait for the family planning laws to change so they could have son in the future. The Tribunal asked if anything had happened to his wife since he left China. He said nothing had happened to her and she stays at home with her mother. The Tribunal asked if his wife had been given a sterilisation procedure. He said she had not. He said if she did that then they would not be able to have children in the future. The Tribunal put to him that if the authorities were concerned about them having more children, then they could solve the issue by giving his

wife a procedure to ensure she could not have more children, and that would be the end of the matter. After a pause, he said she was too weak to have that procedure.

23. The Tribunal noted that these events had occurred two years ago and, the fact that nothing had happened to his wife with regard to the sterilisation, and as he had not claimed that the authorities had made any attempt to contact him in the meantime, suggested that the authorities had no interest in him or his wife and had no intention to perform a sterilisation procedure on either of them. In response, he said that his wife had been in hiding. When asked to give details of where his wife had been in hiding, he said she had been living with her mother, and then more recently, she had been renting her own place outside the area with their children. When asked for more details, after a pause, he said that she had moved out last September. The Tribunal put to him that, if that was the case, then it would seem the authorities had taken no action to contact her at her mother's house in the 18 months she stayed there, and that, in light of his evidence that it was at her mother's house that they found her in [early] 2012, it seemed that they knew where she was but did nothing. In response, he said that he left in June 2012 so it would not have been possible for her to fall pregnant again, so they probably did not worry about her after that.

24. The Tribunal put to him again that, if the authorities did not want them to have more children, then they could perform a procedure on either of them to ensure that did not happen. He agreed that would be the case. The Tribunal put to him that the fact they had not contacted his wife in that regard indicated that they had no intention to carry out such a procedure on either of them. He said that was not true and they would do it to him as soon as he went back to their town.

25. The Tribunal noted that he lodged his application for Protection 10 months after his arrival, and it asked him why he had not applied earlier if his fears about being sterilised had existed at the time of his arrival. He said he was waiting and hoping the Chinese authorities would change their policy. The Tribunal noted that the family planning laws and one child policy had existed since 1979 and there was no information to indicate that the authorities had any intention to change those laws; it asked him to explain why he thought that was something that might happen soon. He said it is an inhumane policy. The Tribunal repeated its question about why he waited so long to lodge his application. He said he wants to go home to his family but he is waiting for the policy to change.

26. The Tribunal discussed information before it from independent sources which indicated that forced sterilisations of men who had breached the family planning laws had rarely occurred in China in the recent past, and that the Tribunal had not been able to find any reports of such incidents occurring in Hebei province in recent years. When asked to comment, the applicant said that it was impossible that there were no reports about it. It happened all the time. The Tribunal asked him if he had any information to support his claims, and in response he said that the government covered it up and did not allow it to be reported.

27. The Tribunal noted that certain aspects of his claims and evidence caused it to have some concerns about the credibility of his claims to be at risk of persecution on return, including his delay in lodging his application, the fact the authorities have taken no apparent action to contact him or his wife since [early] 2012, as well as the absence of information to support his claims that forced abortions and sterilisations occurred all the time in Hebei. He said his wife had been in hiding since he left. The Tribunal asked him why he did not attend the interview with the delegate. After a long pause, he said he did not get the letter. The

Tribunal noted that he had maintained the same residential address since he lodged his application. After a pause, he said he must have gone away when that letter arrived.

28. The Tribunal asked him whether he had considered returning to China and, instead of going back to his home, relocating to a new city, far away from the local family planning officials. He said that he had used all of his money to come here and now he has nothing. The Tribunal noted that that was not an answer to whether he could relocate. In response, he said they would find him wherever he went. When asked to explain how they would find him, he said that he did not know. The Tribunal asked him if there was any reason why he could not simply return and live in another city. He said there are no human rights in China. The Tribunal asked him whether he would consider living in another city. He said he does not want to go back. They would find him. When asked again to explain how they would find him if he returned and lived in a big city like Shanghai, he said he does not want to go there, and he said he did not know how they would find him.

