

1306011 [2014] RRTA 522 (11 June 2014)

DECISION RECORD

RRT CASE NUMBER: 1306011

COUNTRY OF REFERENCE: China

TRIBUNAL MEMBER: Mila Foster

DATE: 11 June 2014

PLACE OF DECISION: Sydney

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

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

Statement made on 11 June 2014 at 11:42am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants, [Applicant A] and [Applicant B], Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be mother and [child] (respectively) and citizens of China, arrived in Australia as visitors in August 2012. They made a combined application to the Department of Immigration for the visas [in] November 2012; [Applicant A] on the basis that she would be persecuted if she returned to China and [Applicant B] on the basis that [they were] a member of [Applicant A's] family unit.
3. The delegate refused to grant the visas [in] April 2013 and the applicants applied to the Tribunal for review of the delegate's decision [later that month]. They were represented in relation to the review by a registered migration agent.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

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 Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

9. 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)). Examples of 'serious harm' are set out in 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.
10. 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.
11. 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.
12. 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 being persecuted for a Convention stipulated reason. 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.
13. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of 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.

Complementary protection criterion

15. 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').

Member of the same family unit

16. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a 'dependent child' which includes a child of the person who has not turned 18.

Section 499 Ministerial Direction

17. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. [Applicant A] is seeking protection because she claims she will be persecuted by the Chinese authorities for being a practitioner of the Chinese cultivation system¹ of Falun Gong. The Chinese government banned Falun Gong in July 1999 and then followed with a widespread crackdown².
19. [Applicant A] has presented her claims in writing and orally. She submitted an (undated) written statement in support of her protection visa application and was interviewed by the delegate [in] March 2013³ about her protection visa application. On 28 February 2014 [Applicant A] testified at hearing before me as did two Falun Gong practitioners on behalf of [Applicant A]. Documents in support of the protection visa application and review application have been submitted to the Department and Tribunal including the applicants' Chinese household registration card, [Applicant B]'s birth certificate, a notice of [Applicant A]'s detention in a Chinese labour camp, and two written testimonials from two Falun Gong practitioners [Applicant A] has met in Australia⁴.
20. [Applicant A's] claims are as follows. In the course of conducting [her] business in China she found the local police to be corrupt; they sought bribes and gifts which she felt forced to give them in order to avoid unwarranted fines. In January 2010 she exposed the improper conduct of a local police officer and as a result her [child] was kidnapped and beaten in retribution. She reported the attack on her [child] to the relevant authorities but no action was taken. The incident was a big blow and she felt society had degenerated from its roots.

¹ Sets of mental and physical regimens aimed at cultivating the body into a higher form.

² Penny, B. 2001, 'The Past, Present and Future of Falun Gong – A Lecture at the National Library of Australia, Canberra', <http://www.nla.gov.au/grants/haroldwhite/papers/bpenny.html>.

³ A recording of which I have listened to.

⁴ Tribunal file 1306011, ff.66-68.

