

1415229 (Refugee) [2015] AATA 3874 (7 December 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1415229
COUNTRY OF REFERENCE:	China
MEMBER:	Rachel Homan
DATE:	7 December 2015
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act.

Statement made on 07 December 2015 at 1:25pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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 applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who the Tribunal accepts is a citizen of China, applied for the visa [in] July 2012 and the delegate refused to grant the visa [in] September 2014.
3. The applicant appeared before the Tribunal on 6 November 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's mother, [Ms A]. 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 his registered migration agent, who also attended the hearing.
4. The issue in this case is whether the applicant is member of the same family unit as a non-citizen who holds a protection visa. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

5. The visa applicant is a [age]-year-old Chinese national who arrived in Australia [in] October 2011 as the holder of a student visa which expired [in] March 2014. The applicant travelled outside Australia between [June] and [August] 2013 and has remained in Australia since that time.
6. The applicant's mother arrived in Australia at the same time as the applicant as the holder of a Student Guardian visa. [In] July 2012, the applicant's mother applied for a protection visa which was refused by the Department [in] November 2012. The applicant's mother sought review of that decision by the Refugee Review Tribunal (RRT), which remitted the matter for reconsideration on 12 December 2013. The applicant's mother was granted a protection visa [in] September 2014.
7. [In] February 2014, following the remittal of the applicant's mother's application for a protection visa but before the visa was granted, the applicant submitted to the Department a completed Part D of Form 866 and pages 1 and 10 of a Part B of Form 866, seeking to be included in his mother's protection visa application.
8. After interviewing the applicant and considering the documentary evidence submitted to the Department in support of his application, the delegate found that the applicant was not a credible witness and that his financial circumstances in Australia were not as claimed. The delegate was not satisfied that the applicant was 'dependent' on his mother in accordance with r.1.05A of the Migration Regulations 1994 (the Regulations).

Relevant law

9. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to 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 of the same class.

10. Subsections 36(2)(b) and (c) provide 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 of the same class as that applied for by the applicant.
11. 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 relevantly defined in r.1.12 of the Regulations to include:
 - (a) a spouse or de facto partner of the family head; or
 - (b) a dependent child of the family head or of a spouse or de facto partner of the family head; or
 - (c) a dependent child of a dependent child of the family head or of a spouse or de facto partner of the family head; or
 - (e) a relative of the family head or of a spouse or de facto partner of the family head who:
 - (i) does not have a spouse or de facto partner; and
 - (ii) is usually resident in the family head's household; and
 - (iii) is dependent on the family head.
12. 'Dependent child' is defined in r.1.03 of the Regulations as follows:

dependent child, of a person, means the child or step-child of the person (other than a child who is engaged to be married or has a spouse or de facto partner), being a child who:

- (a) has not turned 18; or
- (b) has turned 18 and:
 - (i) is dependent on that person; or
 - (ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.

13. The term 'dependent' is defined in r.1.05A of the Regulations. A person is "dependent" on another person for the purposes of an application for a protection visa if that person is wholly or substantially reliant on the other person for financial, psychological or physical support.
14. Section 91WB prevents the Minister from granting a visa to an applicant on the basis of the family unit criteria in ss.36(2)(b) or (c) if the applicant applies for the visa only *after* their family member has already been granted a protection visa.

Dependent child

Parent-child relationship

15. Submitted with the applicant's visa application was a certified copy of a translated notarial certificate certifying that the applicant's mother is [Ms A]. The applicant's mother declared her relationship to the applicant in her own protection visa application. There is no material before the Tribunal which casts any doubt upon the applicant's claim to be the natural child of [Ms A]. In the circumstances, the Tribunal accepts that the applicant is the 'child' of [Ms A].

Relationship status

16. The applicant declared in his visa application form that he had never been married or in a de facto relationship. At the Tribunal hearing, both the applicant and his mother gave oral evidence that the applicant had never been engaged, married or in a de facto relationship. Having regard to the applicant's relatively young age and the absence of any information to

the contrary, the Tribunal accepts that the applicant is not engaged to be married and does not have a spouse or de facto partner.