29. The Tribunal noted that the family planning laws of China were the domestic laws of China that applied equally to all citizens, and that the available independent information indicated that the penalties imposed under those laws were imposed when a person breached the law; as such, the law was a law of general application, and it asked him to comment on the penalty he might receive if he was found to have breached that law. He said it was inhumane. The Tribunal asked him if he thought his punishment would be different to that imposed on other people who had breached the law. He said it was inhumane. The Tribunal noted that his evidence did not indicate that any harm inflicted on him by the operation of that law was for a Refugee Convention reason, but rather because he had broken the law, which indicated that the Refugee Convention might not apply to that claim. However, the Tribunal had to consider the operation of the complementary protection criteria, which did not have a similar requirement. He said he would suffer significant harm if they gave him the sterilisation procedure against his will and that it would definitely happen if he went back. He wants to have a son. The Tribunal noted that the independent information before it did not indicate that the sterilisation procedures on men had been carried out in recent years in Hebei, and that it had to consider that information in the context of whether it had substantial grounds to believe there was a real risk he would be subjected to the procedure on return. He said it would definitely happen.

Information in the applicant's offshore application for the Student visa

30. Following the hearing, it came to the Tribunal's attention that the applicant had provided a different account of his family in his offshore application, which is contained in Department file [File number deleted]. In that application, he declared that his family was comprised of himself and his wife and, in response to the question which asked if he had dependent children, he answered 'not applicable'. Furthermore, as part of that application, he completed a 'Family Composition' form (Form 54), in which he provided the details of himself and his wife as being the only members of your family unit. He also provided a notarised copy of his Hukuo card which only listed himself and his wife as the members of his household. That information caused the Tribunal to have serious concerns with the reliability of the applicant's claims to have had two children in China, which underpinned his claims to fear persecution on return. Accordingly, on 23 April 2014, it invited him to attend a further hearing on 23 May 2014 in order to discuss this issue. Further, on 29 April 2014, in accordance with ss.424A and 424B(3), it invited him to attend an interview on 23 May 2014 before the commencement of the hearing, to respond to and comment on the information. The applicant did not respond to the invitation to attend the interview or the hearing.

Interview and hearing on 23 May 2014

31. The applicant did not appear before the Tribunal on the day and at the time and place at which he had been scheduled to appear, nor did he contact the Tribunal about the failure to attend. He did not nominate a person to be an authorised recipient for him. The Tribunal finds that the invitations to attend an interview and a second hearing were sent to the last address for service provided in connection with the review. The Tribunal is satisfied that the applicant was offered the opportunity to appear before it but that he did not do so. He failed to contact the Tribunal to seek a postponement of the interview or the hearing, or to provide any reason why he could not attend at the scheduled time. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.

FINDINGS AND REASONS

Assessment of the applicant's claims and evidence about past events

32. The Tribunal's first task in determining whether the applicant is owed protection is to make findings of facts on relevant matters. The task of fact-finding often involves an assessment of an applicant's credibility. In this context, as set out in Appendix 1, the courts have made it clear that the Tribunal must be sensitive to the potential difficulties faced by asylum seekers in putting forward their claims, and that the Tribunal should adopt a reasonable approach to making its findings with regard to credibility and afford the benefit of the doubt to asylum seekers who are generally credible but unable to substantiate all of their claims. However, the Tribunal is not required to accept uncritically any and all claims made by an applicant.

Country of nationality

33. The applicant has consistently maintained that he is a citizen of China. Having observed the original passport document he used to enter Australia, which contains his photographic image and confirms the details of his claimed identity, in the absence of any evidence to the contrary, the Tribunal finds that the applicant is a national of China and has assessed his claims against China.

The applicant's general background

34. On the basis of his consistent evidence the Tribunal accepts the following:

    (a) The applicant is a [age] male from Gaocheng in Hebei province.

    (b) He was married [on date].

    (c) He was granted a Student visa [in] May 2012 and departed China [in] June 2012 and arrived in Australia [in] June 2012.

    (d) He studied in Australia for a few days and did not complete the course in which he had been enrolled. His Student visa ceased [in] February 2013 and he remained in the community without a visa until he applied for a Protection visa [in] April 2013.

35. With regards to his other claims, for the reasons discussed below, the Tribunal had significant concerns about the reliability of his evidence in support of his claims, and, for the reasons discussed below, did not find him to be a reliable or credible witness.

Claims to have two children in China

36. In his application forms, the applicant declared that he had two daughters in China, born on [dates]. At the hearing, he told the Tribunal that the information in the forms was all true and correct and had been read back to him before he signed the forms. However, at the hearing, he said that his children were born on [different dates]. When the Tribunal noted the inconsistency between his written and oral evidence, the applicant said that the dates may have been incorrectly recorded due to the differences between the solar and lunar calendars. While his response has some plausibility with regard to the discrepancy with the dates of his first child's birth, which are about six weeks apart, it is less plausible with regard to the second child, where the difference is about five and a half months. He claimed that the reason for that was that people in China had only recently started using the lunar calendar, which had caused a lot of confusion. This caused the Tribunal to have some concerns with the reliability of his evidence about his children, and it asked him if he had any independent, documentary evidence with regard to their dates of birth. In response, he said that he did not have any evidence but could obtain a copy of his Hukuo.

