1220505 [2014] RRTA 83 (4 February 2014)

DECISION RECORD

RRT CASE NUMBER:	1220505
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Christine Cody
DATE:	4 February 2014
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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

SUMMARY

1. The applicant is [a] Chinese national who seeks to be granted a protection visa on the grounds that he is a refugee or entitled to protection under Australia's complementary protection provisions. The applicant claims to fear harm as a result of his actions as a representative of his work colleagues in opposing corruption and unfair practices in his factory workplace, that he has suffered harm for this reason, and that if he returns to China he will suffer harm at the hands of corrupt officials and the authorities, and he is unable to obtain protection from the authorities. The Tribunal does not accept that the applicant has a well-founded fear of persecution for a Convention reason, nor that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm. The Tribunal has accordingly affirmed the decision of the delegate to refuse to grant the applicant a protection visa.

BACKGROUND TO THE APPLICATION FOR REVIEW

2. 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). The relevant law is set out in Appendix A.

3. The applicant was represented by a registered [migration agent], from the time of lodgement of the initial protection visa application with the Department, and for the lodgement of the application for review before the Tribunal, and until May 2013. He thereafter was not represented by a registered migration agent.

4. The applicant had applied to the Department of Immigration for the visa [in] January 2012. The Tribunal has before it the Department's file relating to the application for a protection visa ([Reference deleted]) which contains (amongst other material) his protection visa application, his signed and dated statement (in both Mandarin and English) and a copy of certain pages of his passport issued [in] 2006.

5. According to those documents, the applicant was born [in] Fuqing in China. He speaks reads and writes in Mandarin and he was married [in] 1988 in Fuqing. He has three children [according to his evidence, his eldest son, [age] years old, is studying [overseas], his younger son, [age] years old, is studying [overseas], and his daughter, whom he accompanied to Australia for her studies, is now married in Australia with two children]. He fled to Australia in desperation [in] July 2007 (holding a student guardian visa: subclass TU-580).

6. According to his statement: he was fighting against the corruption of Chinese local government during the privatisation of state-owned corporation; he was tortured and persecuted by local police; ever since he has been in Australia his family has been continuously harassed and persecuted by local government; his whole family has been implicated; and if he returns to China he will be put in prison. His claims in that statement are as follows:

   - From 1988 he worked in a factory in [a] city, a state-owned enterprise, and he was promoted to be [position]. There was a governmental policy of reformation which led to corruption within his factory and he was opposed to this, so he made enemies. In May 2005 certain changes occurred which led to 200 workers becoming angry (the nature of the change that occurred in the factory differed between his statement and his evidence at interview/hearing).

He was appointed to negotiate with the workers however he did not compromise although "they" (the leaders of the factory/ the government) wanted to 'buy me off'. He then wrote 5 letters to [the] County Government Principal Regulatory Committee revealing how [name deleted] embezzled state-owned assets, but he had received no response 5 months later.

- In February 2006 he visited the office but was unable to see anyone; he made three further visits and each time excuses were made so that he could not have a meeting as requested. So [in] February 2006 he went to sit in front of the county government with more than 200 workers; he argued with the receptionist, security was called in, he was beaten up and towed out of the building, however he did not leave so the police were called. Three other representatives and the applicant were taken to the police station and were sentenced to 15 days detention on the charge of "disrupting public service". After he was released he was dismissed from work so he went to [city], but he could not find a new job. His wife used to work in a [business] but she was also fired because of him.

- As the government was so unfair, he was determined to petition to a higher level. [In] February 2007 he went to the Letter and Visits Bureau of the Provincial government in [City 1], argued with the guard for 10 minutes and was then taken to the police station, where he was badly beaten. The police tortured him and wanted him to admit that he had "violently disobeyed the law and assaulted police". He was detained for 30 days and then released. After that he was required to report to the police once every 2 weeks.

- As the government was so corrupt, he and his family decided he had to leave his wife and sons in China for his safety.

- After leaving China he did not give up his petitioning. He searched and collected a lot of information regarding the corruption of the Chinese government. He had written 8 letters in Australia, posting them to different departments including the [County Principal Regulatory Committee] and the Letters and Visits Office of [Province 2].

- After his departure for Australia the local police of [City 1] started to harass his two sons; they were accused of harbouring the applicant and abetting his escape. The police threatened to throw his sons in prison if he continued to write petition letters, so although they were under threat he could not give up his principles so he didn't stop. His sons had excellent academic records but they were disqualified from entering university because of the applicant, and they were monitored and harassed by local police and government and they suffered "pointing fingers" from the neighbours. In desperation his wife sold the house and helped them flee overseas. However the police did not leave his wife alone: she was required to report to the local residential committee for any updates and any news of his family: she was in tears all day long as the family was torn apart.

