

**0906840 [2009] RRTA 967 (2 October 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0906840

**DIAC REFERENCE(S):** CLF2007/14009 CLF2009/96124

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** John Cipolla

**DATE:** 2 October 2009

**PLACE OF DECISION:** Sydney

**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. 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).
2. 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 facsimile.
3. 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.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. 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**

6. 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.
7. 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. 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.

10. 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.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). 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.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of 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.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. 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**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The evidence before the Tribunal indicates that the applicant was granted a student visa. The evidence indicates that the applicant's visa was automatically cancelled under Section 137J of the Migration Act for a breach of Condition 8202(3)(b), on the basis that his education provider had certified that the applicant's attendance levels had not reached the minimum 80% required. The evidence indicates that the applicant when he came to Australia as the holder of a student visa was enrolled in the course which covered several weeks. The applicant's attendance during this course was 39.11%.
21. The evidence before the Tribunal indicates that the applicant, after the completion of the course, went underground and did not attempt to regularise his migration status. The applicant was located by Departmental officers. The evidence before the Tribunal indicates that in a field interview conducted at the time of his location, the applicant advised Departmental officers that he still held a student visa, that he did not know when he intended to leave Australia, and that his boss owed him a sum of money, that he did not want to leave Australia and did not have enough money to depart. The applicant advised the Departmental officers that he had been working for a company. The applicant advised the Departmental officers that he was not studying, that the last time he had studied was nearly a year ago and that since that time he had been working in a shop on a part-time basis. The applicant was not aware of any visa cancellation that applied to him. The applicant stated that with regards to his future plans, he wanted to work to get enough money to study.
22. The applicant was interviewed by an officer of the Department at a post-location interview. Interview notes indicate that the applicant had been granted a specific visa. The applicant presented a drivers' licence and a student identity card, along with work related papers. Evidence indicates that the interview with the applicant was conducted in Mandarin. The applicant advised what his last job was and that he worked for a company on a casual basis, and that before that he worked in a shop. The applicant advised that he did not have money to pay for an air ticket. The applicant advised that he wanted to apply for a bridging Visa. The applicant stated that he wanted to apply for a student visa and that he would study and that he would ask his family to send him money for his student fees. The delegate then asked the applicant why he was not able to ask his parents for money for a return ticket home, and the applicant is recorded as saying that he was scared to ask his parents because his family did not know that he had stopped attending school and that his family was of the belief that he was still studying.
23. At an interview which ran for 30 minutes and where the delegate interviewed with the assistance of a Mandarin interpreter, the applicant advised that he wanted a further five days

to complete an application. The applicant did not advise in these interviews that he wanted to stay in Australia for any other reason than to pursue further study.

24. At an interview a few days later the applicant advised for the first time that he wanted to apply for a protection visa application.
25. The applicant lodged a protection visa application. The applicant was assisted in the completion of the application by a registered migration agent.
26. The form B indicates that the applicant was born in the People's Republic of China, and notes that he had applied for a student visa from the PRC. The application indicates that the applicant's family resided in the PRC.
27. The form C submitted with the application indicates that the applicant spoke both Mandarin and Fujing. The applicant travelled to Australia on a PRC passport issued in the People's Republic of China.
28. The form C notes that the applicant had lived in one address, the time of his birth until the time of his departure
29. The Form C indicated that the applicant had completed ten and a half years of education which consisted of primary school, middle school, senior high school, and study at a college.
30. With regards to past employment, the applicant noted that he had worked in a shop in Australia, and for another company in Australia.
31. With regard to the applicant's claims for protection, the application annexed a typed statement. In this statement the applicant notes that:

**'Q.41: Why did you leave that country?'**

I came to Australia to study English and then high school. A guardian was arranged by the school, but I never met the guardian or knew his name. I studied two semesters. I had to pay fees but had no money, so I stopped attending.

My parents had problems in [date] and told me that they had no money to give me.

I lost contact with my parents in [date]. I was told by relatives things about my parents' problems.

My parents' problems started because a [developer] wanted my parents' house to re-develop the land. The [developer] tried to buy it at a very low price. When my parents did not accept the price he hired some people to threaten and harass my parents.

My parents went to the police. The developer had contacts with the police so the police did not do anything. My parents went to complain to the local government authority and they were ignored. They were told to stop complaining and that if they continued complaining they would be detained. They continued complaining so were detained.

If I return I will complain, even though I know what happened to my parents, I will still do it because I feel it has been extremely unfair to my parents and my family. I will keep complaining and if I do that I might be detained.

I can find ways to try to help my family in Australia by furthering my studies and then maybe help them to come to Australia or send them money.

