

1508271 (Refugee) [2016] AATA 4344 (29 August 2016)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1508271
<b>COUNTRY OF REFERENCE:</b>	China
<b>MEMBER:</b>	Denis Dragovic
<b>DATE:</b>	29 August 2016
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 29 August 2016 at 11:50am

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 claims to be a **citizen of China**, applied for the visa [in] December 2013 and the delegate refused to grant the visa [in] May 2015. The applicant appealed the decision [in] June 2015.
3. The applicant appeared before the Tribunal on 15 August 2016 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicant was represented in relation to the review by his registered migration agent.

### RELEVANT LAW

5. 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 of the same class.

#### Refugee criterion

6. 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).
7. 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.
8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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. 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.

11. 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.
12. 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.
13. 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.
14. 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.
15. 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**

16. 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').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). 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. 'Cruel or



inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Section 499 Ministerial Direction**

19. 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**

20. [The applicant] is a Chinese national who came to Australia in 1997 on a [certain] visa to study at [a] University. Claiming to be from an educated and landed family who suffered during the Cultural Revolution, [the applicant]'s family moved away from their home in [location] to Henan Province. As a student in China he claims to have felt the prejudice against families of his social background. In addition his family were Christians, but he claims participating in home churches led to their punishment. Shortly after his arrival in Australia [the applicant] claims that his mother fell ill which precipitated a family financial crisis and distracted [the applicant] from his studies. This led to him traveling to China briefly in July 1997 before returning to Australia in September 1997. Since his return in 1997 [the applicant] has not left Australia. His last valid visa expired [in] October 1998 before being granted his current Bridging Visa [in] December 2013, which is associated with the protection claim under review. Over the course of several years in the early 2000's [the applicant] became a Jehovah's Witness and has since then increasingly played an active role in the religion. This element is central to his claim for protection.
21. The delegate determined [the applicant]'s identity as Chinese, without any information to the contrary I have assessed the applicants' claims against China as his country of reference for Refugee Convention reasons and receiving country for Complementary Protection purposes.
22. [The applicant] is claiming protection based upon being a practising Jehovah's Witness who is afraid of returning to China for fear of being persecuted for his faith. An additional implicit claim is that he fears the government's treatment of children of his parent's social class that were considered counter to the ideals of the cultural revolution as well as being a child to parents who were ill-treated for being Christian. Furthermore, I have considered whether his absence from China for nearly twenty years would expose him to a real risk of significant harm upon return.
23. In a decision dated [in] May 2015, provided to the Tribunal by the applicant, the Minister's delegate questioned the degree of commitment to the Jehovah's Witness faith based upon finding the applicant's knowledge and degree of participation to be insufficient to demonstrate that he has genuinely converted. The delegate found that this lack of commitment, apparently contingent on other factors such as employment and his financial

situation did not reflect the level of someone who would fear persecution for their faith were they to return to their home country. In addition, the delegate considered whether the applicant had reason to fear persecution based upon his parent's Christianity. In this regard the delegate did not accept that the applicant's family are Christian or that the family's mistreatment was because of their religious beliefs.

24. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

*The applicant's circumstances prior to departing China*

25. The applicant claims to have been born to a father who had come from a landed family that was considered wealthy and of a social class contrary to the ideals of the Cultural Revolution. As a [age] child the applicant was denied treatment for [a medical condition]. In addition, he claims that while at school he had to complete forms that none of the other children had to complete and although he was a good student the teachers never chose him as a school monitor. I put to the applicant that this was during the latter stages of the Cultural Revolution or shortly thereafter and asked whether he faced any discrimination in his later years including at university. In response he stated that he had problems with the government before middle school but not thereafter, though, he added that were he to return he would not have a chance of becoming a public servant based upon his family background and being away for many years.
26. I asked him about his [sibling], who continues to live in the same town as his father and what work [sibling] did. He responded that [sibling] worked for a state owned enterprise that manufactures [certain] parts. When pressed that this did not seem to reflect any discrimination, he argued that [sibling] should be a manager and not a general worker. In addition he noted that his father should have received a three bedroom apartment for his former position, [position], but instead was given a one bedroom apartment and when he complained in Beijing they sent him back with a security escort.
27. I accept as fact that the applicant suffered discrimination because of his family's social class through to when he was in middle school and that thereafter he has not faced discrimination. I do not accept that he would have problems finding work because of his parent's social class as his [sibling] and father are testament to being able to find employment despite their familial circumstances. While I accept that he would have trouble finding work because he has been away from China for nearly two decades, I do not accept that this would be as a result of discrimination based upon his social class, as he inferred, but rather simply because of not meeting employers' skills and experience expectations.
28. Based upon the accepted evidence I do not find that now or in the reasonably foreseeable future the applicant faces a real chance of suffering serious harm on the basis of being a member of a particular social group, namely, a child of parents from a social class perceived to be counter to the ideals of the Cultural Revolution.
29. The applicant noted in his application for protection that his parents were never treated in a fair manner because of their social class but also in part because of them being Christians. When asked if he knew which denomination they were, he did not know as he claims never to have accompanied them to their house church meetings. When asked if his parents (mother passed away in the late nineteen-nineties) were leaders in their church, he said that he hadn't heard directly from them that they were, but his [sibling] had said something to that extent and without a doubt they would be respected within the group considering how long they have been practising. He claims that his father was locked up in a small cell for about a week, labelled as anti-communist because of his faith. This was when the applicant was [age]. He also claims that his father thought that he was spied on by an old lady from the

