

1216897 [2013] RRTA 332 (30 April 2013)

DECISION RECORD

RRT CASE NUMBER:	1216897
DIAC REFERENCE(S):	CLF2012/180532
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Frances Simmons
DATE:	30 April 2013
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 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) applied to the Department of Immigration for the visa [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012 and the delegate refused to grant the visa [in] October 2012.
3. The applicant appeared before the Tribunal [in] April 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by her registered migration agent.

CONSIDERATION OF CLAIMS AND EVIDENCE

4. 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.
5. 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).
6. 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').
7. The issue in this case is whether the applicant has a well-founded fear of persecution for one or more of the five Convention reasons if she is returned to China and, if not, there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to China, there is a real risk she will suffer significant harm.

CLAIMS AND EVIDENCE

8. According to her protection visa application, the applicant is a Chinese national who was born in [year deleted: s.431(2)] and arrived in Australia as a student in September

2011. At the time she arrived in Australia she was married to a Chinese national but her husband was unfaithful and sought a divorce, which she has said was officially granted in [2012]. Shortly after the applicant divorced, she claims she fell in love with a married Australian man and in July 2012 they began living together. In August 2012 she lodged a protection visa application claiming that if she was returned to China her parents would not allow her to keep in touch with her boyfriend and that this harmed her feelings (Department file, folio 37). In a written statement, the applicant expands upon how she met [Mr A] and why she believes they are destined to be together (Departmental file, folio 42-43). She also said her parents disagree whole-heartedly with her relationship with her Australia boyfriend who is now seeking a divorce.

9. The applicant provided a certified copy of the biodata page of her passport and various identity documents for herself and her boyfriend, a rental tenancy agreement showing she and her boyfriend signed a lease for a property in July 2012, a letter from her boyfriend's solicitor indicating requesting he pay a filing fee for a divorce application and provide his original marriage certificate, and various photos of the applicant with her boyfriend.
10. The applicant supplied a copy of the decision of the delegate with her application for review. The delegate found the applicant has not claimed persecution in relation to Convention reason but had applied for protection because she did not want to be separated from her boyfriend in Australia. The delegate notes that the applicant did not 'claim fear of persecution or physical harm', but rather stated that, if she returns to China, she will be put under pressure by her parents to separate from her boyfriend and prevented from returning to China.
11. The delegate found the applicant did not have a well-founded fear of persecution for convention reason and the evidence she provided did not suggest she would face significant harm under the complementary protection criteria. The delegate's decision record notes:

At the end of the interview the applicant asked if her application assessment could be prolonged as to give her [an] opportunity to wait until her boyfriend divorces his wife. She reiterated that she fears to be separated from her boyfriend and stated that if she marries her boyfriend before returning to China, then no-one will be able to bring them apart (Tribunal file, folio 8).
12. In response to an invitation to attend a hearing [in] April 2013, the Tribunal received a fax [in] March 2013 requesting the hearing be postponed because the applicant's agent was having a medical operation [in] April 2013 and was then travelling to Taiwan for business [in] March 2013. However, as neither the email exchange between the advisor and her doctor for day surgery or her airline ticket booking indicated the advisor was unavailable [in] April 2013, the Tribunal decided not to postpone the hearing and the applicant was advised of this decision in writing. The response to the Hearing invitation indicated the applicant and her advisor would be attending the hearing [in] April 2013 and requesting the Tribunal take evidence from the applicant's boyfriend, [Mr A].
13. [In] April 2013, the advisor contacted the Tribunal and informed the Tribunal that the applicant was unwell and unable to attend the hearing [the next day in] April 2013. After requesting medical evidence, the Tribunal was faxed a medical certificate indicating that that applicant was 'unfit for work' until [a date in] April 2013. The Tribunal informed the applicant that the request for postponement was refused and the

applicant was advised the Tribunal would assess her ability to give evidence at the hearing [in] April 2013.

