

1304354 [2013] RRTA 645 (24 September 2013)

DECISION RECORD

RRT CASE NUMBER: 1304354
DIAC REFERENCE(S): CLF2012/141400
COUNTRY OF REFERENCE: China (PRC)
TRIBUNAL MEMBER: Kay Ransome
DATE: 24 September 2013
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. The [applicant] is a [age] year old citizen of China (PRC), born in Fuqing in Fujian Province. He claims that if he returns to China he will be harmed because of his religious beliefs and because he fathered a child out of wedlock before the marriageable age.
2. The applicant arrived in Australia in August 2007 as the holder of a student visa which was valid until [March] 2010. [In] July 2012 he applied to the Department of Immigration for a protection visa. The delegate refused to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act) on 6 February 2013. The applicant applied to the tribunal for review of that decision on 20 March 2013.

Jurisdiction

3. There is threshold question in this case of the tribunal's jurisdiction. Pursuant to s.412(1)(b) of the Act and r.4.31 of the Migration Regulations 1994 (the Regulations), an application for review of this decision had to be made within 28 days after the applicant was notified of the decision in accordance with the statutory requirements.
4. The material before the Tribunal indicates that the applicant was notified of the decision by letter dated 6 February 2013 and the decision was dispatched by registered post. As the review application was not received until 20 March 2013, the Tribunal formed the preliminary view that the review application was not valid as it was lodged outside the statutory time limit. On 5 April 2013 the Tribunal wrote to the applicant inviting him to comment in writing on whether a valid application had been made. The Tribunal noted that the decision was posted to the applicant on 6 February 2013 and, on the basis that 15 February 2013 was the date on which he was taken to have been notified, the last day for lodging the application for review was 15 March 2013.
5. In his response the applicant said that he had not received the decision notification from the Department. He stated that he had received previous notifications from the Department but not the final decision.
6. In his application for a protection visa [the applicant] gave his address as [an avenue]. Departmental records show the address was entered as [a street]. The letter notifying the applicant of the decision to refuse the protection visa was posted to [the street] and not [the avenue]. The letter was returned to the department by Australia Post "unclaimed".
7. The Act requires that the notification will, unless it is being handed directly to the recipient, need to be delivered, dispatched or transmitted to an address, fax number or email address provided to the Minister for the purpose of receiving documents. In this case the address provided by [the applicant] for the purpose of receiving documents from the department was the [avenue] address. That he had in fact received other correspondence which was addressed to [the street] does not subvert the Minister's obligation to send the notification to the correct address.
8. In this matter the letter was sent to an incorrect address and notification was therefore ineffective. A failure to properly notify an applicant does not affect the validity of the

primary decision (s.66(4)) but is relevant to the determination of whether a valid review application has been made.

9. The Tribunal accepts the applicant's statement that he was handed a copy of the decision when he attended the Department's offices around 20 March 2013. The Tribunal finds that he was notified of the decision at this time and that the application for review was lodged within time.

Appearance before the Tribunal

10. The applicant appeared before the Tribunal on 29 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Material before the Tribunal

11. The Tribunal has taken into account the applicant's protection visa application, his statement to the Department, his evidence in his interview with the delegate and at the Tribunal hearing, as well as relevant country information. The Tribunal has also had regard to a statement (a copy of which was provided by [the applicant] in support of his protection visa application) made by the applicant's partner, [Ms A], in support of her own application for a protection visa. The Tribunal also has before it the decision by the Tribunal differently constituted which on review affirmed the decision of the delegate to refuse [Ms A]'s protection visa application.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Regulations. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
13. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention). Article 1A(2) of the Convention sets out a definition of who is a refugee.
14. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
15. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it

may be enough that the government has failed or is unable to protect the applicant from persecution.

16. 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.
17. 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.
18. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
19. 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.
20. 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.
21. 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').
22. 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.

23. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in China 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.