7. The applicant attended an interview with the delegate [in] May 2012 (the Tribunal has listened to the recording), where he expanded on his claims and answered questions.

8. The delegate refused to grant the visa [in] November 2012. The delegate had concerns about the applicant's credibility, considering that certain aspects of his claims had been fabricated. The delegate noted that there were numerous occasions where the applicant's testimony at interview differed from claims made in his statement, including: in relation to the issues arising at the factory; the circumstances whereby, in February 2006, he was beaten and the number of days he was detained; the date and the circumstances whereby he was beaten and detained on a further occasion; difficulties of harassment after his alleged release; and his departure for Australia. The

delegate referred to country information supporting the view that persons of adverse interest to the authorities on account of their involvement in activities which are considered to be anti-government would have difficulty in obtaining a passport and exiting China. The delegate also noted that the applicant continued to reside at his usual residence, and suggested that this, and his delay in departing China, indicated that he did not have a fear of the authorities, nor did the authorities have an adverse interest in him prior to his departure from China. The delegate did not accept that his sons were accused of assisting him to escape China, noting that the applicant had departed China legally using his own passport without facing any difficulties or questioning. The delegate also considered the applicant's delay in applying for protection was indicative that he did not have a genuine fear.

9. The delegate was not satisfied that the applicant held the [position] in the factory as claimed, nor that he was involved in protesting or lodging complaints against the management of the factory, nor that he was beaten, arrested or encountered any form of trouble in China at the hands of any authority, nor that he had any profile in China, nor that he is or was of adverse interest to the authorities or that his family members had been harassed by the authorities.

10. The applicant appeared before the Tribunal on 24 October 2013, where he gave evidence, presented arguments, and discussed concerns with the Tribunal. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

11. The Tribunal agreed at the hearing to allow the applicant further time to produce documentation in support of his claims. The Tribunal noted that the applicant had had significant time already to produce documentation, as his application was lodged with the Department [in] January 2012, and he had been asked for documentation at the interview with the delegate [in] May 2012, which he had not produced. In response to the Tribunal's suggestion that he be given one week to produce the documents, the applicant said this was not long enough to receive documents by courier from China. The Tribunal, noting he had sufficient time and had already told the delegate that the documentation was available in [Australia], said that it would grant the applicant two weeks to produce the documentation and suggested that he should start working on this straight away, that he could organise for the documentation to be faxed or emailed, and if he required further time to produce any documentation, he should let the Tribunal know the reasons why. The Tribunal said it was not necessary for the applicant to send old photographs showing that he was working in a factory a long time ago, as the Tribunal would be prepared to accept that, but that this alone did not prove his case.

12. The Tribunal notes that some three months have passed since the hearing and the applicant has not provided any documents to the Tribunal after the hearing, nor has he requested further time to do so, or contacted the Tribunal. The Tribunal also notes that he requested a copy of the hearing recording, which was sent out on the day of the hearing.

13. The Tribunal had access to the Departmental file concerning the applicant's offshore student guardian visa file ([File number deleted]), as well as PRISM/ISCE records relating to the applicant's daughter's studies and her current situation.

14. Relevant evidence and information before the Tribunal is referred to below.

CONSIDERATION OF CLAIMS AND EVIDENCE, AND FINDINGS

Country of reference

15. The Tribunal finds that the applicant is a national of China (PRC) based on his evidence and his passport which was provided to the Tribunal at hearing, and will assess his claims on this basis. The Tribunal finds that the applicant is outside his country of nationality. There is no evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality[1].

16. Taking into account the law and all of the relevant circumstances, the Tribunal has concluded that the decision under review should be affirmed, for the reasons set out below.

Credibility

17. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)

18. The Tribunal did not find the applicant to be a credible, truthful, or reliable witness, and in making this finding, the Tribunal has considered various internal inconsistencies, inconsistencies with information he gave when applying for his visa in coming to Australia, his delay in lodging his protection visa application, as well as other concerns referred to below.

19. ***Firstly,*** the applicant gave inconsistent evidence (as put to the applicant pursuant to s.424AA of the Act), about the reason why he needed to petition in the first place, as set out below:

- In his statement, he claimed that in May 2005, the factory started shareholding reforms, only the managing directors and those with relationships with them were allowed to hold the shares, the proposal was published and about 200 workers became angry; the government appointed people to negotiate with the workers' representatives, which included the applicant.

