

071910232 [2008] RRTA 24 (22 February 2008)

DECISION RECORD

RRT CASE NUMBER: 071910232

DIAC REFERENCE(S): 96/000150; CLF2007/143915

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: T Delofski

DATE DECISION SIGNED: 22 February 2008

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to 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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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.

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

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)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: 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.

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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

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 persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.

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

Whether an applicant is a person to 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.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's and the Tribunal's case files 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.

By way of background, the applicant arrived in Australia on a Chinese passport in a name other than his claimed genuine name. He first applied for a Protection visa soon after This application was refused, a decision subsequently affirmed by another Tribunal. The applicant applied for Ministerial intervention under the Act but was unsuccessful. He then remained unlawfully in Australia until located by Departmental officers and he was transferred to an Immigration Detention Centre. The applicant again requested Ministerial intervention and the Minister decided to allow him to lodge a further application for a Protection visa. This application was subsequent lodged.

The applicant's claims are set out in written submissions to the Department and the Tribunal. In his representative's most recent submission received by the Tribunal, the applicant makes the following claims:

- The applicant and his wife were harassed by authorities in F Province to agree to the sterilization of the wife following the birth of their first child.
- The applicant, his wife and their first child went into hiding in a friend's house to escape forced sterilization.
- The applicant's extended family were harassed by the authorities to determine his whereabouts.
- The applicant witnessed the arrest of his close friend and his wife who were both taken away and detained. The wife died as a result of a forced abortion when she was well advanced into the pregnancy and the husband later died
- The applicant's family member F1, was taken away soon after and subjected to a forced abortion.
- The applicant set up a group (Group G), to organise protest activities against the Chinese authorities' barbaric practices, the injustices of the Family Planning Policy and to demand that the Government stop the implementation of the One Child Policy in their rural area and uphold the "protection of their most basic human right" to have children.
- The applicant had to make arrangements for his wife and first child to go and live in a remote village to protect his wife from the threat of a forced abortion when she

became pregnant with their second child. She subsequently gave birth to their second child.

- When the authorities discovered that the applicant and his wife had a second child, they were fined a stated sum of money, which they could not pay, and the wife was subjected to forced sterilization.
- Police subsequently confiscated the applicant's land and demolished his home.
- In the same year, the police arrested the leaders of Group G, including the applicant. The applicant received a [period of time] sentence for being in breach of the Family Planning Policy and for his related political activities.
- While serving this sentence the applicant was denied sufficient food and clothing, forced to do hard labour and was beaten and physically abused.
- He sustained a serious injury while undertaking forced labour and was temporarily released to receive medical treatment, having almost served out his sentence.
- The applicant fled with his family to another province to escape serving the remainder of his sentence.
- Some time later a further fine was imposed on the family for non-payment of the earlier fine. It was served on the applicant's family member, F2 who still lived in the applicant's home village.
- After fleeing his village, the applicant lived with his family in Province P for a number of years as a fugitive and finally fled China under a false passport with the help of friends.
- The applicant fears persecution if he is returned to China for not serving the remaining period of his sentence, leaving the country, his breach of the One Child Policy and his anti-government activities and opinions.

It is submitted that the applicant and his wife were formally divorced in an attempt to free the wife from the continuing adverse attention from the authorities because of her relationship with the applicant. The wife came to the attention of the authorities when she sought to register their child for school in Province P. The applicant claims that while they are formally divorced, they remain a couple.

In earlier submissions the applicant has provided the following supporting evidence:

- A written statement by the applicant's family member, F2, who still resides in the applicant's home village. He states that the authorities are still looking for the applicant and he is likely to be arrested if he returns.
- A written statement from a neighbour and fellow member of Group G (Mr N) affirming the applicant's claims. Mr N fled to another country and was granted refugee status there. Mr N states that he "was one of the organizers of the anti-government protest. I fled China and gained protection in [another country] later. Even with [that country's] citizenship, when I visited home, local police were still

looking for me and showed interest in my activities. I can imagine that if [the applicant] is forced to return to China, he will definitely be forced to serve his jail term again.”

