

1204744 [2013] RRTA 414 (4 June 2013)

DECISION RECORD

RRT CASE NUMBER:	1204744
DIAC REFERENCE(S):	CLF2011/186243
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Fraser Syme
DATE:	4 June 2013
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The applicant is a [age deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] man from Fujian province, China who arrived in Australia as an international student in March 2008. According to the applicant, his family have been persecuted in the past by the Chinese authorities because of their being active members of an underground Christian church. In September 2009, some of their church members were arrested and his parents have been in hiding since in another province, their property was confiscated. He fears if he returns to China he too will be targeted for harm because he will be an active member of an underground church and because his parents are currently wanted by the Chinese authorities. He fears too his child born out of wedlock will be persecuted because he will be unable to pay the high social compensation fee imposed to obtain the child's household registration.
2. The applicant applied to this Tribunal for review of a decision made by a delegate of the Minister for Immigration to refuse to grant him a Protection visa. In the decision under review, the delegate was not satisfied the applicant would be targeted by the Chinese authorities as his claims regarding his parents were not credible and his own participation in the underground Church had been uneventful. The delegate was not satisfied the applicant had a well-founded fear of persecution in the reasonably foreseeable future.
3. This review application raises the following questions to determine if the applicant meets the criteria for grant of a protection visa:
 - a. Is the applicant's evidence of suffering past harm credible
 - b. Does the applicant have a well-founded fear of persecution in the reasonably foreseeable future
 - c. Are there substantial grounds for believing the applicant has a real risk of significant harm if he is returns to China

HISTORY OF APPLICATION FOR REVIEW

4. The applicant applied to the department for a protection visa [in] November 2011. The applicant's de facto partner was not added to the application, as department records show she has previously been refused a protection visa onshore, so is subject to s.48. The applicant did not provide evidence of the birth of his child to the department and did not seek to add his child to his protection visa application prior to the decision of the delegate. The applicant provided only his passport in support of his application. His claims for protection were set out typed in Chinese and English on his application form 866B in response to questions 42-46. At the first hearing he corrected an error in his statement that events occurred [in] September, not [in] September 2009 in those claims. The Tribunal has listened to a recording of an interview the delegate conducted via telephone with the assistance of a Mandarin Chinese interpreter [in] March 2011 with the applicant. The delegate refused to grant the applicant a protection visa [in] March 2012. The applicant applied to the Tribunal for review of that decision [in] April 2012.

5. The applicant appeared before the Tribunal [in] August 2012 to give evidence and present arguments. The Tribunal hearings were conducted with the assistance of an interpreter in the Mandarin Chinese and English languages. The resumed hearing was necessary as not all of the relevant issues were covered within the time allotted for the first hearing.
6. The applicant was represented in relation to the review by his registered migration agent, who attended both hearings. The migration agent made a brief submission at the conclusion of the resumed hearing noting the applicant had just instructed him of a health condition affecting the applicant's child. The Tribunal agreed to the request of the migration agent for additional time after the hearing provided a written submission and supporting evidence. [In] August 2012 the Tribunal received a letter from the migration agent attaching the birth certificate of the applicant's child, a letter from a GP in Sydney referring the applicant's child to a specialist and an undated letter from the [official deleted: s.431(2)] of [Church 1] stating the applicant "...has attended Sunday worships ([mission]) in Church." There are no other submissions.

RELEVANT LAW

7. 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 '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.
8. 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 Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
9. 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').

CONSIDERATION OF CLAIMS AND EVIDENCE

10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
11. In making its findings, the Tribunal is mindful the applicant has a moderate level of education and that whenever evidence is received in a language other than the applicant's first language or through an interpreter there is always room for differences in meaning and nuance. The Tribunal is satisfied that the standard of interpreting at both hearings was reasonable. The Tribunal finds the applicant was able to communicate effectively, understood the Tribunal proceedings and participated in a meaningful way.

12. The Tribunal finds the applicant is a national of the People's Republic of China. He travelled to Australia as the holder of a passport issued by the authorities of China, a copy of which he provided with his protection visa application. He made no claim to be a national of any other country. The Tribunal accepts his claims he should be assessed against China for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa). Similarly, the Tribunal is satisfied the applicant does not have a legally enforceable right to and reside in another country and therefore is not excluded from Australia's protection obligations under s.36(3).