local council during particularly important Christian days. I accept that his parents were long time practising Christians who participated in a house church. I do not accept that they are leaders or that their profile would be such to negatively impugn the applicant.

30. As the applicant raised government persecution as a claim and as I have no reason to believe that there may be persecution from non-government actors it is reasonable to consider the applicant's experiences with the government as an indicator of how he is perceived by the government.
31. The applicant's first degree was from, [a] University, where he studied [course] through distance learning with student-professor gatherings once a year. He then undertook a second degree at [another] University where he studied [a different course], completing a [qualification]. Throughout he claims to have received above average grades. Following his graduation he came to Australia to study at [a] University. I put to him that both Chinese universities are highly ranked. According to QS World University Rankings [name] is [rank]<sup>1</sup> in the world and [name] is [rank]<sup>2</sup> in Asia, and that having been accepted into two good universities does not sound like the Chinese government is discriminating against him. He accepted that his government had changed in their policies by the time he applied for universities. As the applicant's only experience with the government was his university education, in particular, being accepted into two respected universities I do not accept that the applicant has been discriminated against by the authorities upon graduating from middle school.

*The applicant's circumstances since arriving in Australia*

32. I noted to the applicant that he had arrived to Australia in 1997 on a [certain] visa and that he didn't apply for a protection visa until [December 2013]. I asked why he waiting so long. The applicant responded that he had asked numerous migration lawyers about this visa and was told that there was no hope. But now he has strength, given by God, to stand up and admit mistakes that he made in the past. Noting that it is legitimate to take into account an applicant's delay in lodging an application for a protection visa in assessing the genuineness, or at least the depth, of the applicant's claimed fear of persecution (per *Heerey J, Selvadurai v Minister for Immigration and Ethnic Affairs* (1994) 34 ALD 347) I accept that his decision not to apply earlier for a protection visa was as a result of a perceived lack of likelihood of being awarded one and considering that he had remained in Australia for so long I do not negatively infer a lack of genuineness or fear.
33. The applicant claims to have begun practising a Christian faith shortly after he began his period of living illegally in Australia by attending a church in [Suburb 1]. Despite living in [another suburb], which is in the west of [city], he attended a church in the east of [that city] because it was an 'Asian' church where he had friends. It is within this Church that he was baptised, though, he can't remember the denomination, the location or the name of the church. I accept that his first engagement with Christianity was in the manner described and as a result find that his commitment to Christianity at that stage was limited.
34. His engagement with the Jehovah's Witness faith began in 1998 when a Chinese preacher would come every Wednesday or Sunday to his house. He didn't attend a Kingdom Hall, but claims to have attended a major gathering at the [location] at the time. For the next fifteen years he claims that his ability to practise his faith was interrupted by his circumstances, namely that he was illegally in Australia, moved around a lot to find work and as a result couldn't commit long enough in one place to study and be integrated into the community. He

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<sup>1</sup> QS World University Rankings at [information deleted] accessed 16 August 2016

<sup>2</sup> QS World University Rankings at [information deleted] accessed 16 August 2016



claimed that he was only able to fully pursue his faith once he was granted a Bridging Visa in December 2013 at which time he was living in [town] and subsequently moved to [Town 1].