- A written statement by another member of the applicant’s anti-government group (Mr M) who states that the authorities still keep coming to the village looking for the applicant. He believes the applicant will be arrested and jailed if he returns.
- A written statement by the applicant’s wife affirming the applicant’s claims.

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant said that he had been the leader of Group G and a few others, including Mr N, had also been involved in the organisation of political protests against the One Child Policy. The applicant said that his sentence for these political activities was significantly longer than the sentences handed out to the others arrested. He understood that Mr N had been detained for a short time and fined.

The Tribunal noted that the applicant had not mentioned in earlier submissions his release for medical treatment towards the end of his sentence and his decision to flee with his family rather than complete his sentence. The applicant said that after arriving in Australia and applying for a Protection visa his first representative had advised him to keep his story short and simple. The applicant said that he had just arrived and knew nothing about the processes involved in applying for a Protection visa in Australia.

The applicant said that after his arrest for his political activities there had been no court proceedings or formal charges laid. He had spent a few days at a PSB substation and then transferred to a detention centre. He described his day to day existence in detention and said that he had been bullied by other inmates most of whom had been detained for common criminal activities such as stealing.

The applicant said that after fleeing his village with his family they had lived a hand-to-mouth existence in Province P, moving around within the province. They maintained contact with their broader family in the home village through letters using false names. He was informed that the PSB had continued to seek his whereabouts.

The applicant said he had obtained his false passport and airline ticket with the help of a friend in Province P. A few months after he left his wife enrolled their eldest child in a school in Province P. She was required to give the local authorities her household registration which revealed where she was from. This information was somehow leaked to the PSB and resulted in the local PSB harassing her seeking the whereabouts of the applicant. The harassment reached a level some years later where the applicant and his wife agreed they should legally divorce in an effort to mitigate the wife’s harassment by the PSB. Despite this *de jure* dissolution of the marriage, the applicant said that they remain in a *de facto* relationship to this day and they have maintained in close and regular contact. If granted a visa, the applicant said he would seek repatriation of his wife and family to Australia.

The applicant said that he had obtained the supporting documentation after phoning family members and friends. The written statements had been faxed to Australia together with the respective identification documents. The applicant said that in recent times he had been in regular contact with Mr N, who had been a fellow leader of Group G and whose wife had been subject to a forced abortion. Mr N had subsequently fled to another country where he

had been granted refugee status and permanent residence. The applicant said Mr N had returned to their home village in China in recent years where, despite his foreign citizenship, he had been harassed by the local PSB who were concerned that he would again get involved in political activities there. The applicant said that Mr N had told him that he (the applicant) would be arrested if he was forced to return. The applicant said that this advice had stopped him from pursuing his enquiry in Australia about obtaining a travel document.

The applicant said that his friend Mr M had also been involved in Group G but he had never personally breached the One Child Policy and hence was of lesser interest to the local PSB. He had told the applicant, however, that he (the applicant) was still of adverse interest to the PSB.

The applicant said that he was sure that he would be arrested and jailed for his past political activities against China's family policies and practices if he was forced to return to China. The representative said that the applicant's unlawful departure would also attract the authorities' adverse interest and increase the risk of his persecution for past political activities.

Background

Excerpt from the Country Report on Human Rights Practices in China

Released by the US Bureau of Democracy, Human Rights, and Labor

March 6, 2007

The country's birth planning policies retained harshly coercive elements in law and practice. The laws restrict the rights of families to choose the number of children they have and the period of time between births. The penalties for violating the law are strict, leaving some women little choice but to abort pregnancies. In addition, implementation of the policy by local officials resulted in serious violations of human rights. Reports of forced sterilizations and abortions, in violation of the national law, continued to be documented in rural areas. During the year officials in Chongqing municipality and in Fujian Province reportedly forcibly sterilized women. In June Western media reported that a woman fell to her death while fleeing Anhui authorities who were trying to force her to abort twins.