14. The applicant, her boyfriend, and her advisor attended the hearing [in] April 2013. The applicant confirmed her advisor had explained to her the definition of a refugee but indicated she did not understand the complementary protection criteria. The Tribunal explained the complementary protection criteria.
15. The applicant was asked how she was feeling, and she indicated – using hand gestures - her throat was sore and she could not speak. The Tribunal was presented with a copy of a pharmaceutical receipt for a prescription cough syrup. The applicant's boyfriend said her glands were sore. The applicant indicated she was willing to have the Tribunal contact her doctor and seek his opinion about her fitness to participate in the hearing. She said she didn't feel like she could participate in the hearing because she couldn't really talk much.
16. I said I would explain what I considered to be the issues in her application and then I would ask her whether she felt she could address those issues today or whether she would like to come back and address these issues on another day. I informed the applicant that I had read her statement about how she met her boyfriend (Departmental file, folio 42-43). I said that the issue for the Tribunal was not whether she was in love with her boyfriend, but whether Australia owed protection obligations to her. I commented that her written statement did not indicate that she would face harm for a Refugee convention reason if she returned to China. I asked the applicant whether she felt she would face serious harm or significant harm if she returned to China. She indicated she would face harm from her family.
17. I then adjourned the proceedings to another date so the applicant could present evidence in support of her claims that she would face harm if she was returned to China. I invited the applicant to provide a written statement before the hearing resumed in which she set out what harm she believed she would face if she were to be returned to China and how that harm met the refugee criteria or the complementary protection criteria.
18. The Tribunal invited the applicant to a resumed hearing [later in] April 2013. The response indicated that the applicant and her advisor would attend the resumed hearing. It did not refer to the applicant's boyfriend. The Tribunal also received a written statement dated [in] April 2013, in which applicant claimed:

...my parents are very traditional Chinese. They would not allow me to marry an Australian. What makes it worse, [Mr A] has [children]. If I return to China now, they will try their best to prevent me from contacting [Mr A]. They will arrange me to meet other men, and try to marry me to a Chinese man. To me, this is more painful than killing me. The mental suffering is beyond imagination for a couple, who are desperately in love but can never meet again in life. I just experienced a marriage failure last year. It was [Mr A]'s care that reignited my passion for my life and my longing for love. Without him, my life becomes meaningless. This mental persecution is unbearable to anyone.
19. When the hearing resumed [in] April 2013 the applicant said she was feeling better. She confirmed she understood the refugee and complementary protection criteria.

20. The applicant gave evidence that before she left China she was living with her ex-husband. She lived with him for four years. Before that she lived with her parents. She contacted her parents quite often in China and now she speaks to her parents about once a month. She speaks to her mother and her father. She said their relationship was good. She said she normally talked to her mother over the phone because her father doesn't have a good temper. She was introduced to her former husband by her friends. At first she was happy with him but after she travelled to Australia she discovered he was having an affair and they divorced. In China she worked in sales for [company deleted: s.431(2)].
21. The applicant gave evidence she had planned to return to China but she fell in love with an Australian man and decided to live with him. She indicated her boyfriend has sought a divorce but he is having an argument about property with his ex-wife. She said she is afraid if she returns to China she will face harm because she loves her boyfriend and she believes her parents won't let her contact him. She was asked whether they would harm her any other way. She said they wouldn't let her call her boyfriend and would introduce her to other men and ask her to marry someone else.
22. I put to the applicant and she was a grown woman and she had lived away from her parents. She was asked why her parents would be able to control what she did. The applicant said because she was divorced she had to leave her parents' home. She said in China that's the way. She was asked if she feared any other harm. She said she no.
23. The applicant claimed she would face psychological persecution. She was asked how the harm was linked to a Convention ground. She said she had read the requirements and she believed psychological persecution was a kind of persecution. The applicant asked for a little more time so [Mr A] could settle his divorce. Then they could marry and no one could separate them.
24. I commented that the decision record of delegate notes that the applicant told the delegate while her parents disapprove of her relationship she believes that they might accept her boyfriend after they finally marry. She said her boyfriend is in divorce proceedings and once they marry and they return to China her parents will be have to accept it.
25. I commented that decision record of the delegate indicates that she wanted her protection visa application to be prolonged so she could wait until her boyfriend was divorced (and she made similar representations to the Tribunal). I commented that this may indicate to the Tribunal that she applied for protection, not because she had a genuine fear of persecution in China or that she believed she would be at real risk of significant harm from her parents if she returned to China but because she wanted to find a way to stay in Australia while her boyfriend got divorced.
26. The applicant said in her first statement that she lived with her boyfriend and her parents disagreed. Her mother believed she could find another man. She lodged the application because she was afraid she would be forced to marry another man if she returned to China and that was really persecution. I commented that I did not think she had mentioned that before her statement [in] April 2013. The applicant said when she submitted the first statement in August her parents just knew they lived together and didn't show their strong objection. She said in the intervening period her parents got to

know [Mr A] had [children] so they objected quite strongly. She said she really loved her boyfriend and she did not marry anyone else.

