

1500421 (Refugee) [2015] AATA 3502 (8 October 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1500421
COUNTRY OF REFERENCE: China
MEMBER: Penelope Hunter
DATE: 8 October 2015
PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the [first named applicant] satisfies s.36(2)(a) of the Migration Act; and
- (ii) that the other applicants, [the applicant wife] and [the applicant daughter], satisfy s. 36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

Statement made on 08 October 2015 at 10:14am

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 applicants Protection visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants are a husband, wife and child, who claim to be citizens of the People's Republic of China (China). They applied for the visas [in] February 2014 and the delegate refused to grant the visas [in] December 2014.
3. The applicants appeared before the Tribunal on 21 September 2015 to give evidence and present arguments. The Tribunal also received oral evidence from [two officials of a Catholic Community] and [another] member of [that community and another church]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicants were represented in relation to the review by their registered migration agent.

STATUTORY FRAMEWORK

5. 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.
6. 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).
7. 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.
8. 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').

9. 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

10. The [primary applicant] fears persecution in China for the Convention related reason of religion. He claims that he will be arrested and imprisoned if he returns to China for attending unregistered Catholic church activities and his role in distributing Catholic religious information that he brought in to China when he last returned in [late] 2013 to January 2014. He claims that he is known to the Chinese authorities for evangelising, that he has previously been detained and suffered serious harm. Further that when last in China he departed having escaped police custody.

[The applicant]

11. The main issue in this case is whether the Tribunal accepts that [the applicant] is a genuine Catholic, that he has engaged in evangelism in China and that his claims of harm are believable. In the event that I am so satisfied, I must consider whether he faces a real chance of Convention related persecution or, failing that, a real risk of serious harm in China. I found that [the applicant] provided detailed evidence to the Tribunal on issues relevant to his claims that demonstrated to my satisfaction that he had knowledge or experience of the events claimed. There has been supporting evidence provided by his Pastor, [the applicant wife], and members of his church, as well as significant photographic evidence that I have accepted. I find that [the applicant] is generally credible and consistent in the presentation of his claims and evidence. For the following reasons, I have concluded that the present matter should be remitted for consideration.
12. [The applicant], claims that his mother was a Christian however the family became deeply involved with an underground Catholic church in Fujian province following his mother's illness in 2003. At the time his father was away working in [another] province and it was members of the church that provided assistance to his mother and support for [the applicant] and his elder sister. His parents became firm followers of the church and in September 2004 he undertook a 6 month Catechumen class, following which he was baptised. He told the Tribunal that he regularly attended a teenage group of the underground church following his baptism and in 2006 distributed some Catholic material at his school. This material came to the attention of the school administration and the PSB police who investigated but [the applicant] was not discovered as one of the distributors of the material. [The applicant] gave detailed evidence about his activities in China and I accept that he had attended an underground Catholic church in China since his early teens.
13. [The applicant] arrived in Australia [in] April 2008 on a Student visa and undertook and completed several units of study. I have viewed certificates of completion of his courses that have been lodged with the Department. [The applicant] had been attending [another church in Sydney] since 2009. A letter of confirmation was provided to the Tribunal to this effect by [a pastor of their Catholic Community], dated [in] September 2015. Although they were members of the same church, [the applicant] and [the applicant wife] gave separate consistent evidence of how their relationship developed in 2012 while working at a [workplace] in [Sydney]. At that time [the applicant wife] was separated from her husband, having previously married in 2009.

