

**1411886 [2015] RRTA 225 (20 April 2015)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1411886

**COUNTRY OF REFERENCE:** China

**TRIBUNAL MEMBER:** R. C. Titterton

**DATE AND TIME OF ORAL DECISION AND REASONS:** Monday 20 April 2015, 3.20pm

**DATE OF WRITTEN RECORD:** 27 April 2015

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the decision under review with the direction that the applicant satisfies s 36(2)(b) of the Migration Act.

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.

## APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] June 2014 to refuse to grant the applicant a protection visa under s 65 of the *Migration Act 1958* (the Act).
2. At the hearing on 20 April 2014 the Tribunal made an oral decision and gave an oral statement of decision and reasons. The following is the written record of those reasons.

## BACKGROUND

3. The applicant, a citizen of China, applied to the Department of Immigration the (Department) for the visa [in] November 2012.
4. The delegate refused the visa [in] June 2014 on the basis that the applicant was not a person to whom Australia has protection obligations under the Refugees Convention.
5. On 7 July 2014 the applicant applied for a review of that decision. A hearing took place today 20 April 2015. The applicant appeared in person. He was represented by [his migration agent]. He was assisted by an interpreter in the Chinese and English languages. Two witnesses were present, his [wife] was and [Father A]. I shall refer to their evidence below.
6. There a number of preliminary matters to note or to address.

## SGZIC

7. Section 48A of the Act imposes a bar on a non-citizen making a further application for a protection visa while in the migration zone in circumstances where the non-citizen has made an application for a protection visa which has been refused. In *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 the Full Court of the Federal Court of Australia determined that s 48A does not prevent a person from making another application for a protection visa on complementary protection grounds where the first application was made (and refused) before the commencement of the complementary protection provisions of the Act on 24 March 2012. The applicant made an initial application for protection [in] February 2000. This was refused [that month]. On 28 June 2001 the Tribunal (differently constituted) affirmed the Department's decision. Accordingly the applicant was not prevented by the decision of *SZGIZ* from lodging his current application for protection. Initially his application was to be considered solely on complementary protection grounds. However by email to the Tribunal on 28 January 2015 the applicant indicated that his wife had recently been granted a protection visa. He asks the Tribunal to now take into account this matter in assessing the present application. This consideration in turn leads to the second preliminary matter requiring consideration.

## THE MIGRATION AMENDMENT (PROTECTION AND OTHER MEASURES) ACT

8. The second matter to be considered is this. *The Migration Amendment (Protection and Other Measures) Act* 2015 came into effect on 18 April 2015. Section 91WB(2) of that Act provides that, despite anything else in the *Migration Act*, the Minister must not grant a protection visa to a family applicant (here the applicant/husband) on the basis of a criterion mentioned in s 36(2)(b) or (c) unless the family applicant applies for the protection visa before the family visa holder (here [his wife]) is granted a protection visa.

9. [The applicant's wife] and the applicant were married [in] October 2013. In this respect I have been provided with a copy their marriage certificate [that day] signed by an authorised marriage celebrant, and the registration certificate in respect of their marriage dated [in] January 2014.
10. The applicant applied for a protection visa [in] November 2012. [His wife] was granted a protection visa [in] January 2015. In this respect I note the letter from the Department to [the applicant's wife] of that date.
11. Accordingly I find that the applicant applied for a protection visa before his wife was granted her protection visa. Accordingly I am not prevented from granting a protection visa to the applicant on the basis the prohibition contained in s 91WB(2).

### **THE HEARING**

12. As noted the hearing took place on 20 April 2014. The applicant through his legal representative asked me initially to consider his application for protection on the basis of membership of the same family unit as his wife. He submitted that if I was satisfied that he was entitled to protection on this basis it was not necessary for the Tribunal to consider to his claims based on complementary protection.
13. In this respect I then heard evidence from [Father A], [the applicant's wife] and the applicant.
14. [Father A] is a member of St Columban's Mission Society. For many years he has been the [position] to the Chinese Catholic Community of Western Sydney. He has known the applicant and [his wife] since their time in Villawood Detention Centre. He describes them as a "well-adjusted and loving couple". He has noticed their affection and demonstrativeness. He says that he was impressed with their love and support of each other in the sad circumstances of the death of their baby shortly after birth some 12 months ago.
15. [The applicant's wife] confirmed that the circumstances of meeting the applicant. She explained that her application for protection had been granted on the basis of a her leadership of an underground Church group in Shijiazhu City, Hebie Province. This is her second marriage, her first husband having died. She is very grateful to find happiness in this second relationship with a kind and good man.
16. Finally the applicant gave evidence of his love for his wife, and her qualities that he "feels in [his] heart". He explained that, as he is not presently allowed to work, she is working hard to support the two of them. They share the expenses and the income and make do as best they can in their present circumstances.
17. In the circumstances I am satisfied that the applicant is married to [his wife], and that theirs is a genuine and loving relationship. I thought that they gave their evidence with dignity and sincerity, and I have no reason to disbelieve them.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

18. In accordance with s 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

...

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

19. For the reasons set out above the applicant now claims protection on the basis of s 36(2)(c), in short membership of the same family unit as his wife.

20. Regulation 1.12 relevantly sets out the meaning of member of the family unit as follows:

Reg 1.12 Member of the family unit

1.12 (1) For the definition of *member of the family unit* in subsection 5(1) of the Act, and subject to subregulations (2), (2A), (6) and (7), a person is a member of the family unit of another person (in this subregulation called *the family head*) if the person is:

(a) a spouse or de facto partner of the family head; or

21. For the reasons set out above I am satisfied that the applicant is a person who is mentioned in s 36(2)(b), by reason that he is a member of the same family unit as his wife (who is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol), and his wife having been granted a protection visa [in] January 2015.

## CONCLUSIONS

22. As a result the Tribunal is satisfied the applicant meets the criteria in s 36(2)(b).

## DECISION

23. The Tribunal remits the decision under review with the direction that the applicant satisfies s.36(2)(b) of the Migration Act.

R. C. Titterton  
Member