21. She came to know a [customer] in the course of her business who gave her a copy of *Nine Commentaries on the Communist Party*⁵. She was shocked and impressed by the book. She formed the view that it contained the truth about the Chinese Communist Party; that contrary to what she had been taught in textbooks at school - it was an evil, brutal party which manipulated its citizens with lies and violence. She thus recommended the book to her relatives and friends and secretly distributed it to other [customers].
22. About six months later she was reported to the police. She was arrested [in] 2010 and detained [in the same month]. She was perceived to be Falun Gong practitioner and required to undergo re-education through [a] Women's Labour [camp]. During her time at the camp she was tasered many times. There were Falun Gong practitioners in the camp who taught her simple exercises to alleviate back pain she experienced. She gained a basic awareness of Falun Gong but did not regard herself as a Falun Gong practitioner at the time.
23. Upon being released from the camp she found that her friends and relatives distanced themselves from her upon her, and that her [child] had been physically mistreated and humiliated at school by teachers and students because she had been in detention. She thus came to feel that she and her [child] could not have a normal, happy life in China and decided it was best to leave.
24. She was introduced to Falun Gong groups in Australia by a respected elder who is a Falun Gong practitioner. She began attending Falun Gong study groups and reading *Zhuan Falun* (one of the two principle Falun Gong Falun texts⁶) in September 2012 and eventually became a Falun Gong practitioner. She has participated in many Falun Gong activities and events since 2013. She has for example, attended Falun Gong marches and conferences, and handed out Falun Gong material at tourist spots. She claims that Falun Gong is her belief, that she would not be free to practise Falun Gong if she returned to China and would be arrested for being a Falun Gong practitioner.
25. [Applicant A] has given three accounts of her claims for protection – in her written statement, to the delegate and at the hearing. I found her accounts to be consistent. [Applicant A] demonstrated a good understanding of the history of Falun Gong and its practices both in her interview with delegate and at hearing; more than I had anticipated given the relatively short length of time she has been a Falun Gong adherent. She conveyed how she practised Falun Gong in her day to day life and how the practice has changed her life in a clear and direct manner at the hearing. She gave specific examples of how she applied the Falun Gong principle of Truthfulness, Compassion and Forbearance. Her testimony at the hearing overall was given in a direct and forthcoming manner. She provided details when asked without, it seemed to me, exaggerating or changing the claims and written statements she had made up to that point. She was able to provide clear and credible explanations for issues which I raised with her including those related to matters which led the delegate to make adverse findings. [Applicant A] thus appeared to me to be a credible witness.
26. [Applicant A]'s claim that she was sentenced to re-education through labour at [a] Women's Labour Camp [is] supported by the decision record of [a] City Labour Education Administration Committee she provided to the Department and information I have found

⁵ The *Nine Commentaries* are editorials attacking the Chinese Communist Party which first appeared as a series of nine editorials in a newspaper founded by Falun Gong practitioners called *The Epoch Times* (The Epoch Times 2004, *Nine Commentaries on the Communist Party*, Yih Chyun Book Corp., Gillette, NJ, pp.v-xvii; Ownby, David 2008, *Falun Gong and the Future of China*, Oxford University Press, New York, p.220).

⁶ UK Home Office 2002, *Revolution of the Wheel – The Falun Gong in China and in Exile*, paragraph 1.14.

which indicates that a women's re-education camp by that name which "specialises" in the so-called re-education of Falun Gong practitioners exists in the [city].

27. Further, [Applicant A's] claims about her Falun Gong practice and activities in Australia are corroborated by the statements and testimony of four Falun Gong practitioners in Australia who have known her since January 2013 and who have been Falun Gong practitioners for between 17 and 20 years. Each expressed a belief based on their interaction with and observations of [Applicant A] that she was a genuine Falun Gong practitioner. I found the two witnesses who testified at the hearing most credible. They testified in an understated but forthright and clear manner. I have thus given their opinions that [Applicant A] is a genuine Falun Gong practitioner considerable weight.
28. I have thus concluded that the claims and evidence [Applicant A] has provided to the Department and Tribunal to be truthful and genuine. I therefore accept that [Applicant A] is a genuine Falun Gong practitioner who wishes to continue to practise Falun Gong.
29. At this point I note that a person can acquire refugee status *sur place* where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention. I am satisfied that [Applicant A] has attended Falun Gong study groups and has attended and participated in Falun Gong activities in Australia because she has a genuine belief in the practice. I am satisfied that [Applicant A] has not engaged in those activities for the purpose of strengthening her claim to be a refugee. Section 91R(3) therefore does not apply.
30. Having found that [Applicant A] is a Falun Gong practitioner I have decided that this matter should be remitted for reconsideration for the following reasons.
31. The applicants claim that they are nationals of China and no other country. Their protection visa application included certified copies of their Chinese passports. The official Chinese documents (along with translations) which the applicants submitted to the Department including their household registration card, [Applicant A]'s marriage certificate, and [Applicant B's] birth certificate refer to their respective citizen identity card numbers. I am satisfied on the basis of these documents and the passports that the applicants are nationals of China as they claim. There is no evidence before me to suggest that they are nationals of any other country and thus I accept that they are not nationals of any country other than China.
32. I have had regard to reports from a range of sources about the abuse Falun Gong practitioners have been subjected to by the Chinese authorities since Falun Gong was banned⁷. The abuses