37. As noted above, following the hearing, it came to the Tribunal's attention that the applicant had provided a different account of his family composition in his offshore application for the Student visa. In that application, he declared that his family was comprised of himself and his wife and, in response to the question which asked if he had dependent children, he answered 'not applicable'. Included with that application was a 'Family Composition - Form 54', in which he provided the details of himself and his wife as the only members of his family unit. In addition, he provided a notarised copy of his Household Registration (Hukuo) card, which includes the details of the applicant and his wife as the only members of his household. That information caused the Tribunal to have serious concerns with the credibility of his claim to have two children in China, which underpinned his claims to fear persecution on return. Accordingly, it wrote to him and invited him to attend a further hearing to discuss the issues raised by the information in his offshore application. In addition, in its letter dated 29 April 2014, the Tribunal explained to him that the information he had provided in his offshore application for the Student visa appeared to directly contradict the claims he had made in his Protection visa application, which he had confirmed at the first hearing. It explained that the information in his offshore application, which included a notarised copy of his Hukuo, indicated that at the time he applied for that visa in early 2012, the only members of his family unit were himself and his wife and that they had no dependent children. The letter advised him that the information may lead the Tribunal to find that he had not provided credible evidence about his true situation in China, and that it may lead the Tribunal to not accept his claims to have two children in China, or his claims that his wife was subjected to a forcible termination of her pregnancy in early 2012, or that he or his wife have been notified by the authorities that him or her are to be sterilised in accordance with the family planning laws of China. The letter advised him that the information may lead the Tribunal to find that he is not a credible witness, and that he had not been truthful and that his evidence is not reliable and that he is prepared to provide false or misleading information to the Tribunal.

38. If he had attended the interview and second hearing, the Tribunal would have had the opportunity to discuss this information with him and to have received his comments and responses to the information. It would have had the opportunity to ask him to explain why there are significant inconsistencies between the evidence in his offshore and onshore applications in regard to the existence of his claimed children, and to have tested the veracity

of his response and comments. However, it was not possible to discuss any of these issues with him because, despite being advised by the Tribunal in its letter dated 23 April 2014 that it had considered all the material before it but was unable to make a favourable decision on that information alone, and despite its invitation to attend a further hearing and an interview to respond to and comment on the information in his offshore application, the applicant did not attend the Tribunal at the scheduled time, nor did he contact the Tribunal to explain why he could not attend or to seek a postponement.

39. Accordingly, in the circumstances, on the evidence before it, which includes the notarised copy of his Hukuo card, the 'Family Composition' form (Form 54) and his offshore Student visa application, the Tribunal is unable to be satisfied that the applicant has two children in China. Indeed, in light of the directly inconsistent and contradictory evidence about the existence of the claimed children, which the applicant chose not to respond to or comment on, the Tribunal has no confidence in accepting his evidence and claim that he has two children in China. Having carefully considered the evidence and information before it, the Tribunal does not accept that the applicant has two children in China. It follows as a matter of logic from this finding that the Tribunal does not accept his claim that his wife was subjected to a termination of her pregnancy in [early] 2012, as the basis of that claim was that she had breached the family planning laws by being pregnant with her third child. It also follows as a matter of logic from this finding that the Tribunal does not accept his claim that either himself or his wife are at risk of being forced to undergo a sterilisation procedure, as the basis of that claim was that they had breached the family planning laws by attempting to have a third child. The Tribunal put the applicant on notice that it might make these findings as a result of the information in his offshore application that directly contradicted his claims to have two children, however, despite being given the opportunity to respond to and explain that information, he chose not to.

Summary of refugee claims

40. As the applicant made no other claims to fear harm or persecution in China, on the basis of the above findings, and having considered his claims individually and cumulatively, the Tribunal does not accept that there is a real chance he would suffer serious harm for any reason, if he returns to China now or in the reasonably foreseeable future. Accordingly, the Tribunal finds that the applicant does not have a well-founded fear of persecution in China.

Complementary protection

41. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative, complementary protection criterion in s.36(2)(aa) and has had regard to 'PAM3 Refugee and Humanitarian - Complementary Protection Guidelines'.