Age

17. The Tribunal is satisfied on the basis of the identification documents submitted to the Department including, the applicant's passport and notarised birth certificate, that the applicant has turned 18.

Incapacity

18. There is no material before the Tribunal to indicate that the applicant has any mental or physical incapacity. At the departmental interview, the applicant specifically denied having any physical or mental health conditions.

Dependency

19. In his visa application form, the applicant gave a residential address at [Address 1]. The applicant declared that between October 2011 and November 2012 he had been studying at [a] School. Between November 2012 and January 2014, he had been studying at [College 3]. The applicant declared that he was not currently employed and gave his occupation or profession before coming to Australia as 'student'.
20. The applicant submitted to the Department various items of documentary evidence including a statutory declaration made by his mother on 12 February 2014 declaring that the applicant's student visa was due to expire shortly. [Ms A] claimed that when she applied for a protection visa, she did not know that she could include her son in the application as he was holding a student visa at the time. [Ms A] said she was later advised that she could include the applicant in the application.
21. Also submitted was a signed, typed letter in the English language from [name deleted], dated [February] 2014 certifying that the applicant and his mother were living at an address in [Address 2] between August 2012 and June 2013. A number of other documents, dated in late 2012 and early 2013, showing the applicant's mother's address as [Address 2], including a photo ID card, pathology report, medical report, and correspondence from the Department, appear on the Department's file. Bank statements addressed to the applicant's mother at [Address 1], dated [July] 2012, [January] 2013 and [January] 2014 were also submitted.
22. The applicant submitted to the Department a copy of his driver's licence showing his address as [Address 1] as well as [Bank] statements and correspondence in his own name, showing his address as [Address 1], dated [October] 2011, [February] 2012, [July] 2012, [October] 2013 and [January] 2014. Also appearing on the Department's file are [mobile phone] [mobile phone] tax invoices addressed to the applicant at [Address 1], dated [July] 2012, [September] 2012, [December] 2013 and [January] 2014.
23. The applicant attended an interview with a departmental officer [in] April 2014 and the Tribunal has listened to a recording of that interview. The applicant claimed that he had been studying in Australia between October 2011 and March 2014 but could not remember precisely when he last attended classes. The applicant claimed that since ceasing his studies, he had been waiting at home for the outcome of his protection visa application.
24. The applicant said that he had studied English language for half a year, then studied high school for half each year. The applicant then returned to study English. In November 2012, the applicant transferred to a different college, where he remained until March 2014. In total, the applicant estimated that he had studied in Australia for over two years but had not

completed any qualification. The applicant stated that he had no evidence or receipts from payment of his tuition fees.

25. Asked whether he had ever worked, the applicant stated that he had worked in a [workplace] in 2012 and his friends had recently asked him to do some casual work. The applicant described his current work as [details deleted] and said it was a casual job. The applicant said that he did not work most of the time but sometimes would [work]. The applicant stated that he commenced this type of work when he stopped going to school but could not remember the date more was specifically. The applicant was unsure of the identity of his actual employer but said his friend had asked him to go to work with him. The applicant stated that he was paid [details deleted]. The applicant denied having done any other work in Australia.
26. The delegate put to the applicant that according to the Department's records, several organisations or employers had checked whether the applicant had work rights in Australia in July 2012, March 2013 and November 2013. The delegate suggested that this indicated that the applicant had applied for jobs on at least three occasions. The applicant agreed that he had applied for jobs advertised in the newspaper.
27. The applicant stated that the purpose of his visit to China in 2013 was to visit his grandparents and family. The applicant claimed that his mother had paid for the air ticket and had given him \$1000 as spending money.
28. The applicant said he had virtually no income at the present time. The departmental officer noted that the closing balance of the applicant's bank account [in] January 2014 was more than \$3000. The applicant claimed that the money in his account was deposited by his mother. The applicant stated that his mother had previously been employed as [occupation] but was now employed in [industry]. The applicant stated that his mother paid their rent. The applicant stated that his father was employed doing occasional [work]. The delegate noted that in his student visa application the applicant had presented evidence that his father had been employed as [occupation] in [a] company. The delegate further noted that evidence had been provided in his student visa application that the applicant had access to 700,000 RMB. The applicant denied any knowledge of the documents submitted with his student visa application. The applicant stated that his parents had arranged his student visa application. The applicant expressed agreement with the delegate's observation that the information about his father's employment and financial position provided with his student visa application appeared false.
29. The applicant confirmed that he was presently residing at [Address 1]. The applicant stated that, in August 2012, he moved to [Address 2] and lived there for less than one year. The applicant returned to [Address 1] in June 2013. The applicant could not recall the street name or street number where he had resided in [Address 2] but stated that it was near the railway bridge.
30. The delegate noted that the applicant's [mobile phone] bills showed his address as [Address 1] at the time when he claimed to be residing in [Address 2]. The applicant claimed that he had not changed his address and his landlord, with whom he resided at [Address 1], had forwarded his mail. The applicant noted that his [Bank] statements also continued to be directed to the [Address 1] address.
31. The applicant stated that he paid for his clothes and other expenses using his mother's money. The applicant stated that his mother also paid for his food and rent. Previously she had paid the applicant's tuition fees. The applicant indicated that although he had stopped studying he wished to continue [studying].