14. [The applicant] and [the applicant wife] married [in] July 2014. Their [daughter] was born [in] August 2014. [The applicant daughter] was baptised at [the other] church [in] November 2014.
15. [The applicant's three witnesses] provided consistent and independent evidence of his constant attendance at [the other church], his regular involvement in activities such as bible study, fundraising and social activities for the church. Photographic evidence was also supplied. I note that [the applicant] began attending church soon after his arrival in Australia and approximately five years prior to his Protection visa application. I accept that [the applicant] has regularly attended Catholic church in Australia. [The applicant] was able to explain clearly the basis of his beliefs as a Christian and I accept that he is a genuine Catholic. The delegate did not appear to dispute this claim. Further I am satisfied that his attendance at [the other church] and his engagement in [the Catholic Community] related activities was otherwise than for the purpose of strengthening his claim to be a refugee and I am not required to disregard this conduct pursuant to ss. 91R(3) of the Act.
16. [The applicant] returned to China in 2009 and again in January 2013. He gave evidence that these trips were without incident, although he attended underground Catholic services and engaged in activities with his friend [Friend A] associated with his Catholic faith. [The applicant] gave evidence that he felt compelled to evangelise to others when he returned to China as he had experience of Catholicism outside of what was tolerated and promoted by the Chinese government. He wished to share his knowledge and experience. Due to the generally consistent nature of his evidence I am satisfied that he engaged in these activities. [The applicant] did not seek to overstate the nature of the activities or exaggerate any perceived threat to his person at that time.
17. It was events that occurred in [late] 2013 and January 2014 that [the applicant] claimed gave rise to his risk of serious harm. On this trip he again brought Catholic material back to China, he identified clearly the texts which were books he had purchased in Hong Kong. [The applicant] claimed to have copied material from the books and assisted in the dissemination of the material to students at [a] University and attended underground church meetings. Additionally he travelled with his friend [Friend A] to distribute promotional Catholic material to [a specific] mountain village []. The police came to his parent's home [in] January 2014 and arrested [the applicant] and he was taken to the Public Security Bureau (PSB) office in Fuqing city. He later learned that [Friend A] had been arrested the day before. [The applicant] claimed that he was questioned about his association with [Friend A] and the police asserted that he took part in activities that disturbed the social order. [The applicant] was then transferred to Fuqing detention centre. He remained there until [a later date in] January 2014 and was frequently questioned by police. He provided the Tribunal with contextual detail and a richness of sensory detail about his detention and questioning. On [the later date] he was assaulted by other prisoners and transferred to hospital. [The applicant] claimed he sustained bruising to his body and a [specific] injury following an attempted [attack]. The delegate had concerns as to the extent of [the applicant's] injuries given the photographs he submitted. [The applicant] submitted further photographic evidence to the Tribunal following the hearing. In addition a small scar in the proximate location of his alleged injury was observed on his [body part] at the time of hearing. I do not consider the photographic evidence he has provided to be inconsistent with his claims of injury. [The applicant] did not claim that he was assaulted as a consequence of his religion but rather during a fight with another inmate that broke out while he was in the detention centre. He did not seek to exaggerate the events that led to his injuries. In relating his evidence he provided a detailed narrative of events that was generally consistent with his original claim and interview with the delegate. His evidence of his experience was considered plausible and I accept that he was detained by authorities in China as a consequence of his religious activities and while in detention he suffered serious harm.

18. Likewise [the applicant] gave detailed evidence of the means of his departure from China and the reasons why he is certain he was of interest to the Chinese authorities. This related to his escape from hospital while still under detention, which involved a series of family resources such as bribing his hospital guard, enquiries through a cousin with the police and also the assistance of another relative who worked at the airport. [The applicant] also submitted to the Tribunal at the hearing a copy of his original travel itinerary which had him departing China at a later date. This is consistent with his claims that he departed China in a hurry. The delegate found that the method of [the applicant's] departure involved a series of coincidences. On the contrary I considered that [the applicant's] method of departure involved a network of family connections, was planned and organised and he was able to explain plausibly how this occurred.
19. [The applicant's] ongoing fear of harm arises from the fact that he left China having been detained for his religious activity and he escaped from police detention. He relayed to the Tribunal that his parents have subsequently experienced harassment and difficulty leaving Fujian to travel for work. Additionally, [the applicant] reports that [Friend A] remains in custody and other students from [the] University have also been detained.

[The applicant wife]

20. [The applicant wife] was also found to be generally credible and consistent in her evidence. She told the Tribunal that she had no claims for protection independent of her husband.
21. I accept her evidence that she has been a Catholic since birth and she attended an underground church while she was in China. She reported no instances of harm while pursuing her religion in China, although claimed she was not totally free to pursue her faith and that sometimes people would come and investigate or monitor church activities.
22. [The applicant wife] arrived in Australia in June 2007 on a Student visa and has since returned twice to visit family in China without incident. [Two of the witnesses] provided evidence that [the applicant wife] had regularly attended [the other church] since 2008, prior to [the applicant] and several years prior to them forming a relationship. She gave separate and consistent evidence, from [the applicant] and [one witness], as to how her relationship with [the applicant] developed.
23. When asked about her concerns upon returning to China she spoke only of her concerns for her husband, on observing his injuries when he returned from his last trip in January 2014.

[The applicant daughter]

24. [The applicant daughter] is an infant and was born in Australia. She has been baptised in the Catholic faith. Her parents did not advance any independent claims on her behalf.