- However, the applicant told the delegate at interview that the factory was state owned, a decision was made to sell the factory and move it to a rural area, and it was being sold at too low a price (this was similar to what the applicant told the Tribunal at hearing).

20. When the Tribunal noted that these circumstances were different, he responded that the factory for which they had spent most of their lives working had cheated them, and there is corruption. He did not explain why he gave different reasons for the need to petition. The Tribunal considers that the applicant's changing reasons for the problems (shareholding reforms as against sale and

[1] The applicant had said to the Tribunal that he had entered Australia on transit to [another country] however there was no evidence (in his passport or elsewhere) to suggest that he had an enforceable right to enter [this country] at the present time.

relocation) undermines his claims about problems at the factory and the requirement that he act and petition for justice.

21. ***Secondly,*** the applicant gave inconsistent evidence about the details surrounding the first time he was detained as a result of him protesting the injustices at the factory (as put to the applicant pursuant to s.424AA of the Act), namely that:

- In his statement, he said that when he went to protest [in] February 2006, there were 4 representatives taken to the police station, and he was sentenced to 15 days detention on the charge of disrupting public service.

- However, at interview, he said that in February 2006, when he went to protest at the county government with all of the 200 workers, the 3 representatives (including himself) were called in, the PSB came and put them in separate rooms and beat the three of them, he signed a document admitting that he had breached the law, he showed it to the protesters who then dispersed, and then he and his 2 colleagues were locked up for 4 to 5 days.

- At hearing, he told the Tribunal that there were 7 to 8 people taken to the police station, and that they were detained for 7 to 8 days.

22. The Tribunal was concerned about the applicant's differences in evidence concerning the number of people detained, and how long they were detained for. In response, the applicant said that everything he said is true, but it was the one month in the psychiatric ward that he will never forget and he dreams about it; the other detention was small. The Tribunal does not consider this to be persuasive as to why the applicant has given such different evidence about the first time he was detained (and also notes that there are inconsistencies in his evidence concerning the time he claims to have spent in the psychiatric ward as set out in the next paragraph).

23. ***Thirdly,*** the applicant gave inconsistent evidence about the details surrounding the second time he was detained (as put to the applicant pursuant to s.424AA of the Act), namely that:

- The applicant did not suggest in his statement that he had been detained at all in a mental health hospital/psychiatric ward; he simply said that he was detained for the second time [in] February 2007 for 30 days before he was released and after that he was required to report to the police once every two weeks.

- However, at the interview he said that he had been detained in a mental health hospital in October 2006. Further, at interview he said that the 3 representatives went together and were detained.

- At the Tribunal hearing he said he had been detained in a mental health hospital, but that this occurred in January/February 2007, and that there were 10 representatives who had gone together and had been detained.

24. The Tribunal was concerned about the differences not only between the date the applicant was detained on the second occasion, but also the number of persons who were detained with him on that occasion, and the location. In response the applicant said that he hates talking about that period in his life in the mental ward as he feels like that was the biggest humiliation of his life. The Tribunal has considered the applicant's explanation and accepts that if indeed the applicant had been held in a mental health unit against his will for one month, then his memory and ability to recall details may have been adversely affected. However, the Tribunal notes that the applicant

was able to provide many details to the Tribunal about different matters, and it is not persuaded that this is the reason why the applicant gave such significantly different details in relation to his second detention.

25. ***Fourthly,*** the applicant gave inconsistent evidence to the delegate and the Tribunal about whether he had supporting documentation for his claims. As put to the applicant pursuant to s.424AA of the Act, he told the delegate at interview [in] May 2012 that he had evidence that the factory existed and that he worked there; that the factory had given him awards and there are also photos; these documents are in [Australia] but he did not bring them with him; he would bring them to the delegate (which he did not do).

26. In contrast, the applicant told the Tribunal that he did not have any supporting documentation; it had all been in China, not in [Australia].

27. When the Tribunal put to the applicant its concern about his differing evidence concerning supporting documentation, the applicant responded that he told his daughter to bring back the documentation from China but she could not because everything had been confiscated by the government; and he does not want to produce any false documents. The Tribunal does not accept the applicant's explanation, noting that it was his evidence that his daughter had travelled to China in 2011, and thus he would have known, by the time of the delegate's interview [in] May 2012, that she had not brought back documents from China to [Australia]. Further, this does not explain why the applicant would have told the delegate that he had documents in [Australia] if, as he claimed at hearing, he has never had those documents in Australia. The Tribunal considers that the applicant's changing evidence about supporting documentation, and his failure to produce any documents after the hearing despite the Tribunal allowing him time to do so (or contacting the Tribunal in this regard to offer an explanation) indicates that his claims have been fabricated and are not able to be supported by documentation.