42. With regard to his claims to fear harm from the family planning officials in China, in light of its earlier reasons with regard to there not being a real chance that he would suffer harm for those reasons, the Tribunal considers there are no substantial grounds for believing there is a real risk he will suffer significant harm in that way.

43. Having considered the applicant's circumstances singularly and on a cumulative basis, the Tribunal finds there are no substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China, there is a real risk that he will suffer significant harm.

CONCLUSIONS

44. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations and it finds that he does not satisfy the criterion set out in s.36(2)(a) or (aa). There is no suggestion 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) for a Protection visa.

DECISION

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

Christian Carney
Member

APPENDIX 1 - RELEVANT LAW

46. Section 65(1) of the Act provides that a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a Protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person 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.

47. 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.

Refugee criterion

48. 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. Generally speaking, as a party to the Refugees Convention, Australia 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.

49. The High Court of Australia has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51. Sections 91R and 91S of the Act qualify certain aspects of Article 1A(2) for the purposes of the application of the Act and Regulations to a particular person.

50. There are four key elements to the Convention definition. Firstly, an applicant must be outside his or her country. Secondly, the applicant must fear persecution, which, according to s.91R(1) of the Act, must involve 'serious harm' and 'systematic and discriminatory

conduct'. 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). The High Court has said 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 condoned or be incapable of being controlled by, by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.

51. Thirdly, 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).

52. Fourthly, an applicant's fear of persecution for a Convention reason must be 'well-founded'. 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 a genuine fear founded on a 'real chance' of being persecuted for a Convention 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.

53. 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.

Complementary protection criterion

54. 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'). The Tribunal notes the explanation of the 'risk threshold' in the 'PAM3 Refugee and Humanitarian - Complementary Protection Guidelines', however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of the assessment of the refugee

definition in accordance with the decision of the Full Court of the Federal Court in *MIAC v SZQRB* [2013] FCAFC 33.

55. 'Significant harm' for these purposes is exhaustively defined in s.36(2A). 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.

56. 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).

Credibility

57. The Tribunal's task of fact-finding may involve an assessment of an applicant's credibility. In this context, the Tribunal is guided by the observations and comments of both the High Court and Federal Court of Australia in a number of decisions including *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510, *Randhawa v MILGEA* (1994) 52 FCR 437, *Selvadurai v MIEA & Anor* (1994) 34 ALD 347, *Minister for Immigration and Ethnic Affairs and McIllhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 and *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220. In these and other decisions, the courts have made it clear that it is important the Tribunal is sensitive to the difficulties faced by asylum seekers and that it adopts a reasonable approach in making its findings of credibility.

58. In *Minister for Immigration and Ethnic Affairs and McIllhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445, Foster J stated at 482 that "care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted." Numerous decisions have endorsed the principle that the benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims.

59. The Tribunal has also had regard to the decision of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* (1996) 185 CLR 259, and the comments of the High Court on the correct approach to determining findings on credibility. Kirby J observed at [39]:

> First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is not desirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is

> not an error of law for a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, as long as, in the end, he or she performs the function of speculation about the "real chance" of persecution required by Chan.

60. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is it required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out, or obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. In *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997), the Full Court of the Federal Court observed that "where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another." Nevertheless, as Burchett J counselled in *Sundararaj v Minister for Immigration and Multicultural Affairs* [1999] FCA 76, it is necessary to:

> … understand that any rational examination of the credit of a story is not to be undertaken by picking it to pieces to uncover little discrepancies. Every lawyer with any practical experience knows that almost any account is likely to involve such discrepancies. The special difficulties of people who have fled their country to a strange country where they seek asylum, often having little understanding of the language, cultural and legal problems they face, should be recognised, and recognised by much more than lip service.

61. Indeed, as the Full Court noted in *Sujeendran Sivalingam v Minister for Immigration and Ethnic Affairs* (unreported, 17 September 1998) "refugee cases may involve special considerations arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia." On this point, the Tribunal also takes into account the comments of Professor Hathaway in *The Law of Refugee Status"* (1991, Butterworths) at pages 84-86. Nevertheless, there is no rule that a decision-maker may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for any delay in the making of claims or for any evidentiary inconsistencies: *Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 at 558-9. Nor is there a rule that a decision-maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case. However, if the Tribunal has 'no real doubt' that the claimed events did not occur, it will not be necessary for it to consider the possibility that its findings might be wrong: *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J (with whom North J agreed) at 241. In addition, 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. The Tribunal is also mindful of the observations of Gummow and Hayne JJ in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [191]:

> … the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not for life.