⁷ For example: Human Rights Watch, *World Report 2014 - China* (published 21 January 2014), <http://www.hrw.org/world-report/2014/country-chapters/china>; Amnesty International, *Annual Report 2013 - China*, <http://www.amnesty.org/en/region/china/report-2013>; Sarah Cook, Senior Research Analyst for East Asia, Freedom House, *The Origins and Long-Term Consequences of the Communist Party's Campaign against Falun Gong*, Written statement for Congressional-Executive Commission on China Hearing Falun Gong: Review and Update, 18 December 2012, <http://www.freedomhouse.org/sites/default/files/The%20Origins%20and%20Long-Term%20Consequences%20of%20the%20Communist%20Party%E2%80%99s%20Campaign%20against%20Falun%20Gong.pdf>; US Department of State 2014,

reported include arbitrary detention, widespread surveillance, torture, harassment, deaths in custody, long term prison sentences following unfair trials and administrative punishment such as re-education through labour camps and involuntary treatment in psychiatric institutions. These sources also indicate that Falun Gong was suppressed and its practitioners targeted by the Chinese authorities because they are viewed as being a threat to the Chinese Communist Party and having views which are antithetic to the Chinese government⁸. This leads me to find that the Chinese authorities persecute Falun Gong practitioners for reasons of their imputed anti-government political opinion. Having already come to the adverse attention of the Chinese authorities in the past for being connected with Falun Gong, the risk and seriousness of harm [Applicant A] would face as a Falun Gong practitioner in the future would be increased. In the circumstances I find that if [Applicant A] returned to China there is a real chance that in the reasonably foreseeable future she will be subjected to serious harm and systematic and discriminatory conduct amounting to persecution by the Chinese authorities because she is a Falun Gong practitioner and that she would be so persecuted for reasons of her imputed political opinion. As the reports indicate that the persecution of Falun Gong practitioners is part of a systematic and nationwide policy by the Chinese government, the questions of relocation and state protection do not arise. I thus find that [Applicant A] has a well-founded fear of being persecuted for reasons of political opinion, is outside the country of her nationality and owing to such fear is unwilling to avail herself of the protection of that country.

33. For the reasons given above I am satisfied that [Applicant A] is a person in respect of whom Australia has protection obligations. She therefore satisfies the criterion set out in s.36(2)(a).
34. I am not satisfied that [Applicant B] is a person in respect of whom Australia has protection obligations. Therefore he does not satisfy the criterion set out in s.36(2)(a) or (aa). However, on the evidence before me including [Applicant B's] birth certificate, I am satisfied that [Applicant B] is [Applicant A]'s dependent child and as such is a member of the same family unit as [Applicant A] for the purposes of s.36(2)(b)(i). The fate of his application therefore depends on the outcome of [Applicant A]'s application. As [Applicant A] satisfies the criterion set out in s.36(2)(a), it follows that [Applicant B] will be entitled to a protection visa provided [they meet] the criterion in s.36(2)(b)(ii) and the remaining criteria for the visa.

DECISION

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

Mila Foster
Member

Country Reports on Human Rights Practices for 2013 – China, 27 February, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dlid=220186#wrapper>.

⁸ See also Human Rights Watch 2002, *Dangerous Meditation: China's Campaign Against Falungong*, Sections I and VII, 7 February 2002.