28. ***Fifthly***, the Tribunal was concerned about the applicant's evidence to the Tribunal concerning letters he sent back to China. He claimed in his statement that whilst he was in Australia, he had posted eight letters to different departments including a Regulatory Committee and the Letters and Visits Office of [Province 2]. However, when the Tribunal asked the applicant for copies of these letters, he claimed to have not kept copies of the letters. When the Tribunal expressed surprise that he would not have kept copies of letters he had written in Australia, he said he may have some drafts. Although the applicant was allowed further time to produce documentation after the hearing, he has not produced any such drafts to the Tribunal. The Tribunal notes that the applicant claimed that he was previously an [position] in China, a diligent worker with high ethical standards, who was considered competent enough to be a representative of the 200 factory workers who had been disadvantaged by corruption, who had written letters in 2005 on behalf of these workers and he claimed that he wanted to support court proceedings against the corruption. In the circumstances the Tribunal considers it highly unlikely that he did not think to retain copies of eight letters he had sent to the Chinese authorities whilst in in Australia, and that this undermines his claim to have sent letters from Australia.

29. ***Sixthly***, the Tribunal was concerned about the applicant's claim that he continued to write letters from Australia (and to send money back to support a court action to be taken by his fellow colleagues) and that he allowed his daughter to return to China, in light of his claims of the seriousness with which the authorities took his behaviour, and the consequences for his family members.

30. In this regard, the Tribunal notes that the applicant claimed he had been detained, beaten and tortured by the authorities, and was thus aware that the authorities viewed his activities as dangerous. In his statement he claimed that that after he left, the local police started to harass his two sons, who were under threat such that they had to flee overseas (he gave evidence that his sons remained in China until 2008 and 2011 respectively); and the police did not leave his wife alone and she was required to report to the local residential committee, such that she was living in tears all day long (he gave evidence that his wife and elderly parents remain living in the family home). When the Tribunal put to the applicant that it did not understand why he would put his family's lives in danger by continuing to support the petitioners and sending letters, he said that the workers and he have persisted for most 10 years, they had worked for a long time in the factory. The Tribunal does not consider that this adequately addresses the concerns raised.

31. The Tribunal also put to the applicant that it also did not understand why, if the situation was so dangerous, he would let his daughter go back (in accordance with his evidence that his daughter went back for a month in 2011 because his wife was sick). In response the applicant then said that she had received permanent residence and she did not participate in these activities. The Tribunal noted that according to his claims, it did not matter if people participated in his activities, the authorities targeted his family members anyway. The applicant agreed that the authorities targeted his family members, and his only explanation as to why he let his daughter go back was that her mother was ill and she had to go back.

32. The Tribunal does not find the applicant's explanations for putting his family members' lives at risk to be persuasive. The Tribunal considers it highly unlikely that if his family was being targeted as claimed, the applicant would have sent one letter per year to continue his petitioning, and he would have allowed his daughter to return to China. The Tribunal considers that these matters undermine his claims that he or his family have experienced any problems in China, and that he has sent any petitioning letters.

33. ***Seventhly***, the applicant's claim at hearing that he had been dismissed from the factory in August 2005 was undermined by information he provided in support of his student guardian visa application lodged in China [in] March 2007. As put to the applicant pursuant to s.424AA of the Act, according to his documentation in support of the application, he was employed as the [position] at the factory as at February 2007. The applicant's response to this information did not directly address the information. He said that if he goes back and takes them to court, then something will happen but if he does nothing, he will be okay. When the Tribunal noted that his response did not directly address the information, he said that he has been in Australia for many years and it is not that he wants to stay here, he is here for a reason. The Tribunal does not consider that the applicant was able to satisfactorily explain why his documentation showed he was employed at the factory in February 2007, which is in contrast to his claims in his statement that he had been dismissed from his work at the factory after he was released from 15 days detention (in early March 2006).

34. Although the applicant did not raise this explanation with the Tribunal, the Tribunal has considered the explanation he raised at the departmental interview, namely that he needed to organise this documentation, saying that he was still employed at the factory, in order to obtain the visa. The Tribunal considers this is a plausible explanation, however in light of the Tribunal's other concerns, and the applicant's failure to raise this at the hearing when asked, the Tribunal does not accept the applicant's explanations.