Under the Refugees Convention

The applicant's religious beliefs

24. The applicant advances his claim in relation to religious beliefs on two bases – his own Christian beliefs and his relationship with his partner, [Ms A], who is a Christian.
25. Based on his lack of knowledge of the Christian religion, the delegate did not accept that [the applicant] is Christian. At the hearing before the Tribunal [the applicant] was questioned about his religion. He said that he was not a Christian before he came to Australia and that his partner introduced him to the church. He stated that he had been baptised and attends a church in [a suburb].
26. [The applicant] said that he believes in God and believes God exists. He conceded, however, that he is not very devout, describing himself as “sort of Christian”. He said that he rarely reads the Bible and does not often attend church. His partner goes often but he does not have much time to go and has not been for two months. He said that he stays at home and looks after their child while his partner attends church. He said that he got baptised because his girlfriend asked him to. When asked to describe his Christian beliefs [the applicant] was unable to answer.
27. [The applicant] said that, if he was alone he would not be harmed if he returned to China. However, he now has a partner and child and, if returned to China, he would go to a house church with his partner and then he would have trouble with the police and would be arrested and beaten. He said that Christian churches are not allowed in the area he comes from in Fujian Province, namely Fuqing. He said that [Ms A], who is also from Fujian, had been arrested in China before because of her involvement with a house church and described the events set out in [Ms A]’s statement made in support of her protection visa application.
28. [Ms A] did not attend the Tribunal to give evidence in [the applicant]’s application. [The applicant] said that she had to stay at home and look after their son who was sick and so could not come to the hearing. When asked whether he was aware of the Tribunal’s decision in relation to [Ms A]’s application for a protection visa, [the applicant] said he was. The Tribunal pointed out that her application had been refused because the Tribunal was not satisfied that there was a real chance she would suffer harm if returned to China on account of her Christian beliefs. He said that the information relied upon by the Tribunal in considering [Ms A]’s application was wrong.
29. The Tribunal discussed with [the applicant] a number of issues, based on available country information, which indicate that Christians who attend house churches in China, particularly in Fujian province face a very small risk of being harmed or arrested because of their religious beliefs. The information specifically put to [the applicant] was that:

- large numbers of Christians exist in Fujian and a significant proportion of them worship in unregistered groups or house churches;¹
 - there are few reports of repression of house church Christians in Fujian in general and in Fuqing in particular;²
 - the authorities in Fujian are one of the most lenient on unregistered Christians in China;³
 - small groups meeting in private dwellings are not of particular concern to authorities in Fujian;⁴ and
 - few arrests have been reported⁵
30. In response [the applicant] said that the information the Tribunal has may not be correct. He said that before he came to Australia he knew that people who attended gatherings held at someone's house got arrested because of their Christian beliefs. He said his partner had been arrested before she came to Australia because she was a Christian. He also said that the Chinese media does not report bad news so there would be no reports of people being arrested or imprisoned.
31. The Tribunal accepts that [the applicant] has been baptised and does attend a Christian church in [a suburb] from time to time. As he acknowledged at the hearing, however, his own Christian beliefs are not strong. I find, based on [the applicant]'s characterisation of his own beliefs, that it is very unlikely [the applicant] would engage in active promotion of his own Christian beliefs should he return to China. He also claims, however, in relation to his religion that he will be harmed because he will attend church with his partner if they return to China.
32. I, like the member who determined [Ms A]'s application for review, accept that she regards herself as a Christian and, if she were to return to China, would regularly attend house church gatherings. I also accept that [the applicant] would accompany her on occasions as he has done in Australia. However, I find that the available country information shows that the Chinese authorities exhibit a liberal and tolerant approach to worship at unregistered or house churches in their place of residence. I find that there is not a real chance that the applicant will suffer serious harm or persecution in the foreseeable future by the Chinese authorities due to his own religious activities or because he may be associated with the religious

¹ Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

² Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.

³ Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Executive Secretary, Hong Kong Christian Council comments reported in Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2005, *CHN100387.E – China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong (2001-2005)*, 7 September; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

⁴ Schak, David 2011, 'Protestantism in China: A Dilemma for the Party-State', *Journal of Current Chinese Affairs*, Vol 40, No 2, p.92

⁵ Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April; see 2 above

activities of his partner. I therefore find that his fear on account of his and his partner's religion is not well-founded.