I did not tell the school about my problems. I thought that if I worked and made money to pay the fees I would be allowed to continue study.

**Q. 42: What do you fear might happen if you go back to that country?**

If returned fear that will be harmed by the government authorities and the police.

**Q.43: Who do you think may harm/mistreat you if you go back?**

Government authorities and the police.

**Q.44 Why do you think this will happen to you if you go back?**

Because I will complain about my parents' situation and because of the problems my parents have.

**Q.45 Do you think the authorities of that country can and will protect you if you go back? If not, why not?**

No. They did not help my parents so they will not help me.'

32. A delegate of the Department of Immigration rejected the application for the protection visa. The delegate could not be satisfied on the basis of the evidence before them that the applicant had substantiated a claim of having a well funded fear of persecution for a convention based reason.
33. The applicant lodged a review application with the Tribunal.
34. A case note on the review file indicates that a person identified as Person X called the Tribunal to advise that she was a migration agent acting for the applicant at primary stage, she was not listed in the review application form for the RRT and that she would be asking the applicant to fax nomination to the Tribunal in due course.
35. The Tribunal sent an invitation to the applicant, inviting him to a scheduled hearing on a specific date.
36. The Tribunal received a response to the hearing invitation from the applicant advising that he would be attending the Tribunal hearing and that he required a Mandarin interpreter and that his preference was for a female interpreter.
37. The Tribunal wrote to the applicant inviting the applicant to comment on or respond to information that the Tribunal considered could be the reason, or part of the reason for affirming the decision under review. The particulars of the information were:
  - 'The evidence before the Tribunal indicates that you applied for a Protection visa on [date]. Annexed to your application was a typed statement which contains your claims for protection.
  - 'In those claims you stated that you came to Australia to study English then high school. You claim that you studied 2 semesters and then had to stop because *'my parents had problems in [period] and told me that they had no money to give me.'*

You go on to claim that *'My parents' problems started because a [developer] wanted my parents' house to re-develop the land. The [developer] tried to buy it at a very low price. When my parents would not accept the price he hired some people to threaten and harass my parents.*

*'My parents went to the police. The developer had contacts with the police so the police did not do anything. My parents went to complain to the local government authority and they were ignored. They were told to stop complaining and if they continued complaining they would be detained. They continued complaining so were detained. If I return I will complain'.*

The evidence before the Tribunal indicates that your student visa was granted on [date] and that you arrived in Australia on [date]. Your student visa (along with permission to work) was automatically cancelled on [date] under Section 137J of the Migration Act because you had breached conditions attached to your student visa.

You were detected by [Department] officers as an unlawful non-citizen in [location] on [date]. You were interviewed by [Department] officers with a Mandarin interpreter. You advised [Department] officers during this interview that you held a student visa which was still valid. You advised that you did not know when you were intending to leave Australia. You advised that you had been working since [date] for [name of company]. You advised that you did not want to leave Australia and did not have enough money to leave. You advised that the last time you studied was in [period] and that you had been working since [date] for a [shop] near [location] and for [name of company]. You advised that your future plans were to get enough money to study and you could borrow money from your boss.

A [interview] was conducted with you on [date], with the assistance of a Mandarin interpreter. You advised you had worked in a [shop] and for [name of company].

You stated that *'I don't want to leave Australia and I have nothing to do in China.'*

You were asked whether you intended to apply for a substantive visa and you advised: *'Yes, a student visa, I will study, money for visa (student) I will ask my family. Family will help with student visa fees. I'm too scared and worried to ask my family to pay my airfare back home. Family didn't know I didn't go to school and think I'm currently at school.'*

At a further interview on [date] you advised a delegate of the Department of Immigration, [name] that you wanted to apply for a Bridging [visa], you wanted to apply for a student visa. You are recorded as saying: *'I will ask my family to send me money for student fee'*. You also stated: *'Scared to ask my parents because my family doesn't know I am not attending school, family thinks I am still studying at school'*.

A follow-up interview at [location] was conducted on [date] with a Mandarin Interpreter. At that interview you stated you wanted a further five days to lodge an application. You then lodged a protection visa application 15 days later on [date].

The information before the Tribunal could lead the Tribunal to affirm the decision of the Department. The information suggests that you discontinued your studies and from [period] you worked and this work was unlawful from [period] when your student visa was automatically cancelled. When you were interviewed by [Department] officers you did not advise that you had a real fear of persecution in the PRC. You only advised that you wanted to get enough money to study. At your

post-location interview on [date] you did not advise that you had a real fear of persecution in the PRC. You once again stated that you had nothing to do in the PRC, that you wanted to study in Australia and that you would ask your family for money for your visa.