32. There was an extended discussion at the interview about the fact that departmental records had been changed in February 2014 to give the applicant's residential address as [Address 2] despite the applicant's claim that he continued to reside at [Address 1]. The [Address 2] address had appeared on correspondence sent to the applicant by email inviting him to the departmental interview. The applicant denied having advised the Department of any change of address. The applicant stated that since returning to [Address 1], neither he nor his mother had moved back to [Address 2] or lived at any other address.
33. Following the departmental interview, the applicant submitted further documentary evidence to the Department including an income tax assessment for the year ended 30 June 2013 in the applicant's mother's name showing her taxable income as just over [amount]. The corresponding electronic tax return indicates that [Ms A] was employed in [work] and gives her home address as [Address 1].
34. The applicant also submitted two Confirmation of Enrolments (CoEs) showing that he was enrolled in a [College 3] with a start date of [date] May 2013 and an end date of [date] February 2014; and was enrolled in a [course] at the same college between [date] November 2012 and [date] May 2013. Also submitted was a tax invoice for \$1,110 from [an] Education Group Australia P/L dated [February] 2012; and [mobile phone] tax invoices addressed to the applicant at [Address 1] dated [July] 2012, [September] 2012, [December] 2013 and [January] 2014.
35. The applicant and his mother also submitted statutory declarations addressing some of the issues raised at the interview. In his statutory declaration, the applicant confirmed that he had looked for part-time jobs during his school holidays but it had been difficult to find a job as most vacancies were for full-time positions. The applicant explained that his [job] was a two-day job to assist his friend's business. The applicant denied ever working full-time and claimed to be totally reliant on his mother's support for his education and basic living. The applicant stated that his mother deposited cash into his account to support his daily expenses including his phone bills. The applicant denied ever having lived independently from his mother since arriving in Australia and again denied having notified the Department of any change of address in 2014. With regard to his trip to China, the applicant explained that his grandfather was seriously ill and he and his mother thought it might be the last chance to see him. The applicant's mother could not return to China owing to her fear of persecution, therefore, the applicant visited his grandfather alone. The applicant was [age] years old at the time and had no problem travelling by himself. His mother paid for the tickets. The applicant's mother's statutory declaration was expressed in similar terms.
36. At the time he applied for review, the applicant submitted to the Tribunal a copy of the delegate's decision record. Prior to the Tribunal hearing, the applicant submitted additional documentary evidence including a letter from [College 4] confirming the applicant's enrolment in a [course] between [October] 2015 and [March] 2016; a letter from [College 4] confirming the applicant's enrolment in a full time General English course between [September] 2014 and [October] 2015; printouts of the applicant's online attendance records at [College 4], dating in September 2014, January 2015 and October 2015; an enrolment agreement dated [October] 2015 issued by [College 4]; duplicates of the CoEs submitted to the Department for [College 3]; a CoE for a General English course at [College 4] between September 2014 and February 2015; further [mobile phone] tax invoices addressed to the applicant at [Address 1]; further [Bank] statements addressed to the applicant at [Address 1]; [Bank] statements addressed to the applicant's mother at [Address 1] dated [January] 2015 and [July] 2015 with transactions identified as transfers to the applicant highlighted; correspondence from the Australian Taxation Office addressed to the applicant's mother at [Address 1]; and a letter from [another bank] addressed to the applicant's mother at an address in [Address 5], dated 13 October 2015.

