

1500075 (Refugee) [2016] AATA 3667 (31 March 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1500075
COUNTRY OF REFERENCE:	China
MEMBER:	Gabrielle Cullen
DATE:	31 March 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 31 March 2016 at 3:08pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, a citizen of China, born in Fuqing, Fujian Province claims he fears return to China as his father was involved with the Local Church and when the police came in August 2005 to break up his father's church gathering, he, the applicant hit one of the police officers with a vase in the head. He claims subsequently the policeman beat the applicant and his father and when he was at school, the police officer sent local gang members to harass and harm him.
3. The applicant first arrived in Australia [in] August 2006 on a student visa valid to [date] October 2006. A further student visa was granted on [date] October 2006 and expired on [date] March 2009. The applicant applied for a protection visa on [date] November 2013.
4. On [date] April 2014 the applicant was interviewed by the Department. The Tribunal has listened to the tape of that interview and where relevant the evidence from that interview appears in this decision.
5. The delegate refused to grant the visa on [date] December 2014 on the basis that the applicant was not credible as to his claims.
6. The applicant appeared before the Tribunal on 31 March 2016 to give evidence and present arguments and where relevant the evidence from that hearing appears in this decision. He was assisted with an interpreter in the Mandarin and English languages.
7. The issues to be considered in this case are as follows.
 - Is the applicant credible as to his claims?
 - Does he have a well-founded fear of persecution in relation to China and meet the protection obligation under the Refugees Convention?
 - Does he meet the protection obligations under the complementary protection provisions of the Migration Act?

RELEVANT LAW

8. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.

Refugee criterion

9. 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).

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
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 '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 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.

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.

Complementary protection criterion

19. 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').
20. '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.
21. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

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.

CONSIDERATION OF CLAIMS AND EVIDENCE

23. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources. This includes, but is not limited to, the following.
 - The applicant's protection visa application of [date] November 2013, identity documents and attached statement.
 - Oral evidence of the applicant provided at the Department interview on [date] April 2014 and the Tribunal hearing on 31 March 2016.

- DFAT, *DFAT Country Report China*, 3 March 201 and DFAT, *DFAT Thematic Report – Unregistered religious organisations and other groups in People’s Republic of China*, 3 March 2015.
- Department of Immigration – PAM3 Refugee and Humanitarian – Complementary Protection Guidelines and PAM3 Refugee and Humanitarian – Refugee Law Guidelines.

24. For the reasons that follow, the Tribunal has concluded that the decision under review should be affirmed.

The Applicant’s claims

25. The applicant claims in his statement attached to his protection visa application that he fears return as his father is a member of the Shouter Christians. He claims he remembers them gathering together very often, sometimes at their home and sometimes at other places.
26. He claims on [date] August 2005 his father and members were gathering at his home and suddenly the police broke into their home and took away all the material and said they were involved in an illegal gathering. He claims his father and the other members were taken to the police station and the police mocked them and tore up all the materials. He claims his father was beaten and verbally abused and he, the applicant was very scared for his father. He claims he fought back against one of the police and he tried very hard to hit one of the police with a vase he picked up. He claims they then started to beat him and his father came to protect him and took all the hits. He claims he does not know how long he was beaten for and then they were taken to the police station and the policeman he fought was taken to the hospital. The policeman said it was not over. He claims his mother bribed the police with 8,000 yuan and both he and his father were released.
27. He claims the policeman he fought with came later while he was studying at school. He claims his father was also worried about him and started to arrange for him to leave China. He claims he was granted a visa, and came to Australia on [date] August 2006 to study.
28. He outlines the benefits he has received in Australia. He claims he went to apply for a travel documents to return to China in October 2011 from the Chinese Embassy as he had decided to return to China. He claims when he went to buy the air ticket his mother called him and advised the policeman he had fought with had not let it go and was still waiting for revenge. He claims his mother asked him not to go back. He claims he does not know what would happen if he returned. He claims he has stayed here for over 7 years and deeply loves Australia. He claims he will not know how to survive in China.
29. At the Department interview he added that his mother had warned him not to return home in May 2007. He said that while he was at school the police officer who he had hit sent local gang members to harm him between the years 2005 to 2006 He also said in 2011 when he was thinking of returning home his mother advised him not to as neighbours in their apartment block had advised there was a person downstairs asking as to his whereabouts.
30. At the hearing held on 31 March 2016 the applicant was asked what he fears will happen to him on return to China; he said nothing will happen as it has been such long time. The Tribunal asked him whether he currently has any claims for protection or any reasons related to protection as to why he wants to remain in Australia; he said the issue happened over ten years ago and he doesn’t think anything will now happen to him on return. The Tribunal asked again whether he has any claims for protection or reasons why he fears return to China; he replied no. He said he wants to be honest. The applicant agreed when the Tribunal raised with him that it appears he does not have a well-founded fear of persecution

and meet the refugee definition or meet the complementary protection criteria. When the Tribunal asked if there was anything further he wanted to add, he said he can go back to China now. He said what he claimed previously happened was true but it is ok now. He said he knows he cannot meet the requirements for a protection visa but he wants to be able to stay as a migrant.

Assessment of Claims

31. On the basis of the applicant's evidence at hearing, the Tribunal accepts that the applicant is a national of China. For the purposes of s.36(2)(aa) the Tribunal accepts that China is the receiving country.
32. On the basis of the applicant's evidence at the hearing before me, as noted in paragraph 30 above, that he does not fear return to China, no longer has any claims for protection and does not meet the Refugee definition or complementary protection criteria, the Tribunal is not satisfied on the evidence before it that the applicant faces a real chance of persecution involving serious harm if he returns to China now or in the reasonably foreseeable future at the hands of the police, policeman who he claims he hit or the authorities or local gangs as his father is involved with the Local Church or is a Shouter, as he had an altercation with a policeman or as he is perceived to be associated with the Local Church or for any of the reasons he claims.
33. Based on all the evidence before it, including the applicant's claimed past circumstances and what is accepted of his current personal and family circumstances and profile in China, the Tribunal is not satisfied that the applicant faces a real chance of serious harm for any of the reasons claimed or arising on the evidence, either singularly or cumulatively, for a Convention reason, in the reasonably foreseeable future. It follows that the Tribunal is not satisfied that the applicant faces a well-founded fear of persecution in China for a Convention reason in the reasonably foreseeable future. Accordingly, the Tribunal is not satisfied that the applicant is a refugee under section 36(2) (a) of the Act.
34. Similarly, on the basis of the applicant's evidence at the hearing before me as noted in paragraph 30 above the Tribunal is not satisfied on the basis of the evidence before it that there is a real risk that he will suffer significant harm on his return to China at the hands of the police, policeman who he claims he hit or the authorities or local gangs as his father is involved with the Local Church or is a shouter, as he had an altercation with a policeman or as he is perceived to be associated with the Local Church or for any of the reasons he claims.
35. The Tribunal therefore does not accept that there are 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 defined in subsection 36(2A).

CONCLUSION

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

38. 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

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

Gabrielle Cullen
Member