At the follow up interview on [date] you advised that you intended to lodge a protection visa application.

At the interview on [date] with [the Department], you stated that you wished to pursue study and that you would ask your family for money for a student visa. This information directly contradicts the claims made in your protection visa application that you ceased studying because your parents could not pay your fees. You claim that you would like to help your family to come to Australia and to send them money.

This information is relevant to the review because the information suggests that you have not provided a truthful account to the Department in your interviews and in your Protection visa application. This could lead to a finding that you are not a witness of truth, and that you have concocted your claims in an attempt to invoke Australia's protection obligations.'

38. The Tribunal received a response from the applicant in Mandarin. The translation of the response is that the applicant states that 'I do not agree. I want to clarify at the hearing.'
39. The applicant failed to attend the scheduled hearing and did not provide any reason for his non-attendance. The Tribunal is satisfied that the applicant was properly served with the hearing invitation and that he clearly received the invitation. The applicant forwarded a hearing request form to the Tribunal and in it advised the Tribunal that that he required the assistance of a Mandarin interpreter and that he had a preference for a female interpreter.

## **FINDINGS AND REASONS**

40. The evidence before the Tribunal indicates that the applicant entered Australia with a passport issued to him in the People's Republic of China. The applicant entered Australia as the holder of a student visa. The application for a protection visa lodged with the Department of Immigration indicates that the applicant's passport was issued in China. Based on this evidence the Tribunal accepts for the purposes of Article 1 of the Convention that the applicant is a national of the People's Republic of China.
41. As has been noted above, the applicant's claims are encapsulated in a typed statement that was annexed to his protection visa application that was lodged with the Department of Immigration. The applicant claims that he lost contact with his parents over a year ago. The applicant claims that his relatives told him things about his parents' problems in the PRC. The applicant claims that his parents' problems started because a developer wanted to purchase the family home to re-develop the land at a low price, and when his parents rejected the offer, people were hired to threaten and harass the applicant's parents.
42. The applicant claims that his parents as a result of this went to the police and as the developer had contacts with the police, the police did nothing. The applicant claims that his parents went to complain to the local government authority and were ignored at that level and the applicant claims that his parents were told that they should stop lodging complaints or they would be detained. The applicant claims that his parents continued to complain and as a



result they were detained. The applicant claims that he does not know what happened to his parents and that he will keep complaining upon his return to PRC and that he may be detained as a result of this.

43. The applicant as has been noted was invited by the Tribunal to appear before it and give evidence. The applicant sent the hearing invitation back to the Tribunal advising he would be attending however the applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.
44. The applicant's claims are brief and lack detail. The Tribunal had hoped, given the generalised nature of the applicant's claims that the claims and his overall credibility would have been able to be tested more vigorously at a review hearing. Because the applicant failed to attend the hearing, the Tribunal has not had an opportunity to test the applicant's claims further.
45. The Tribunal on the basis of the applicant's assertions made in his Protection visa application cannot be satisfied that the applicant's parents were approached with regard to the purchase of the family property and that due to their refusal to cooperate with the developer and their complaints to a string of authorities were detained.
46. Of concern to the Tribunal is the fact that the applicant at the time of his location in the community as an unlawful non-citizen when interviewed by Departmental officers did not until a week after his location advise that he wished to apply for Protection and he did not lodge a Protection visa application until some 19 days after his location.
47. The applicant's responses to questions put to him at initial interviews that were conducted at the time of his detection were that he did not want to return to China as he would have nothing to do there. He stated that he had ceased studying and had failed to disclose this fact to his parents. When the applicant was asked about whether he had sufficient money available to fund his departure from Australia he advised that he was too scared to ask his parents due to the fact that he had stopped studying and had failed to disclose this fact to them. He also stated that his family could help fund his student visa fees and that he could borrow money from his boss to continue study. These responses are not indicative of a person who feared persecution in their home country and are more indicative of a child that feared the wrath of their parents because they had failed to comply with their stated objectives in travelling to Australia, namely to study.
48. The responses that were provided by the applicant at his location are not indicative of a person who had a real fear of persecution in their home country for a convention based reason. The Tribunal holds the view that a person who held such a fear based on events that they claim occurred in over a year ago would place this information before the Department at the first available opportunity to do so. The applicant failed to do this at any time after he ceased studying and before his location as an unlawful non citizen or in any of the initial interviews conducted by the Department. These facts in the view of the Tribunal substantially diminish the applicant's credibility along with the additional fact that his claims were not lodged until some 19 days after his initial detection. The applicant's actions in this regard lead the Tribunal to find that the applicant's claims had been concocted whilst in an attempt to invoke Australia's protection obligations.