37. The Tribunal took oral evidence from the applicant and his mother separately at the Tribunal hearing and their evidence was, in most respects, consistent.
38. The applicant and his mother gave consistent oral evidence with regard to their residential addresses in Australia. Both told the Tribunal that they were presently residing in [Address 1] and had resided there since June 2013. The applicant and his mother both described the home as consisting of three bedrooms, one of which had been converted to a study. The applicant, his mother and father were staying in one bedroom whilst the landlord and his partner resided in another bedroom. The applicant and his mother both identified the landlord and his partner by the same names.
39. The parties told the Tribunal that they had resided at [Address 2] for a period of 10 months in a two-bedroom unit which they shared with their landlord and his partner. The parties both told the Tribunal that they moved to [Address 2] in order to be closer to [Ms A]'s work. Prior to living in [Address 2], they had resided at the same [Address 1]. They had maintained a good relationship with their landlord at [Address 1] which was why they were able to return. The applicant told the Tribunal that he had not officially changed his address to [Address 2] as the move was considered temporary.
40. The applicant was unable to account for the correspondence from [another bank] addressed to his mother at [Address 5] in October 2015. The applicant's mother told the Tribunal that the address belonged to a work friend. [Ms A] told the Tribunal that she had gone with the friend when applying for the card and the friend had suggested that [Ms A] use her address. The Tribunal expressed surprise that [Ms A] would have an important document such as new credit card delivered somewhere other than her own address. [Ms A] denied having lived at the [Address 5] address and repeated that she continued to reside at [Address 1].
41. The applicant and his mother both gave evidence that the applicant was presently enrolled in a [course]. Both parties told the Tribunal that the applicant attended classes three days a week between 5 PM and 10 PM. The applicant and his mother both told the Tribunal that the applicant had previously studied English language at the same institution five days per week. The Tribunal noted that the applicant appeared to have attempted both an English course and [another] course on previous occasions and enquired why he had enrolled in the same sort of course again. The applicant indicated that he had difficulties understanding the course materials previously and had been unable to obtain a qualification.
42. Both parties told the Tribunal that the applicant was not presently employed. The applicant gave evidence that he had been employed one or two days assisting a [friend] and worked briefly at a [workplace] in [suburb] when he first arrived in Australia. [Ms A] denied that the applicant had ever worked in Australia. When the difference between her evidence and the applicant's evidence was put to the applicant, he stated that he had not told his mother that he had been looking for work. [Ms A] had not wanted the applicant to work, and wanted him to concentrate on his studies. The applicant had seen that his mother worked very hard six days per week. In the evening she had pain in her hands and they had become hard. The applicant had wished to find work in order to assist his mother. Although he had applied for jobs, he did not take any because he was unable to find temporary jobs at which he could work during his school holidays.
43. The applicant and his mother both gave evidence that the applicant was supported financially entirely by his mother at the present time. The applicant's mother paid the rent and gave the applicant small cash amounts as pocket money. The applicant claimed that his mother also deposited larger sums into his bank account from time to time to cover the cost of his mobile phone and Opal card. The Tribunal noted that the [Bank] statements submitted to the Department showed regular deposits from another [Bank] which did not appear to be the one in his mother's name. The applicant stated that these were Internet transfers from a

high interest savings account which the applicant had opened not long after his arrival in Australia. The applicant told the Tribunal that he had from time to time transferred funds deposited by his mother into the high interest account but withdrew funds from that account from time to time when required. The applicant undertook to provide evidence that this account was in the applicant's name and a transaction history to show the source of funds entering into that account by [November] 2015. Following the Tribunal hearing, the Tribunal received a transaction statement for a [Bank] [account] in the applicant's name for the period April to October 2015. The bank account number and transactions shown on the statement match the deposits into the applicant's other [Bank] account.