COUNTRY INFORMATION

25. The reports indicate that the situation for Christians is not uniform or static in China. The country Information Report, CHN36515 dated 19 April 2010, contains information on the treatment of Catholics in Fujian province. The report states that:

'In Fujian province, as in the rest of China, there is an official Catholic Church called the Catholic Patriotic Association, which owes its allegiance to the Chinese Communist Party; as well as an underground Catholic Church which maintains its allegiance to the Vatican. Estimates of the number of Catholics in Fujian vary between 200,000 and 400,000. Fujian is generally regarded as one of the areas of China that applied regulations on religion more liberally than others, but some sources indicate that police and local officials continue to arrest underground Catholic priests and parishioners and

to demolish churches. Sources consulted also indicate that Chinese authorities continue to appoint Bishops to dioceses in Fujian without the approval of the Vatican, and that local authorities take action against underground Catholics to serve the financial interests of local officials.¹

26. A February 2013 briefing on the ChinaAid release of its report on 'Chinese Government Persecution of Christians & Churches in Mainland China states:

'In 2012, Christians and churches in China experienced a serious comprehensive escalation of government persecution. In comparing the total number of persecution cases, the number of people persecuted, the number taken into custody, the number sentenced, the number of abuse cases and the number of people abused with the same figures for 2011, the total of all six categories rose 13.1% over the previous year. Compared with the statistics in ChinaAid's past annual reports, this trend of worsening persecution has persisted for the past seven years, with an average annual increase of 24.5% in the total of all six categories of persecution statistics tracked by ChinaAid.'²

27. The Australian Department of Foreign Affairs and Trade (DFAT) in its thematic report on unregistered religious organisations in China published in March 2015 assesses that broadly religion in China can be practiced within state sanctioned boundaries and it is difficult to generalise about religious practices. It also comments as follows;

'Religious groups that fail to affiliate with one of the five official patriotic associations are considered illegal. As a result, they can be vulnerable to coercive and punitive action by authorities and denied legal protection under Chinese law.'³

The DFAT report does not discuss the treatment of Catholics in different provinces, but notes that they may encounter 'officially-sanctioned harassment and discrimination when their activities are viewed by authorities to be politically sensitive.' It further comments that discrimination and violence against Catholics in China is 'generally low.'⁴

28. Few recent reports are found of problems for Catholics in Fujian. However there are periodic attempts by the authorities to force some worshippers to join the registered bodies. Police and local officials have sometimes arrested underground Catholic priests, and although not recently, police and officials have arrested parishioners and demolished churches.⁵ The most recent is a 24 March 2010 article on the Catholic news website *Asia News IT* which reports the arrest of Father Liu Maochun, an underground Catholic priest from the diocese of Mindong in Fujian, for being involved in the organisation of a camp for university students. Another priest involved in the camp, Father John Baptist Luo Wen, is reported to have previously been arrested and released after 15 days imprisonment. The article further notes

¹ 'Country Advice China – Fujian Province and Church demolitions' 2010 *RRT Country Advice*, April <<http://www.justice.gov/sites/default/files/eoir/legacy/2013/11/18/Fujian%20Province-Fuging.pdf>> Accessed 4 June 2015 <CISDCDAAB1712>

² 'Annual Report: Chinese Government Persecution of Christians & Churches in Mainland China January-December', 2012, *China Aid Association 2013*, 1 February <<http://www.chinaaid.org/2013/02/chinaaid-releases-2012-annual-report-on.html>> Accessed 4 June 2015 <CIS24908>

³ 'Department of Foreign Affairs and Trade 2015', *DFAT Thematic Report. Unregistered religious organisations and other groups in the People's Republic of China*, 3 March paragraph 2.10

⁴ *ibid*, paragraph 3.17

⁵ For example, see: 'Another underground priest arrested in Fujian' 2010, *Asia News*, 24 March <<http://www.asianews.it/news-en/Another-underground-priest-arrested-in-Fujian-17965.html#>>; 'Church destroyed in Fujian, another to follow shortly' 2006, *Asia News*, 4 September <<http://www.asianews.it/index.php?l=en&art=7112#>>

that two other priests involved in the camp 'received a notice of detention and expect to be taken into custody in the near future'.⁶

29. The United States Commission on International Religious Freedom in its report for 2013 states that:

Since 2005, SARA has acknowledged through a policy posted on its website that family and friends have the right to meet at home for worship, including prayer and Bible study, without registering with the government. Authorities still regularly harass and detain small groups, however, that meet for religious purposes in homes and other locations. Some house church members say they have more freedom than in the past to conduct religious services, as long as they gather only in private.