35. The applicant claims that it is for this reason that he is still not baptised. Before he can be baptised, which he claims he intends to do, he needs to study further and be recommended by two elders.
36. I accept that the applicant's religious journey within the Jehovah's Witness faith began in 1998. I also accept that due to the applicant's circumstances he had only limited engagement with his faith until he received a Bridging Visa in conjunction with his Protection Visa application in December 2013.
37. In support of the applicant's claims of being a practising and committed Witness since 2014 are five supporting statements submitted as evidence along with the evidence of the Minister of Kingdom Hall in [Town 1], [Mr A], who attended the hearing in person. All six spoke positively of the applicant's faith and his commitment to live it. Based upon the letters of support and [Mr A]'s evidence I accept that the applicant is committing himself to the Jehovah's Witness faith.
38. As the applicant embraced his new faith only upon arrival to Australia, I have considered s.91R(3) of the Act. This provision requires that in determining whether a person has a well-founded fear of persecution for a Convention related reason, the Tribunal must disregard the person's conduct in Australia unless it is satisfied that they have engaged in the conduct otherwise than for the purpose of strengthening their refugee claims.
39. The applicant claims to have applied for the protection visa because he wanted to admit to mistakes that he made in the past and he was able to do this because of the strength given to him by God. As the applicant had continued to live illegally within Australia from [year] through to [year], when he submitted his application for protection, I accept that it took a change of heart driven by his faith that made him bring to an end his period of living illegally. As such I accept his embrace of the Jehovah's Witness faith since arriving in Australia was not done to further his ability to claim protection.
40. I asked the applicant to explain what his current activities within the Jehovah's Witness community were. He responded that he spends most of his time with a Chinese congregation of about [number] people in [City 1] studying the Bible and reading Watch Tower magazines. After study sessions they would do questions and answers. This congregation meets every week on Sundays from 10am to 12am. I accept that the applicant regularly attends Bible study classes in [City 1].
41. I asked him why he chose to go to Bible classes instead of Witnessing within the wider community by door knocking. In response he said that he believes that he needs to know more about the Bible before he is ready and that his work situation didn't allow him to take the time to go. I asked how it was that he could go to a meeting in [City 1] and not to door knock in [Suburb 1]. He responded that it was because of distance, that he leaves his house around 7am to get to [City 1] and then were he to go to [Suburb 1] he would only get there around 2pm. I clarified that I didn't specifically mean [Suburb 1] but rather any Chinese speaking community and that the impression I had was that he doesn't want to go door knocking. Nevertheless, he insisted that it is important and that if he could get a different job, which was more flexible, then he would do door knocking.
42. The applicant claims that door knocking is important yet he only began when in [Town 1] and even so over the more than two years that he has lived there he said that he had gone door knocking only 3-4 times. The reason he gives for not going more often is that [Town 1] is an English speaking environment and he speaks Mandarin. The applicant did stress alternative

examples of when he would fulfil his obligation of Witnessing such as by talking to some Chinese people near where he works and talking to a person he sat next to on the train when he went to see his lawyer in [another city].

43. I put to the applicant that considering that over the last 17 years of his association with Jehovah's Witness he has only door knocked 3-4 times suggests to me that it is not a very important aspect to him. To which he again responded that it is very important but because he didn't have work rights on his Bridging Visa he couldn't be picky about his work and as his employer has found him a place to live with cheap rent and provided him employment he is expected to work six days a week which prevents him from fulfilling that obligation. I do not accept that a six-day work week prevents someone from Witnessing by way of door knocking. I find that the applicant has not shown a commitment to door knocking and as such I do not accept that he identifies it as central to his faith.
44. I asked the applicant what makes a good Jehovah's Witness. He responded that there were a few aspects. Understanding of the Bible in a different way, namely that Jehovah's Witness doctrine is solely based upon what the Bible says. Secondly, a behavioural aspect. They have strict rules to abide by including Witnessing. The applicant explained that in the beginning Witnessing would mean knocking on people's door to spread God's good news, but now they mainly establish booths in public areas as well as to a lesser degree continuing with door knocking.
45. Having an understanding of how the applicant understands his faith's obligations I moved on to enquiring about Jehovah's Witness in China and in particular whether the applicant knew if there were any Witnesses there and how they practise their faith. He responded that he has heard from some brothers there were Witnesses in China. To be connected with a Jehovah's Witness community requires a letter from a minister or elder, which will then be sent to someone in [country] and then to someone in China as an introduction. He continued by saying that in China you need to separate your time between gatherings and studying, with no group having more than ten people. Based upon what he has heard, if you go to door knock then it would be seen as illegal because, he claims, it would be seen as door to door sales, which is illegal. I asked how other Witnesses are fulfilling their faith's obligations. To which he responded that they would Witness in private, among friends and relatives. He, though, wants to profess his faith 'loudly and proudly rather than sneaking around' and this he believes would lead him into trouble. Based upon past behaviour, in particular a preference for spreading the faith quietly by way of speaking to friends and people who he sits next to on public transport, I do not accept that his preference to profess his faith loudly and proudly is genuine.
46. Country information suggests that Jehovah's Witness are not on the list of banned "cults" nor have there been any arrests or detention of their members in China despite there being 'large quantities of Jehovah's Witnesses literature being circulated in China'.<sup>3</sup> Australia's Department of Foreign Affairs notes that it would be very difficult for Jehovah's Witness to proselytise amongst the broader community as such activities are prohibited.<sup>4</sup> A first-hand account of how proselytising occurs in China shows Jehovah's Witnesses avoiding traditional methods of engagement and instead focusing on converting people initially