Fathering a child out of wedlock

33. [The applicant] said that he met his partner, [Ms A], in Australia and they formed a relationship. [Ms A] accidentally became pregnant and gave birth to a son on [date deleted]. [The applicant] was [age deleted] when their son was born and [Ms A] was about to turn [age deleted]. As noted above, [Ms A] did not attend the hearing. [The applicant] told the Tribunal that he and [Ms A] are still in a relationship and hope to marry one day but they do not have enough money to do so at the present time. He also said that they need the blessing of their parents to get married.
34. [The applicant] did not bring any evidence of his relationship with [Ms A] to the hearing and nor did he provide a copy of his son's birth certificate, despite the veracity of the relationship being an issue in the delegate's decision. I note, however, that [the applicant] gave evidence to the Tribunal at the hearing of [Ms A]'s application and I accept that they are in a relationship, are not married and have a child together.
35. [The applicant] said that because he was under the marriageable age and he and [Ms A] were not married when they had their son, they will be fined a large amount if they return to China. He said that he had heard that the fine would be at least 20,000 RMB.
36. In Fujian it is forbidden to give birth 'before the stipulated time'⁶ Article 14(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* states that 'a child is regarded as born before the stipulated time' in the case where 'those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age)'⁷ The legal marrying age is 20 years for women and 22 years for men.⁸ I accept that [the applicant] was under the marriageable age in China when his son was born and that he and [Ms A] were not married. The penalty for having a child 'before the stipulated time' is outlined in Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province*. The standard penalty is a fine, often referred to as a social compensation fee. Chinese nationals who breach the family planning regulations while outside the country, and who are not eligible for an exemption, must pay a compensation fee calculated using the average income of the district in which they have household registration.⁹
37. I accept based on the available country information that the birth of [the applicant]'s child was in breach of the family planning laws and he would most likely be required to pay a social compensation fee should he return to Fujian. At the hearing [the applicant] said that he did not live in a city in Fujian but in a small regional place. Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* calls for a social

⁶ *Population and Family Planning Regulation of Fujian Province*, art 14, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld

⁷ *ibid*

⁸ *Marriage Law of the People's Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People's Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People's Republic of China

⁹ Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

compensation fee of 60 to 100 per cent of the average local annual income.¹⁰ While local family planning officials have some discretion in determining social compensation fees,¹¹ the Tribunal put to [the applicant] that in his circumstances the fine would be in the vicinity of 4,456 RMB to 7,427 RMB,¹² not the 20,000 RMB he had claimed.

38. [The applicant] said that, while that may be the amount the law stipulates, in small places the officials take more money than you are required to pay. He said that he and [Ms A] have no savings and would be unable to pay the fine. [The applicant] said that therefore he and his partner and child would not be able to survive in China and would have no place to live or enough to eat.
39. The Tribunal put to [the applicant] that under the relevant laws persons who are unable to pay a fine in a lump sum can apply for approval to pay by instalments and that in Fujian province repayments could be made over three years.¹³ [The applicant] responded that he didn't know anything about paying by instalments and, in any event, the official rules don't apply in a small place like the one he comes from.
40. When asked whether he and [Ms A] would be able to work to pay off the fine, [the applicant] stated that only one of them could work as the other would have to stay at home to mind their son. He said it would be hard to find a job as he is not well educated and the pay is low. At another point in the hearing he did, however, say he would be able to find a job. He said that the price of goods in China is expensive and they need to raise a child and therefore would not have enough money to pay the fine. [The applicant] also said that, while he may be able to get a job, he would not earn enough money. He said that he had worked as a plasterer in Australia but had hurt his back and can't do heavy work anymore. He said that [Ms A] has stomach problems and often gets sick which affects her ability to work.
41. The Tribunal asked [the applicant] about whether he and [Ms A] could obtain some assistance from their families to pay the fee. He said that neither his nor [Ms A]'s family would help them. He said that neither of their families is rich and his girlfriend's father owes money to other people. After having initially said that he speaks with his family by telephone once a month, [the applicant] then said that he does not have regular contact with his family and they wouldn't care if he were alive or dead and therefore wouldn't help him.
42. [The applicant] said that [Ms A]'s father does not approve of him or their relationship. The only contact she has is with her [sibling] and [Ms A]'s family would not help them if they returned to China. He said that both his and [Ms A]'s family are against them because of their relationship.