27. I put to the applicant that she had not raised her concerns about being forced to marry before [a date in] April 2013, she described her relationship with her parents as good, she had not been subjected to a forced marriage in the past, and that on the evidence before me I may doubt that she would face harm that is sufficiently serious to amount to persecution if she returns to China because of her parents' objections to her relationship with an Australian man or their desire she marry someone else. I said I may doubt her claims that her parents would force her to marry someone else.
28. I put to the applicant that any mental suffering she would face or any disapproval expressed by her parents about her choice of partner would not seem to be sufficiently serious to constitute persecution and nor did it appear to be harm that was feared for a convention reason. The applicant said psychological persecution was a form of harm. She said she couldn't work were she was working before she left China because she had divorced from her husband and that she would have to go and live with her parents.
29. I put to the applicant that she did not appear to fear persecution for one or more of the five convention reasons. She indicated she did not have anything further to say.
30. I explained the definition of significant harm for the purpose of complementary protection criteria to the applicant. I explained to the applicant, the legal definition of cruel, inhuman treatment and punishment and degrading treatment and punishment indicates that these types of harm must be intentionally inflicted: s5(1) of the Act. I put to the applicant at the hearing being separated from boyfriend would cause harm that was intentionally inflicted upon her or that the harm she feared would be sufficiently serious to amount to significant harm. In response the applicant reiterated she believes that if she can't see her boyfriend in the future and she lives with her parents she will face huge pressure. This pressure, which will come from her family, society and herself will drive her crazy.
31. I commented that the applicant had previously indicated that she wanted her Australian boyfriend, [Mr A], to give evidence in her case. I said the issue for the Tribunal was not whether they were loving relationship but whether she met the criteria for protection as a refugee or under complementary protection. I noted the applicant's boyfriend was not present at the hearing [in] April 2013 and asked whether there was any evidence she wanted him to provide, that she could not provide herself.
32. The applicant said yes. She was asked what evidence this was about. She said her boyfriend wanted to come to the Tribunal today but it was school holidays and he hopes that the Tribunal could wait for him to marry and then they could go back to China together. I commented that it seemed unnecessary for me to talk to her boyfriend as she had given me that information. The applicant nodded and said ok.
33. After an adjournment in which the applicant spoke with her advisor, she said she wanted more time to discuss with her boyfriend what evidence he could give the Tribunal because her evidence did not represent her boyfriend's evidence. The applicant said her boyfriend wanted to be here today because he wanted to give evidence but she was not sure what sort of evidence he wanted to give. She said if he has any other evidence then she would contact her agent. The advisor asked if the

boyfriend could submit a statement because he wanted to come to the hearing but he had [kids] to look after so he couldn't attend the hearing.

34. I said to the applicant I had discussed the issue of her boyfriend giving evidence with her earlier in the hearing. I said it was unclear, based on her evidence today, what evidence her boyfriend would be able to provide that would assist her case. I reiterated that the issue was whether she would face harm if she was returned to China, not whether she was in a relationship with her boyfriend. I said in that context I was not minded to provide further time for her to provide evidence or submissions from boyfriend. I asked the applicant for her comments. She said it was her wish.

FINDINGS AND REASONS

35. The applicant presented the Tribunal with a passport issued by the People's Republic of China bearing her name and likeness. On the basis of the evidence before me, I find the applicant is a citizen of the PRC and I have assessed her claims for protection against PRC as her country of nationality.
36. The applicant has claimed she will face harm if she returns to China from her parents, who disapprove of her relationship with an Australian man, and because of the 'mental suffering' she will endure as a result of being separated from her Australia boyfriend. The applicant is [age deleted: s.431(2)] and she has said she worked and lived away from her parents since she married her first husband in [year deleted: s.431(2)]. To the extent that the applicant has articulated her concerns that her parents will harm her, she has said her feelings will be harmed by the fact her parents disapprove of her relationship and her parents will try and stop her contacting her boyfriend if she returns to China. In a statement dated April 2013 she also claimed her parents would make her marry another man, a claim she reiterated at the hearing [in] April 2013.
37. On the evidence before me and in the absence of any evidence to the contrary, I am prepared to accept that the applicant is in a relationship with an Australian man and that she wishes to remain in Australia with him. However, based on my assessment of the applicant's evidence, I find that there is no real chance she will face serious harm if she is returned to China because of her parents' objections to her relationship with an Australian man, their desire that she marry another man, the 'mental suffering' she will experience if she is separated from her boyfriend, or for any other reason.
38. I do not accept that the applicant genuinely fears her parents will harm her because she has entered in a relationship with an Australian man, or because they have recently discovered he has children, or because they will force her to marry, or for any other reason. As I put to the applicant, she had not raised the prospect that her parents would make her marry another man before [a date in] April 2013, she has not previously been subjected to forced marriage, and she has been living independently from her parents since [year deleted: s.431(2)] and therefore I doubt her parents would make her marry another man. When asked why she only raised the claims she would be forced to marry [in] April 2013, the applicant indicated her parents did not strongly object at the time she lodged her protection visa application but their objections were now stronger because they discovered her boyfriend had children.
39. The applicant's written statement of claims to the department lacks detail about how and why she believes her parents will harm her and I do not consider this deficiency

was remedied by the applicant's evidence to the Tribunal. I also consider the applicant's evidence that she is still in contact with her parents (on a monthly basis), the fact that she indicated she believes her parents will accept her boyfriend once they finally marry, and late introduction of her claim that her parents will make her marry another man, casts doubt on her claims that her parents will seriously harm her upon return to China.