49. The Tribunal's findings in this regard are fortified by the fact that the applicant in his Protection visa claims asserts that his parents experienced problems over a year ago, however the applicant did not make any attempt to lodge a protection visa application until over one year later. The Tribunal finds that the substantial delay in the lodgement of the Protection visa application further diminishes the applicant's overall credibility.
50. This evidence leads the Tribunal to find that the applicant has not acted consistent with a person who held a real fear of persecution for a Convention based reason if they were returned to the PRC.
51. The Tribunal notes that the mere fact that a person claims to fear persecution for a particular reason does not establish either the genuineness of the asserted fear, or that it is well-founded or that it is for the reasons claimed. Further to this, the Tribunal is not required to accept uncritically any and/or all of the allegations made by an applicant (See *Randhawa v MIEA* 1994 (52 FCR 437 at 451)).
52. Based on the limited evidence before it, along with the fact that the applicant's claims have not been able to be tested by the Tribunal at review, the Tribunal finds that it cannot be satisfied that the applicant invokes protection obligations in Australia. The Tribunal had hoped at hearing to ask the applicant about the inherent delays in the lodgement of the protection visa application given that he had been advised over a year ago about his parents' problems in the PRC. The Tribunal had also hoped to ask the applicant why he had ceased attending his course of study in breach of his student visa and to explore whether his motives in coming to Australia were purely economic. With regard to his actual claims the Tribunal had hoped to explore at hearing why his parents' house had been specifically targeted by a developer. The Tribunal had wanted to ask the applicant some detailed questions about the physical environment around his parent's home in an attempt to ascertain whether it was plausible that the house would be targeted for some form of development. The Tribunal had prior to the hearing conducted a Google Earth search of the applicant's parent's home address which showed that the locality was made up of a large number of tenement buildings and the Tribunal had hoped to raise this with the applicant at hearing as it went to the heart of his claims. The Tribunal was also going to ask whether neighbouring properties had been targeted and if not, why the applicant's parents' property had been targeted. The Tribunal had also hoped to ask the applicant about some of the finer details that were not provided in his claims, details such as the conversation that he had with relatives about what had happened to his parents and what his relatives had in fact relayed to him about the development issue and his parents' detention and disappearance.
53. The Tribunal had also hoped to ask the applicant at hearing about the answers that he had provided at various interviews with the Department at the time of his detection. Namely that he did not want to return to the PRC because he would have nothing to do there, that he wanted to continue to study in Australia and that he was too scared to approach his parents for any financial assistance due to the fact that he had ceased studying without their knowledge. The Tribunal finds based on the answers that were given by the applicant at the above mentioned interviews that they were not consistent with a person who had a real fear of persecution for a Convention based reason and as noted were more the responses of a child who had been sent away to study and had failed in this endeavour and was fearful of his parents' wrath.
54. It remains for an applicant for a protection visa to satisfy the Tribunal that all the statutory elements for the grant of protection are made out. See (*MIEA v Guo and Anor*) (1997) (144),

and although the concept of the onus of proof is not appropriate to administrative enquiries in decision making (*Wao Jin Li v MIMA*) (1997) (74 FCR 275 288), and the relevant facts of the individual case will have to be supplied by the applicant themselves, in as much detail as necessary to enable the decision maker to establish the relevant facts. A decision maker is not required to make the applicant's case for him/her. The Tribunal for the reasons stated cannot be satisfied that the applicant's claims represent a truthful account of his circumstances or indeed the circumstances of his parents in the PRC. Accordingly, based on the claims that the applicant has provided, the Tribunal is not satisfied that all the statutory elements for the grant of a protection visa have been made out.

55. Again, based on the evidence before it and the findings made above the Tribunal cannot be satisfied that the applicant because of his political opinion or any other Convention reason would be of adverse interest to the Chinese authorities if he returned to the PRC.
56. Accordingly, the Tribunal does not accept that the applicant has a real chance of persecution arising from his political opinion, or any other convention ground should he return to the PRC.
57. Accordingly, I am satisfied that the applicant does not have a well-founded fear of persecution for a convention reason should he return to the PRC.

#### **CONCLUSION**

58. Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees' Convention as amended by the Refugees' Protocol. Therefore, the applicant does not satisfy the criterion set out in Section (36) (2) of the Migration Act for a protection visa.

#### **DECISION**

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

<p>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 <i>Migration Act 1958</i>.                      PRRRNM</p>
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