The law standardizes the implementation of the government's birth limitation policies; however, enforcement varied significantly from place to place. The law grants married couples the right to have one birth and allows eligible couples to apply for permission to have a second child if they meet conditions stipulated in local and provincial regulations. Many provincial regulations require women to wait four years or more after their first birth before making such an application. According to the UN Population Fund (UNFPA), the spacing requirement was removed in eight and relaxed in 10 of 30 counties across 30 provinces participating in UNFPA's "Fifth Country Program." The law requires couples that have an unapproved child to pay a "social compensation fee," which sometimes reached 10 times a person's annual disposable income, and grants preferential treatment to couples who abide by the birth limits. Although the law states that officials should not violate citizens' rights, these rights, as well as penalties for violating them, are not clearly defined. The law provides significant and detailed sanctions for officials who help persons evade the birth limitations.

Social compensation fees are set and assessed at the local level. The law requires family planning officials to obtain court approval before taking "forcible" action, such as detaining family members or confiscating and destroying property of families who refuse to pay social compensation fees. However, in practice this requirement was not always followed.

The one-child limit was more strictly applied in the cities, where only couples meeting certain conditions (e.g., both parents are only children) were permitted to have a second child. In most rural areas (including towns of under 200,000 persons), which included approximately 60 percent of the country's population, the policy was more relaxed, generally allowing couples to have a second child if the first was a girl or had a disability. Central government policy formally prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, although reports of physical coercion to meet birth targets continued.

Provinces were responsible for implementation of the regulations. All provincial-level governments except the Tibet Autonomous Region (TAR) amended their regulations to conform to the new law. For example, Anhui Province passed a law permitting 13 categories of couples, including coal miners, some remarried divorcees, and

some farm couples, to have a second child. Ethnic minorities like the Uighurs and the Tibetans are also allowed more than one child.

Seven provinces--Anhui, Hebei, Heilongjiang, Hubei, Hunan, Jilin, and Ningxia--require "termination of pregnancy" if the pregnancy violates provincial family planning regulations. An additional 10 provinces--Fujian, Guizhou, Guangdong, Gansu, Jiangxi, Qinghai, Sichuan, Shanxi, Shaanxi, and Yunnan--require unspecified "remedial measures" to deal with out-of-plan pregnancies.

In order to delay childbearing, the law sets the minimum marriage age for women at 20 years and for men at 22 years. It continued to be illegal in almost all provinces for a single woman to have a child. Social compensation fees were levied on unwed mothers.

The country's population control policy relied on education, propaganda, and economic incentives, as well as on more coercive measures such as the threat of job loss or demotion and social compensation fees. Psychological and economic pressures were common. According to provincial regulations, the fees ranged from one-half to 10 times the average worker's annual disposable income. Those who violated the child limit policy by having an unapproved child or helping another to do so faced disciplinary measures such as job loss or demotion, loss of promotion opportunity, expulsion from the party (membership in which was an unofficial requirement for certain jobs), and other administrative punishments, including in some cases the destruction of property. In the case of families that already had two children, one parent was often pressured to undergo sterilization. These penalties sometimes left women with little practical choice but to undergo abortion or sterilization. There were several rewards for couples who adhered to birth limitation laws and policies, including monthly stipends and preferential medical and educational benefits. The National Population and Family Planning Commission (NPFPC) expanded a number of programs to encourage smaller families. For example, new pension benefits were made available nationwide for those who adhered to birth limitation laws.

The law states that family planning bureaus will conduct pregnancy tests on married women and provide them with unspecified "follow-up" services. Some provinces fine women who do not undergo periodic pregnancy tests. For example, in Hebei fines range from \$25 to \$62.50 (RMB 200 to 500) and in Henan from \$6 to \$62.50 (RMB 50 to 500).