Credible evidence of suffering past harm

13. In summary the applicant's claims are his mother and father became Christians in 2003 and 2005 respectively. His parents' previously quarrelsome marriage improved, which he attributes to their new faith. He began attending an underground Christian church after he relocated to a second province in July 2006 where his father had a business. The applicant joined a youth group of the underground church led by a Mr S. The applicant additionally participated in preparing and distributing church materials as well as spreading the gospel. He was baptised in December 2006. Upon arriving in Sydney in 2008, he attended many churches but had difficulty locating a suitable church due to differences in teachings. In September 2009, the business of the applicant's father was raided by the Public Security Bureau. One of his father's staff members Ms L was arrested. Ms L had helped Mr S with church activities and used the applicant's father's office to prepare church materials. Mr S and 10 other church members too were later arrested. The applicant's parents have been in hiding in a third province without any income since then as their business was confiscated. The applicant ceased his studies in October 2009 and relocated to [town deleted: s.431 (2)] in November 2009, where he attends [Church 1].
14. The applicant fears he will be arrested by the police or other Chinese authorities if he returns to China because he intends to be an active member of an underground Christian church and because his parents are wanted due to their past underground church activities. He fears too that his child will be a 'black child' denied access to health and education services, because the child was born out of wedlock and he is unable to pay the social compensation fee to obtain household registration for the child. He will be extorted by the family planning authorities, village chief or the police to pay a corrupt, exorbitant fee, not the official social compensation fee.
15. The applicant's claims therefore relate to his religion, his parents' underground church activities and his child being a member of the particular social group of what is referred to as a 'black child' – children without a Chinese household registration.
16. The Tribunal accepts that 'applicants for refugee status face particular problems of proof as an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.' The Tribunal also accepts that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*). However, the Handbook also states:

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

17. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence it must proceed to assess the claim on the basis that it might possibly be true (see *MIMA v Rajalingam* (1999) 93 FCR 220). However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not 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, see *Randhawa v MILGEA* (1994) 52 FCR 437.
18. For the reasons discussed below, the Tribunal finds the applicant has fabricated his claims. It finds the applicant was not a credible witness. His responses in the hearing were often vague and evasive. Importantly, there were substantial and material inconsistencies and variations in the applicant's claims in his written statement and his oral evidence to the Tribunal. The Tribunal discussed with the applicant during the hearing it considered his credibility an issue. The difficulties in the evidence of the applicant which the Tribunal identified to him include:
 - a. The applicant claimed his parents have been in hiding in a third province since September 2009 following the arrest of the underground church members. He claimed they have no fixed address and do not have telephones. He then said he does not know their telephone numbers and waits for them to contact him. Each call is only short so they do not tell him very much. He has only spoken with them 5 or 6 times since their going into hiding, the last time being about 2 months prior to the hearing. They have had no income as their business was confiscated by the Chinese authorities due to the premises being used for underground church activities. He explained he believes his parents have been able to so subsist because his father used to do business in the third province and may have good friends there to help them. The Tribunal noted they must be very good friends for his parents to reveal they were in hiding from the police. To which he said he had no memory of his father ever mentioning the existence of such good friends in the third province.

The Tribunal considers implausible his parents have been without an income and living with friends of the applicant's father since 2009 nor is plausible that he does not know how to contact his parents because each phone call is too short so they do not tell him how to contact them.

- b. At the hearing, the Tribunal put to the applicant under s.424AA the departmental file included banking documents of his father provided in support of his student visa application. Those documents are all issued by a bank in the capital city of the applicant's home province and record transactions which occurred during the time the applicant claims him and his father were living in a second province. The Tribunal told him it was concerned these documents indicate the applicant was not living in the second province, as it appeared his father continued to do banking in his home province. Therefore the Tribunal may find he did not attend an underground church in the second province as claimed and that he had not provided credible evidence. If the Tribunal did not accept his evidence as credible about this, it may go on to find he has not been a credible witness general and not accept any of his claims. That would be a reason to affirm the decision. The applicant was advised he could seek additional time to comment or respond. He chose to respond at the hearing stating he applied for a student visa through an agent in his home town because it was more convenient. He then changed his evidence

to because he heard that agent was good when the Tribunal questioned why it would be convenient to use an agent hundreds of kilometres away from where he said he was living in the second province. He then explained that he was certain his father could only obtain a loan from a bank in the place of his household registration. That is why the bank documents were not from a bank where his father was living in the second province. When the Tribunal noted the bank documents were issued from a bank in the capital city of his home province, not the place of his household register, he explained his hometown is part of the capital city. The Tribunal noted all of the documents he provided indicated the place of his household register was a different city to the capital city. The applicant replied he did not know why the documents were from the capital city, his father prepared the bank documents, not him.