40. On the evidence before me, I do not accept that the applicant's parents will force her to marry another man, or that they will otherwise harm the applicant (including by restricting her freedom of movement or prohibiting her from contacting her boyfriend) if she returns to China. Having regard to all of the evidence before me, I do not accept that the applicant fears any harm from her parents and I find she has applied for protection in Australia in an attempt to remain in the country with her boyfriend.
41. While I am prepared to accept for the purpose of this decision that that the applicant is distressed by the prospect of being separated from her Australian boyfriend, on the evidence before me, I do not accept that the mental suffering that she says she will endure if she is separated from her boyfriend is sufficiently serious to amount to persecution for the purpose of the Convention.
42. On the evidence before me, I do not accept the harm the applicant claims she fears she would experience if she were to return to China would be essentially or significantly due to one or more of the Convention grounds as required by s.91R(1)(a) or amount to serious harm as required by s. 91(R)(b) or involve systematic and discriminatory conduct as required by s.91R(1)(c). The applicant's fears therefore do not relate to persecution as defined in the Convention and the Act. I therefore am not satisfied that she has a well-founded fear of Convention-related persecution, now or in the reasonably foreseeable future, if she returns to China.
43. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), I have considered the alternative criterion in s.36(2)(aa).
44. 'Significant harm' for these purpose of the complementary protection criteria is exhaustively defined in s.36(2A): s.5(1). As I explained to the applicant at the hearing, a person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment.
45. The definition of cruel or inhuman treatment or punishment requires the relevant act or omission to be 'intentionally inflicted on a person' while the definition of degrading treatment or punishment requires that the relevant act or omission to cause and be intended to cause extreme humiliation which is unreasonable: s 5(1) of the Act.
46. Because I do not accept that the applicants' parents will force her to marry another man, or otherwise harm the applicant (including by restricting her freedom of movement or preventing her from contacting her Australian boyfriend), I do not accept that there is a real risk that she will face significant harm for any reasons relating to her parents' claimed disapproval of her relationship with an Australian man.

47. While I accept that the applicant is distressed at the prospect being separated from her boyfriend, I do not accept that the harm she fears is of sufficient gravity to amount to significant harm for the purposes of the complementary protection criteria and nor do I consider the 'mental suffering' the applicant claims she will experience as a result of being separated her boyfriend would be intentionally inflicted upon her or intended to cause her extreme humiliation that is unreasonable.
48. Although the applicant did not specifically identify the act or omission that was said to intentionally inflict 'mental suffering' upon her, I note that in *SZRSN v MIAC* [2013] FMCA 78 Driver FM confirmed that the act of removal resulting in 'forced separation' (in this case from children residing in Australia from their parents) does not meet the definitions of "significant harm" and, particularly, degrading treatment or punishment [60]-[65].
49. In any event, on the evidence before me, I am not satisfied that any 'mental suffering' claims the applicant would experience if she were returned to China as a result of being separated from her boyfriend as a result of being removed from Australia and/or because of any pressure she claims would be placed upon her by her parents or for any other reason would amount to 'significant harm' as it is defined in s 36(2A) and s 5(1) of the Act.

CONCLUSION

50. On the evidence before me, I am not satisfied that the applicant meets either the refugee criterion in s. 36(2)(a) or the complementary protection criterion in s. 36(2)(aa). There is no suggestion on the evidence before me that she 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, she does not satisfy the criterion in s.36(2).
51. In assessing the applicant's claims for protection, I considered her request to take evidence from her Australian boyfriend. After initially agreeing with the Tribunal's view that it was unnecessary to take evidence from her boyfriend, after an adjournment the applicant reiterated her request that the Tribunal take evidence from her boyfriend but was unable to indicate what evidence her boyfriend would provide. When I commented it was unclear how his evidence would assist her case, she said it was her wish that he provide evidence. I did not provide further time to provide evidence from the applicant's boyfriend, because I do not accept that such evidence would have assisted the applicant's case.

DECISION

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