Officials at all levels remained subject to rewards or penalties based on meeting the population goals set by their administrative region. Promotions for local officials still depended in part on meeting population targets. There continued to be sporadic reports of violations of citizens' rights by local officials attempting to reduce the number of births in their region. The most egregious reports occurred in 2005 in Linyi, Shandong Province. International press reports alleged that local officials detained some 130,000 persons and forced them to submit to abortions or sterilization procedures. At least 7,000 persons were forcibly sterilized. Local officials profited from this illegal system by charging detention fees. Local rights activists documented several cases of forced late-term abortions.

According to law, citizens may sue officials who exceed their authority in implementing birth-planning policy. However, local officials retaliated with impunity against whistleblower Chen Guangcheng for his work in exposing the Linyi family planning abuses. In August Chen was sentenced to four years' and three months' imprisonment on dubious charges of obstructing traffic and damaging public property (see section 1.e.).

Laws and regulations forbid the termination of pregnancies based on the sex of the fetus, but because of the intersection of birth limitations with the traditional preference for male children, particularly in rural areas, many families used ultrasound technology to identify female fetuses and terminate these pregnancies (see section 5). The male-female birth ratio for first births was 118.58 to 100 (compared with norms of between 103 and 107 to 100), and in some parts of the country, the ratio was even more skewed. For second births, the national ratio was 152 to 100. While the NPFPC continued to deny a direct connection between family planning and skewed sex ratios at birth, it promoted expanded programs to raise awareness of the sex ratio imbalance and to improve protection of the rights of girls.

FINDINGS AND REASONS

For the purposes of this review, the Tribunal accepts the applicant's claims about his name and that he is a Chinese national.

The applicant claims that he has been persecuted for opposing and breaching China's One Child Policy. He claims that his wife has been subject to forced sterilization and that he was sentenced to a period of detention for leading Group G and organizing political protests in his

village against the government's family planning policies and practices. He claims that he fled F Province when he was temporarily released from detention for medical treatment, having served most of his sentence. He has been advised that he remains of adverse interest to the PSB and fears further persecution if he is forced to return to China.

The applicant's claims relating to his experiences with China's One Child Policy are consistent with independent country information. The Tribunal notes that the Departmental delegates and another Tribunal who have examined this case have all accepted the applicant's claims of being adversely affected by China's family planning policies and practices. The Tribunal also accepts that the applicant and his wife have suffered as a result of the application of the One Child Policy.

The central issues are the nature and extent of past persecution for the applicant's claimed political activities against these policies and practices and the likelihood of further persecution should the applicant be required to return to China. The Tribunal found the applicant's account of his detention during his sentence and his unauthorised fleeing to Province P credible. On the questions of whether the authorities remain interested in the applicant and the risk of his further persecution should he be forced to return, the Tribunal attaches significant weight to the views of Mr N who was, with the applicant, a fellow Group G organiser and who has been granted refugee status in another country. Mr N states that, despite his foreign citizenship, he has himself been harassed by the local authorities when he recently visited his (and the applicant's) home village; and that he believes the applicant will be arrested if he is forced to return. The Tribunal also considers that the applicant's unlawful departure from China under a false passport and his extended absence are also likely to arouse the authorities' adverse interest in the applicant and increase the risk of his persecution on return.

Based on this independent evidence and the Tribunal's views and findings in the preceding paragraphs, the Tribunal accepts that if the applicant were to return to China now or in the reasonably foreseeable future there is a real chance that he would be persecuted by the authorities for his past political activities against the government's family planning policies and practices and because he failed to complete his sentence of detention for those political activities

The Tribunal considers that the persecution which the applicant fears clearly involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant's political activities and opinion are the essential and significant reasons for the persecution which he fears, as required by paragraph 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely his political opinion.

The Tribunal finds that the applicant is outside his country of nationality, China. For reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his political opinion if he returns to that country now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Government of China.

There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).

Having considered the evidence as a whole, the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.

Sealing Officers ID: PRRTIR