The Tribunal considers implausible the applicant's explanations why the bank documents are issued to his father from a bank in the capital city of his home province rather than the second province. The Tribunal is not persuaded too why the applicant would use an agent in his home town to prepare his student visa application, rather than the city he claimed to be living in at that time in the second province. The Tribunal considers these documents indicated his father and the applicant was not living in the second province as claimed. That his father remained banking in the home province and used an agent in the his home town to prepare the student visa application indicate the applicant remained living in his home province at the time he was preparing his student visa application in 2008 and therefore would not have been able to attend an underground church in the second province.

- c. When describing his activities in the youth group of the underground church with Mr S, the applicant said he spread the gospel. He then said he only spread the gospel to friends who seemed interested. He named five people who he said he spread the gospel too, all of whom joined and would sometimes the underground church. Later during the hearing he stated the church had 60-70 members, although they attended in different groups. When asked who were the 10 members arrested in September 2009, the applicant said they included 5 people whom he introduced to the underground church. When put to him was it just a coincidence of 60-70 members half of the members arrested were the people he introduced to the underground church, he replied that the five of them had become responsible people in the church, they were leaders who did some duties. When pointed out his earlier evidence they only attended the church sometimes, the applicant replied that he was not sure, because he was not there. He only knows what he was told by the girlfriend of Mr S after the arrests.

The Tribunal considers it implausible of the church membership of 60-70 members, half of those arrested happened to be the friends the applicant introduced to the church. The Tribunal too is not persuaded by his explanation for the inconsistency in his evidence regarding his earlier stating his 5 friends sometimes attended the church, but later claiming the reason for their arrest was because they are leaders. The Tribunal considers his claiming he only knew from what the girlfriend of Mr S told him was an unconvincing attempt to change his evidence once the inconsistency was pointed out to him.

- d. During the hearing, the applicant said Ms L in September 2009 was arrested because she photocopied church material for Mr S at the office of the applicant's father. When asked did anyone else prepare church material at his father's office, he as best as he knew, no one else did that. In his written statement, he stated he too would sometimes photocopy church material in his father's office. When this inconsistency was pointed out to him during the hearing, he replied he only helped Ms L, he did not do photocopying himself. Then he said he was confused, it happened a long time ago. The Tribunal noted his statement claimed Ms L only began to help Mr S with preparing church documents after the applicant had left China, so how could he assist her to do photocopying too. He replied his statement was not correct.

The Tribunal is not persuaded by the applicant's explanation for the inconsistency in his evidence. The Tribunal considers the applicant changed his evidence more than once, before finally blaming an error in his written statement, despite at the beginning of the hearing confirming he was aware of the contents of the statement and it was correct, other than a reference to events occurring [in] September, which should be [in] September.

- e. The applicant gave evidence at the hearing about his attending [Church 1]. He was able to state the address and the names of the Church leaders of the Chinese congregation. He said he attended the Chinese service of [Church 1] church weekly on Sundays at 3pm. When asked did he attend any activities at Church, he said occasionally when he has the time he will attend Bible study on Thursdays from 10am – 2pm. He last attended a week prior to the hearing. Asked if he attended any other church activities, mentioned sometimes attending prayer meetings on Tuesdays from 12-12:30. He had attended perhaps 7 times during the prior 3 months. The Tribunal put to the applicant information available for the website of [Church 1] indicating Bible study is held on Wednesdays at 10am. The only activity at the church on Tuesdays is singing practice in the evening. There are no church activities listed on Thursdays. When these inconsistencies were put to the applicant he variously said:
- i. The Wednesday bible study is for small children. When the Tribunal noted 10am was during school times, he said did not know. He then said that maybe the information the Tribunal has was during a school holiday. The Tribunal noted it accessed the church website the week before the first hearing, which was not a school holiday period. He then said he did not know what happened at the children bible study, to which the Tribunal noted that it did not ask that question, and it was his evidence the bible study was for children.
 - ii. The bible study he attended on Tuesdays was at a church member's home, not at the church. The Tribunal noted his earlier evidence made no mention his bible study was held at a church member's house. He replied everyone knows bible study is held at church member's houses. He further said he did not understand the Tribunal's earlier question, that he was under pressure and nervous.