35. ***Eighthly***, the Tribunal was concerned about the applicant's delay in lodging a protection visa application. In accordance with his visa stamp in his passport, his visa expired [in] October 2008;

the applicant acknowledged this at hearing. However, he did not lodge his protection visa application until January 2012 (he said at hearing that he thought that this occurred in late 2011). When the Tribunal put to the applicant its concerns that he took over three years to lodge his protection visa application, he said this was because he wanted to be able to go back to China, previously the threat had not been as severe but in the last two years he had been posting money back and they felt he was an even bigger threat. When the Tribunal asked the applicant what was the significant reason that made him consider he had to lodge a protection visa application, he said that when his family told him not to go back to China because the government had said that he should stay in Australia all of his life, which occurred in 2008/2009. The Tribunal then noted that he still waited a further two or three years to lodge his protection visa application, which was a significant delay. The applicant said he wanted to wait until the case was resolved so that he could go back in safety. The Tribunal then noted that he had said that his threats were getting more severe so it seemed unlikely that the case would be resolved. The Tribunal does not accept the applicant's changing evidence and his reasons for the delay in lodging a protection visa application, and considers that the delay indicates that the applicant was not and is not genuinely in fear of persecution.

36. For the reasons set out above, the Tribunal does not accept that the applicant is a credible or reliable witness.

Other matters

37. The Tribunal has considered any possible explanations for the applicant's inconsistent, changing and implausible evidence. The Tribunal considered that the applicant may have been nervous in giving evidence, however it does not accept that this can explain the discrepancies in his evidence. The Tribunal has also considered the applicant's claim that he does not need to lie because his daughter is here and he could stay here based on her residence. The Tribunal does not accept that this claim indicates that the applicant has been telling the truth throughout the process.

38. The Tribunal notes that the applicant claims to have been forced to spend time in a mental institution. As noted above the applicant was able to provide many details to the Tribunal on a range of matters. Therefore, as the applicant has not provided independent supporting evidence of any psychological difficulties, despite ample opportunity to do so since applying for protection, the Tribunal is unwilling to accept that any psychological difficulties from a stay in a mental institution or otherwise affected his ability to present his claims or give evidence throughout the process, including being an explanation for the applicant's inconsistent, changing or implausible evidence.

Credibility summary

39. For the totality of the reasons explained above, the Tribunal does not accept that the applicant is a credible witness.

Findings of fact

40. The Tribunal accepts that the applicant worked as an [position] in the factory as claimed, on the basis of his consistent evidence and on the basis of that claim made in his offshore student visa application. However, on the basis of the adverse credibility finding, as well as the applicant's change in evidence between his statement, and his evidence at interview/hearing as to the nature of the change that led to the problems, the Tribunal does not accept that the factory went through

the changes as claimed; that he was involved in representing workers against the management; that he suffered any threats or harm; was arrested or detained or held in a mental health facility or other detention location; that he was of adverse interest to the Chinese authorities or factory owners when he left China; has come to their attention subsequently; that anyone has had any adverse interest in the applicant (or threatened him) since he left China; that he has written letters or sent money to support colleagues to lodge proceedings against the factory owners/government; or that anyone has threatened or harmed the applicant's family members, or that his sons were forced to flee China, or that his wife was forced to sell the house. The Tribunal does not accept the applicant's claim at hearing that if he returns he will lodge court proceedings, as it does not accept that the claimed basis for the proceedings is true. The Tribunal is not satisfied that the applicant faces a real chance of serious harm from the authorities or the factory owners (including, as claimed, further detention, being placed in a psychological ward, being physically harmed, or even killed).

41. The Tribunal is not satisfied that the applicant has a well-founded fear of persecution by the factory owners or the authorities in China or other groups or persons should he return to China now or in the reasonably foreseeable future. Having considered the applicant's claims individually and cumulatively, 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).

Complementary protection criteria for the applicant

42. 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). For the reasons outlined above the Tribunal is not satisfied that there is a real chance of the applicant being harmed if he was to return to China. In *MIAC v SZQRB,* The Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition.[2] The Tribunal accepts that the test for 'real chance' is the same as that for 'real risk'. Therefore, for the reasons discussed above the Tribunal is not satisfied that there is a real risk that the applicant will be harmed in China. The Tribunal is not satisfied that it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm. Having considered his claims individually and cumulatively, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

43. 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

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

Christine Cody
Member

[2] *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [246], Besanko and Jagott JJ at [297], Flick J at [342].

APPENDIX A - RELEVANT LAW

1. 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.

Refugee criterion

2. 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).

3. 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.

4. 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. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

5. 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. 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.

6. 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.

7. 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.

8. 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.

9. 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

10. 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').

11. '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. 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

12. 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.