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<sup>3</sup> Canada: Immigration and Refugee Board of Canada, *China: The status and treatment of Jehovah's Witnesses (2004-2006)*, 24 February 2006, <http://www.refworld.org/docid/45f147082f.html> [accessed 24 August 2016]

<sup>4</sup> Australian Government: Department of Foreign Affairs and Trade, *DFAT Thematic Report: Unregistered religious organisations and other groups in the People's Republic of China*, 3 March 2015 [3.40]



covertly through the development of friendships and then broaching the topic of religion.<sup>5</sup> Specific to the province where he grew up and where his father and [sibling] live, Henan, country information notes that it has the largest Christian population of any province with an estimate by one scholar of 15% of the population being protestant, though this is not a source of protection against harassment.<sup>6</sup>

47. The issue that arises is whether the applicant's understanding of his religious obligations would place him in circumstances that could see him facing a real chance of serious harm.
48. I have accepted that the applicant's faith is genuine but that he does not see door knocking as central to how he should fulfil his responsibility to Witness. I also recognise that country information notes the existence of Jehovah's Witnesses in China as well as providing insight into how members of the faith undertake their responsibilities to Witness. As such the issue at hand is whether alternative doctrinally acceptable means of fulfilling one's faith, namely by befriending people and then engaging them in conversations about God, would lead to a real chance of serious harm. As noted by the applicant the means of Witnessing has changed and as per the official website of Jehovah's Witness, 'door knocking is a good way to reach people'<sup>7</sup>, but it is not emphasized as being the only way. Country information suggests that China's State Administration for Religious Affairs permits 'friends and family to hold small, informal prayer meetings without official registration'.<sup>8</sup> This would allow him to continue to with his Bible study. I also note that he has not expressed any desire to play a leading role within the Jehovah's Witness community. Considering that there are no reports of arrests or detention of Jehovah's Witnesses and that even those efforts to crackdown on illegal "cults" are primarily aimed at identifying and punishing leaders<sup>9</sup> I do not find that the applicant would face a real chance of serious harm were he to return to China in the reasonably foreseeable future while striving to fulfil the tenets of his faith.

#### *Failed Asylum Seeker from a Western Country*

49. Although the applicant did not express a concern about the Chinese government's treatment of him were he to return, I have considered this possible outcome by reviewing available country information.
50. Chinese law penalises people with imprisonment for up to one year for illegally departing but does not address a citizen's right to repatriate nor remain in exile.<sup>10</sup> There is evidence of Uyghurs, Falun Gong practitioners and unregistered church leaders being subject to interview, surveillance or detention upon return, while members of unregistered churches may be interviewed or kept under some surveillance, but they would probably not be

<sup>5</sup> The Believer, *Leaving the Witness: A Preacher Finds Freedom to Think in Totalitarian China*, February 2013 available at [http://www.believmag.com/issues/201302/?read=article\\_scorah](http://www.believmag.com/issues/201302/?read=article_scorah) [access 24 August 2016]

<sup>6</sup> Tony Lambert, *Review of Henan: The Galilee of China* (Volume 2 of the "Fire & Blood" series) by Paul Hattaway, available at <http://www.chinasource.org/resource-library/articles/the-church-in-henan> [accessed on 25 August 2016]

<sup>7</sup> Watch Tower Society, *Why Do Jehovah's Witnesses Go From Door to Door?* Available at <https://www.jw.org/en/jehovahs-witnesses/faq/door-to-door/> [accessed 24 August 2016]