The Tribunal considers the applicant changed his evidence more than once in an attempt to explain the inconsistency between his evidence of attendance at [Church 1] and the church activity information on its website. The Tribunal find considers it implausible the bible study on Tuesday morning would be for children only. The Tribunal is not persuaded the applicant misunderstood its question when asked what activities he attended at the church would include bible study at a church member's house. The Tribunal is not persuaded all bible study is conducted at church member's houses as the church material indicates bible study is held in the church on Tuesdays.

19. The Tribunal discussed with the applicant the significant delay between the applicant making his protection visa application in December 2011 and his receiving the telephone call in June 2011. As Heerey J noted in *Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347, it is legitimate to take into account an applicant's delay in lodging an application for a protection visa in assessing the genuineness, or at least the depth, of the applicant's claimed fear of persecution. In the Tribunal's view, the significant delay is not consistent with the applicant's claimed fear of harm and indicates that following the claimed raid on his parents' business in September 2009 and arrest of church members, he did not have a genuine fear of persecution if he were to return to China. The applicant explained because his friends who had applied for protection visas had all been refused, he too was worried he would be refused and would have to leave Australia. Had he not become a father, he would not have applied for protection, he did not want his child to have nothing. His wife is unwell, they have little money, and he needs the help of the Australia government. The Tribunal does not consider his friends being refused protection visas as a persuasive explanation why the applicant did not apply for a protection visa earlier. The Tribunal considers his explanations regarding applying for protection because of the birth of his child and the delay in his making the protection application are further evidence supporting its finding the applicant has fabricated his claims for protection in an attempt to remain in Australia.
20. In relation to his claims regarding his religion, the Tribunal finds the applicant does not come from a Christian family. It does not accept he or his parents attended an underground Church in China. It does not accept he joined any youth group, prepared any church material, distributed church materials or spread the gospel to anyone. The Tribunal rejects Ms L, Mr S or any other church members were arrested. It follows the Tribunal rejects too that his parents' business was raided by the Chinese authorities or their property confiscated. The Tribunal further rejects the applicants' parents have been in hiding in another province to avoid arrest. The Tribunal considers the applicant has fabricated these claims.
21. The applicant made no claims of past harm relating to his child, given the child was born in Australia in [month and year deleted: s.431(2)].

Well-founded fear of persecution

22. The Tribunal is mindful it must consider the applicant's risk of harm not only currently but into the reasonably foreseeable future. The applicant gave evidence he and his parents attended an underground Christian church in China. He was unable to name the denomination of the church, but confirmed it he used a regular Bible, not a Recovery Bible and did not attend a Local Church in China. He attended 4 or 5 different churches in Sydney which he named and identified differences between their teachings. The Tribunal discussed with the applicant country information which indicates although practices between provinces and

within various parts of the one province may differ, generally, so long as house church gatherings do not have large numbers of attendees, the Chinese authorities generally do not interfere with them.¹ The applicant replied that the Chinese authorities are able to do whatever they want to do.