.... Religious affairs officials and security organs scrutinized and restricted the religious activities of registered and unregistered religious and spiritual groups. The government harassed, detained, arrested, or sentenced to prison a number of religious adherents for activities reported to be related to their religious beliefs and practices. These activities included assembling for religious worship, expressing religious beliefs in public and in private, and publishing religious texts. There were also reports of physical abuse and torture in detention.⁷

CONCLUSION

30. On the basis of the passports submitted by [the applicant] and [the applicant wife] at the hearing and the applicants' oral evidence of their lives in China, I find that they are both citizens of China. There is nothing before me to suggest that any of the applicants have a right to enter and reside in any country other than China. Therefore I find that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act.
31. I accept that [the applicant] is a genuine Catholic, and that he has attended an underground Catholic church in China. It is accepted that if [the applicant] returned to China he would continue to attend an underground Catholic church. I accept that neither [the applicant] nor [the applicant wife] would attend, or wish to attend the registered churches in China and practice their faith through them.
32. I also accept that [the applicant] is disposed to talking to others about his faith, to sharing his experiences of his faith in Australia and encouraging them to follow the Catholic faith. On the basis of his previous activities, I accept that he would seek to spread his Catholic faith to others in China if he returns, and this heightens the risk that he will come to the attention of the authorities.
33. I also accept and [the applicant] has previously come to the attention of the authorities in China and been detained as a consequence of his religious activities. It is probable the authorities would wish to question him further if he were to return to China, as he escaped detention and it is likely he would be again detained. I make this finding on the basis of [the applicant's] evidence that his family has endured ongoing questioning and surveillance as a consequence of his activities in China, and his companions remain in detention.
34. The available country information, outlined above, indicates there is a risk of harassment, arrest and imprisonment for Catholics in Fujian province, particularly to those who practice outside the registered church system. I accept that the authorities in this province at times arbitrarily restrict the rights of people to practice their faith and that they engage in intermittent crackdowns on practising Catholics, particularly at politically or religiously sensitive times.

⁶ 'Another underground priest arrested in Fujian' 2010, *Asia News*, 24 March <<http://www.asianews.it/news-en/Another-underground-priest-arrested-in-Fujian-17965.html#>>

⁷ USCIRF Annual Report 2013 – Countries of Particular Concern: China, 30 April 2013

35. Based upon information and evidence before me, I am satisfied there is a real chance of [the applicant] coming to the adverse interest of the authorities in China because of his religious beliefs and practice of those beliefs, and of him being arrested, interrogated, detained in prison and physically mistreated.
36. I find that the harm which [the applicant] fears involves 'serious harm' as required by s.91R(1)(b) of the Act in that it involves a threat to his liberty and significant physical harassment or ill-treatment. I further find that [the applicant's] practice of his religion would be the essential and significant reason for the harm that he fears and that the persecution involves systematic and discriminatory conduct, as required by s 91R(1)(c) of the Act.
37. As the persecution feared by [the applicant] in China is from the authorities I find that adequate state protection would not be available to him. I have considered whether he may reasonably relocate to an area to avoid the harm he fears. In this regard it is noted that the response of local authorities in China varies from region to region and the country information indicates that [the applicant's] home province of Fujian is generally one of the more liberal provinces. It is accepted that worshippers in underground churches face harassment, imprisonment and attention by authorities, to varying levels throughout China and it is noted that proselytising in public is forbidden throughout China. I have found that [the applicant] will continue to share his faith and promote his faith. I find that there is a real chance of persecution throughout China for [the applicant]. I find that [the applicant] has a well-founded fear of persecution in China for reasons of his religion. Therefore [the applicant] satisfies the criterion set out in s. 36(2)(a).
38. I am not satisfied that [the applicant wife] is a person in respect of whom Australia has protection obligations. While I accept that she is a Catholic and will continue to engage in her religion at an underground church if returned to China, I am not satisfied that she has a profile that will bring her to the attention of the authorities in China. [The applicant wife] has not endured any past harm and has practiced her religion when she has been in China. I do not accept on the evidence that there is a real chance that [the applicant wife] will be harmed because of her religion. Therefore she does not satisfy the criterion set out in s.36(2)(a) or (aa). I am also not satisfied that [the applicant daughter] satisfies the criterion set out in s.36(2)(a) or (aa).
39. However, on the evidence before me including the marriage certificate of [the applicant wife] and [the applicant] and the birth certificate of [the applicant daughter], I am satisfied that [the applicant wife] and [the applicant daughter] are the wife and the dependent child of [the applicant] and as such are members of the same family unit as [the applicant] for the purposes of s.36(2)(b)(i). As [the applicant] satisfies the criterion set out in s.36(2)(a), it follows that [the applicant wife] and [the applicant daughter] will be entitled to a protection visa provided [the applicant wife] and [the applicant daughter] satisfy the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa are met

DECISION

40. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant, [the applicant] satisfies s36(2)(a) of the Migration Act; and
 - (ii) that the other applicants, [the applicant wife] and [the applicant daughter], satisfy s.36(2)(b)(i) of the Migration Act, on the basis of membership of the same family unit as the first named applicant.

Signed by AustLII

Penelope Hunter
Member

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