44. The Tribunal asked the applicant and his mother about the apparently false financial information that had been submitted in connection with his student visa application. Both told the Tribunal that the documentation submitted with the student visa application had been prepared by the agent they had engaged to obtain the visa. The parties had no knowledge of how the documents were obtained or their contents. [Ms A] and the applicant's representative explained that [Ms A] had sought to escape persecution in China and the applicant himself had suffered discrimination and harassment at school owing to his mother's falun gong practice. The information had been provided in order to obtain a means of escape and the parties had no intention of deceiving or misleading the Department now.
45. The Tribunal discussed with the applicant the delegate's view that he had provided misleading information about his employment and financial position in Australia. The applicant told the Tribunal that he was very nervous at the time of the interview and was an introverted person who had trouble expressing himself to other people. The applicant also denied having informed the Department of a change of address to [Address 2] in 2015 and was unable to account for the Department's records in this regard.
46. The Tribunal asked the applicant and his mother whether the applicant was psychologically reliant on [Ms A] in any way. The parties told the Tribunal that they had a close bond and had always lived together. They had escaped persecution and come to Australia where they had no other friends or family. This had strengthened their bond. The applicant became emotional when talking about the hardships his mother had experienced in order to create a better life in him.

Findings on dependency

47. The Tribunal accepts that at the present time, the applicant is at least substantially reliant on his mother for financial and psychological support.
48. The Tribunal accepts on the documentary evidence and consistent oral evidence presented at hearing that the applicant is enrolled in a course of study. While the evidence indicates that the applicant has, from time to time, earned his own money doing casual jobs, there is no evidence before the Tribunal indicating that he is employed at the present time or that the money he has earned from working in the past would be at all sufficient to support himself financially.
49. The Tribunal accepts that the applicant's mother pays the rent on their accommodation and that they have, at all times since residing in Australia, lived at the same addresses and shared food. The Tribunal is unable to locate any instruction to the Department from the applicant or his mother requesting that his address be changed to [Address 2] in February 2014 and the applicant has denied that he changed his address. The Tribunal accepts as credible, the applicant's explanation for his [Address 1] address continuing to appear on correspondence sent to him after his brief move to [Address 2]. The oral evidence at hearing was consistent with regard to the applicant's and his mother's residential address history in Australia.

50. The applicant and his mother also gave consistent evidence with regard to the other financial support she provides to the applicant. Their evidence was supported by the bank statements submitted to the Department and the Tribunal. The Tribunal is further satisfied on the oral and documentary evidence that [Ms A] has been in receipt of sufficient income through her own employment to provide financial support to the applicant. In the circumstances, the Tribunal draws no adverse inference from the provision of misleading information the applicant's student visa application. As a consequence, the Tribunal is satisfied that the applicant relies on cash and transfers to his bank account from his mother to meet the costs of his mobile phone, transport, clothing and entertainment expenses.
51. Given the applicant's relatively young age, his financial reliance on his mother, his physical proximity to her and their shared experiences over the last few years, the Tribunal also accepts as credible, the applicant's claim that he is substantially reliant upon his mother for psychological support.
52. Having regard to the findings above, the Tribunal is satisfied that the applicant is dependent on his mother, as that term is defined in r.1.05A. The Tribunal is therefore satisfied that the applicant is a dependent child of [Ms A], as that term is defined in r.1.03, and a member of her family unit for the purposes of r.1.12(b).

Conclusions

53. For the reasons given above, the Tribunal is satisfied that the applicant is a member of the same family unit as a person who satisfies s.36(2)(a) and who holds a protection visa. The Tribunal is satisfied that the applicant satisfies s.36(2)(b) of the Migration Act.

DECISION

54. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act.

Rachel Homan
Member