23. The applicant provided a letter of support from [Church 1], but places no weight on that letter as it is undated and provides no detail as to the length or frequency of the applicant's attendance at that church. The Tribunal accepts the applicant may have attended [Church 1] in the past, but finds he has greatly exaggerated the level of his attendance at that Church in an attempt to characterise himself as a committed Christian. While the Tribunal is mindful the applicant is not obliged to do so, the applicant did not provide any evidence of his attending church in Sydney. He demonstrated some knowledge of Christianity and of differences between the various churches he says he attended. But the Tribunal is not persuaded by his reason he did not regularly attend any church in Sydney was due to differences in teachings. Rather the Tribunal considers such acts and level of knowledge to be more likely consistent with someone with a passing interest in Christianity only, changing and attending differing churches. The Tribunal is satisfied the applicant did infrequently attend church in Australia otherwise that for the purpose of strengthening his claims to be a refugee. However, on the limited evidence before it and given the Tribunal has found the applicant not to be a credible witness, the Tribunal is not satisfied the applicant has any genuine commitment to Christianity and rejects his claim he will be an active member of an underground church if he returns to China. On the basis of the country information the Chinese authorities generally do not interfere with the practices of underground Christian churches, the Tribunal rejects too that the applicant as a person with a passing interest in Christianity will be of interest to the Chinese authorities due to his religion or for any other reason.
24. The applicant has made claims his child will suffer persecution as 'black child'. The child was not included in the protection visa application and therefore is not included in the review application. The Tribunal therefore has considered the claims of the applicant relating to his child in the sense that the applicant will suffer some harm as the father of his child.
25. The Tribunal discussed with the applicant country information regarding the payment of social compensation fees in his home province to obtain a household register for a child born out of wedlock. The Tribunal noted anecdotal evidence children born out of wedlock to couples returning to China after studying overseas are sometimes not required to pay any social compensation fee.² The applicant said that may be the case for people returning who had earned their degrees and could contribute to their town, but he did not complete his course and had nothing to contribute. The Tribunal noted it was possible to apply to pay the social compensation fee in instalments. When asked what he thought the amount of the fee would be, the applicant said he knew of people in his situation who had to pay RMB200,000-300,000 and others who paid RMB300,00-400,000. The Tribunal put to him according to statistics issued by his home province government, the average social compensation fee for an agricultural household such as his in 2011 was RMB4,456-7,427 and in 2010 was RMB4,008-RMB6,680³ to register a first child born out of wedlock. The applicant said this

¹ USSD *International Religious Freedom Report 2009*

² DFAT Report 1104 (Feb 2010)

³ Attachment A, RRT China- Family Planning Background Paper (Jan 2012) compiled from *Fujian Statistical Year Book 2011, Population and Family Planning Regulation of Fujian Province* (2002) and *Fujian Province Family Planning Regulations* (1991).

figures were not correct, that is not what really happens. The village chief would think the applicant had made a lot of money while overseas, so would charge him a higher fee.

26. Regarding his claim his child could not receive medical care or receive an education as a black child, the Tribunal put to the applicant the Marriage Law in China states there can be no discrimination between children born in or out of wedlock. Former discrimination in the past against children born out of wedlock, particularly in rural areas, has now improved. The applicant replied the government cheat people and his child will be unable to attend school or attend a doctor without a household registration.
27. On the basis of the country information put to the applicant, the Tribunal considers payment of the social compensation fee to be a law of general application in China in place for an appropriate and adapted legitimate state objective: *Chen Shi Hai v MIMA* (2000) 201 CLR 293. The amount of the fee is not such as to cause undue financial hardship on the applicant. The amount of the social compensation fee payable is less than RMB10,000 and he is able to apply to pay that in instalments. Therefore, paying that amount will not cause undue hardship to the applicant and it is reasonable to obtain a household registration for his child. The Tribunal considers the applicant has sought to grossly exaggerate the amount of the social compensation fee payable in an attempt to establish a claim his child will suffer persecution. On that basis he is not a credible witness and his claims regarding the amount of the social compensation fee are exaggerated, the Tribunal rejects his claim he will have to pay a corruptly increased social compensation fee because he has been overseas. It follows then the child will not be a 'black child' nor will the child be prevented from receiving an education or health care. Consequentially, the applicant will not suffer any persecution on account of his child being a 'black child'.
28. The Tribunal has considered the claims of the applicant individually and cumulatively. For the above reasons, the Tribunal finds the applicant and his family faced no harm in the past due to their religion. The Tribunal has found the applicant and his family are not Christian. Therefore, it is not satisfied the applicant faces a real chance of persecution by the Chinese police or any other Chinese government authorities because he is a Christian, or for any activities of his parents, or for any other convention reason. Similarly, as the Tribunal has found his child will not be a 'black child' the applicant too does not face a well-founded fear of persecution due to his child being a 'black child' or for any other Convention reason. The Tribunal therefore is not satisfied the applicant has a well-founded fear of persecution for any Convention reason now, or in the reasonably foreseeable future if he returns to China. Therefore he does not satisfy the requirements of s.36(2)(a).

Real risk of significant harm

29. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances.
30. On the basis of the Tribunal's findings set out above, the Tribunal rejects the applicant's claims give rise to substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to China, there is a real risk that he would suffer significant harm in the form of: arbitrary deprivation of life; the death penalty being carried out; torture; cruel or inhuman treatment or punishment, or degrading treatment or punishment. Therefore he does not satisfy the requirements of s.36(2)(aa).

CONCLUSIONS

31. 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).
32. 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).
33. 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

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