¹⁰ Defined by the Regulations as 'the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the previous year when the child is born'. See: *Population and Family Planning Regulation of Fujian Province*, art 39, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld; Department of Foreign Affairs and Trade 2012, *DFAT Report No. 1354 – RRT Information Request: CHN39817*, 23 January

¹¹ Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

¹² Based on income levels obtained from the *Fujian Statistical Yearbook 2011* and *China Statistical Yearbook 2012*.

¹³ *Measures for Administration of Collection of Social Maintenance Fees* (China), art 6A, Promulgated 2 August 2002, (Effective 1 September 2002), National People's Congress of the People's Republic of China; Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request CHN37505*, 12 November

43. I am not satisfied that the imposition of a social compensation fee upon [the applicant] constitutes persecution. I am satisfied on the evidence before me that China's family planning laws and policies apply generally to the Chinese population. I am satisfied that the family planning laws are not discriminatory in their intent and are appropriate to achieve a legitimate national objective in the context of China's need to control its overall population growth. Despite [the applicant]'s assertions to the contrary, there is no independent evidence before me that that the relevant laws of Fujian province will be applied to [the applicant] in a discriminatory manner for any reason or that the laws are selectively enforced.
44. Furthermore, there is nothing in the independent country information before me to support [the applicant]'s statement that because he comes from a small place in Fujian he would be required to pay a fee more than twice that stipulated by law. The applicant himself provided no other information to support this statement. I find that he has exaggerated his claims in this regard and that the amount of the fee, being in the vicinity of 4,500 to 7,500 RMB, would not cause undue financial hardship for him.
45. The country information is clear that a person in [the applicant]'s position is able to apply to pay the fee by instalments over three years. While he states that he is unable to do heavy work because of a back injury, there is nothing to indicate that he will not be able to gain employment on his return and thus earn an income. In fact, [the applicant] conceded at the hearing that he would be able to get a job. He would thus have income from his employment and would be most likely to also have support from his family. [The applicant]'s evidence about his contact with his family was contradictory and I do not accept that he would be unable to obtain support from them if necessary. In light of these conclusions the Tribunal finds that there is no basis to his claims that he and his partner and child will not be able to survive or have a place to live or enough to eat.
46. As such, I do not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.
47. [The applicant] also claims that if he returns to China and is unable to pay the fine, his son will not get registration and will not be able to go to school. He further claims that if he and his family return to China, [Ms A] will be sterilised because she has had a boy child.
48. Neither [Ms A] nor their child is included in this application. [The applicant] has not made any claims that he would suffer harm if he returns to China arising out of the claims that [Ms A] will be sterilised or his child, being born out of wedlock, will not be able to be registered. He stated on two occasions during the course of the hearing that he was not concerned for himself but for his partner and child. As [the applicant] has made no claim that he personally fears persecution for reasons associated with the status of his partner and child I find that these issues do not give rise to a claim that [the applicant] is owed protection obligations.

Complementary protection

49. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances.
50. The Tribunal notes the explanation of the 'risk threshold' in the 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

assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZORB* [2013] FCAFC 33.

51. As discussed above, the Tribunal has found that [the applicant]'s own Christian faith is weak but he is likely to attend church with his partner should they return to China. On the basis of my findings set out above, I am not satisfied that the applicant's claims give rise to substantial grounds for believing that, as a necessary and foreseeable consequence of the his removal from Australia to China, there is a real risk that he would suffer significant harm on account of his own or his partner's Christian beliefs.
52. In relation to the imposition of a social compensation fee as a result of the birth of the applicant's son out of wedlock and that at the time the applicant was under the marriageable age, I have found above that the fee is not excessive and that the applicant will be able to make arrangements to pay the fee. Therefore, I find that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm as a result of the breach of the family planning laws.
53. The applicant has not suggested that he would meet with consequences amounting to significant harm arising out of his claims that his son would not be able to be registered and his partner would be sterilised.

CONCLUSIONS

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

DECISION

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

Kay Ransome
Principal Member