<sup>8</sup> Australian Government: Department of Foreign Affairs and Trade, *DFAT Thematic Report: Unregistered religious organisations and other groups in the People's Republic of China*, 3 March 2015 [3.1]

<sup>9</sup> Australian Government: Department of Foreign Affairs and Trade, *DFAT Thematic Report: Unregistered religious organisations and other groups in the People's Republic of China*, 3 March 2015 [3.39]

<sup>10</sup> Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *China: COI Compilation*, March 2014, available at: <http://www.refworld.org/docid/533989d44.html> [accessed 16 August 2016] p306, 312

detained.<sup>11</sup> The level of surveillance and period of detention would vary in different parts of China, and would also be determined by the individual's level of prior public profile.<sup>12</sup> In addition if the individual is known to the local authorities and the government has maintained a "flag" against the individual's name the treatment would differ than those without, though, it is not known definitively how Chinese Authorities treat returning failed asylum seekers or even if they would be aware that they were seeking protection.<sup>13</sup> In reviewing available country information, there is no indication that returnees, such as the applicant who do not fall within any of the above mentioned groups, would be detained upon return to China.

51. As such, I find that the chance of the applicant facing serious harm as a result of being a member of a particular social group, namely, returnees who have lived abroad for an extended period of time and returnees having sought asylum in the West as being remote and therefore not meeting the threshold.
52. In *MILGEE v Che Guang Xiang* the Court required that to establish a real chance it is necessary to look at the totality of circumstances.<sup>14</sup> As such I turn my mind to considering the cumulative impact upon the applicant's profile in relation to Refugee convention grounds as a child of parents of a social class perceived to be contrary to the ideals of the Cultural Revolution, a child of Christian parents, a practising member of a non-registered faith and a returnee who has spent an extended period of time abroad including having sought asylum in a Western country. Drawing upon the findings related to each earlier and considering the claims cumulatively I not find that the applicant faces a real chance of serious harm were he to return to China.

#### *Complementary Protection*

53. I have also considered the Department's Complementary Protection Guidelines as required by Ministerial Direction No. 56. In *MIAC v SZQRB* [2013] FCAFC 33, the Full Court of the Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test in the assessment of 'well-founded fear'. In applying the real risk test to the question of significant harm I find that the chance of the applicant facing significant harm, as defined exhaustively in s.36(2A), is remote when considering the integers presented above including for being a child of parents of a social class perceived to be contrary to the ideals of the Cultural Revolution, a child of Christian parents and a practising member of a non-registered faith.
54. Furthermore I considered whether the applicant's prolonged period of departure from China, in total 19 years, would lead to a real chance of significant harm were he to return. While I accepted earlier the applicant's claims that he would face difficulty in finding a job, this challenge would be no different to what would be faced by others who similarly have a dearth of skills or experience. The applicant's return from Australia would not differentiate him from someone with the same education and work profile who, for example, was moving from a rural area to an urban centre seeking employment. As such and noting s.36(2B)(c) I do not find that the applicant's return after 19 years would amount to significant harm.

<sup>11</sup> Department of Foreign Affairs and Trade (DFAT) 2015, *China - Country Information Request CI150402160444876 - Treatment of Returned Failed Asylum Seekers*, 18 May, R.2. <CXBD6A0DE6523>

<sup>12</sup> Department of Foreign Affairs and Trade (DFAT) 2015, *China - Country Information Request CI150402160444876 - Treatment of Returned Failed Asylum Seekers*, 18 May, R.2. <CXBD6A0DE6523>

<sup>13</sup> Department of Foreign Affairs and Trade (DFAT) 2015, *China - Country Information Request CI150402160444876 - Treatment of Returned Failed Asylum Seekers*, 18 May, R.1. <CXBD6A0DE6523>

<sup>14</sup> Unreported, Federal Court of Australia, Jenkinson, Spender and Lee JJ, 12 August 1994 at 17.

55. I have also considered the integers of his claims cumulatively and similarly do not accept that the applicant's profile would expose him to a real risk of significant harm.
56. For the reasons given above, the Tribunal **is not** satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant **does not satisfy** the criterion set out in s.36(2)(a).
57. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal **is not** satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
58. There is no suggestion that the applicant 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, the applicant does not satisfy the criterion in s.36(2).

### **DECISION**

59. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Dr Denis Dragovic  
Senior Member