

071814262 [2008] RRTA 12 (8 January 2008)

DECISION RECORD

RRT CASE NUMBER: 071814262

DIAC REFERENCE(S): CLF2007/98476

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Kira Raif

DATE DECISION SIGNED: 8 January 2008

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be stateless and formerly resident in China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to 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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204

CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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.

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)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

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 persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.

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.

Whether an applicant is a person to 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.

CLAIMS AND EVIDENCE

The documentary material before the Tribunal is contained in the Tribunal case file and the Departmental case file. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Primary application

According to the Protection Visa application the applicant is a female born in Qindao, China. She has completed eleven years of schooling and holds no other formal qualifications. She stated on the application form that she had been employed as 'staff' at a company for a few years and in a management role for number of years. The applicant stated that she resided in China and that for around a year before arriving in Australia she had been residing in Country A.

When applying for the visa, the applicant provided a copy of a travel document issued by Country A and valid for a year which states that the applicant is an 'asylee' She stated that she would later provide evidence on her claim and that she could not provide some of the evidence which her home country. The applicant also provided a typewritten statement in English in which she made the following claims:

- She was born in a Christian family in China and immediately became a Christian after baptism. Her parents were devout adherents who guided her to believe Christ and his principles and she has been influenced by their thinking and gradually became a faithful Christian. Her parents often took her to a neighbourhood church and she met many Christian members, she was used to going to church weekly and continued doing so after graduating from high school.
- The applicant read the Bible daily and helped to set up a Bible Study group, which later grew to over 30 members, and conducted some functions for the church during weekends. She also assisted people to distribute religious promotion materials in the neighbourhood.
- She met Mr X in a conference, he was also a Christian. They talked a lot and became friends and they got married.
- Later the Bible Study Group came to the attention of the local government because the members distributed religious flyers to nearby residents. One day police broke in while the applicant and her husband were in Bible study in the church. The applicant and her husband were detained for a couple of weeks and were interrogated and physically mistreated but because there was no evidence to charge them, they were released.
- After the prison they were frightened and could not remain in their home town, they had to escape. The applicant's husband applied for a business visa to go to Country A, and he travelled to Country A and he was later granted a protection visa. The applicant also applied to migrate through the sponsorship and her application was

approved easier because of the experience of persecution in China and her husband's refugee position.

- A couple of years later, the applicant went to Country A with the hope of building a new family with her husband but nobody came to the airport to meet her and she could not reach her husband's number. She went to her husband's address but the landlord told her that he moved out several days earlier. The applicant was disappointed and depressed and wanted to commit suicide. She was introduced to a Chinese family and found a job as a housemaid, she worked and stayed there in the following year. She missed her husband and tried to find him with no result. She asked the family for a holiday and travelled to Australia, which she found to be a beautiful country. She has no hope of returning to Country A because she cannot find her husband and she cannot return to China because of the persecution from the government.

The delegate refused to grant the visa to the applicant. The delegate found that the applicant was recognised as a refugee by Country A and that her travel document entitled her to return and reside in Country A with work rights. The delegate found that the applicant made no claims that she feared persecution in Country A and that there was no risk of refoulement to China.

Application for review

The applicant sought review of the delegate's decision.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant's oral evidence is summarised below.

The Tribunal asked the applicant whether the information provided with the application was correct. The applicant said that she could not read English and she thought that her son's name was put instead of her husband's. She thought the other information was correct. The applicant said that a university student in a library helped to translate the application for her, she did not know the name of the person, but somebody told her that in the library there were people waiting and she found such a person. She said that as the document was in English, she did not know what was in it. The Tribunal asked the applicant if she was familiar with her claims. She said that she did not face any persecution in Country A as Country A is a free country and the reason she applied for the visa is because she was very sad in Country A. The applicant said that the student briefly explained to her the statement which was provided with her application for the visa. She told the student the story as to why she came to Australia.

The Tribunal asked the applicant why she feared persecution either in Country A or in China. The applicant said that she did not fear persecution in Country A. She said that in China she was detained for a couple of weeks due to her religious activities because she participated in family gathering. The applicant said that she came to Country A under the family reunion program. She said that her husband applied for protection in Country A and she was granted the visa as well, she said that she was given the visa and the visa appears in her passport and once in Country A, she was given Country A travel document. The Tribunal asked the applicant what rights Country A Travel document gave to her. She said that she does not have a visa, so she needed a travel document. She confirmed that she could remain in Country A indefinitely and that she had the permission to work. She was also given a social security

number. The Tribunal asked the applicant if she applied for permission to return to Country A before travelling to Australia. She said that she did not know about it and she did not apply.

The Tribunal asked the applicant what she needed to do to return to Country A. The applicant said that if the visa ceases, she cannot return. The Tribunal asked the applicant if she was referring to the travel document. The applicant said that she was given only a three months Australian visa. The Tribunal again asked the applicant if there was anything preventing her from returning to Country A. The applicant said that she was very sad in Country A and she did not want to return. The Tribunal repeated its question. The applicant said that she did not know.

The Tribunal asked the applicant why she did not want to return to Country A. She said that she went to Country A. When she touched down, she did not see her husband at the airport. She went to his place and found out that he had moved out. She has no relatives in Country A. His landlord sympathised with her and introduced a Taiwanese family to her and she worked with that family as a housekeeper for a year. This was her second marriage and she got to know her husband through the church, it had a big impact on her.

The Tribunal asked the applicant if she continued practising her religion while in Country A. She said that she has not been to a church since she arrived in Country A because it made her sad. The Tribunal asked the applicant why being sad would prevent her from going to a church. She said that she got to know her husband in a church and she feels like the Lord has deserted her. The Tribunal asked the applicant if she feared any persecution if she were to return to Country A. She said no. The Tribunal asked the applicant why she would fear persecution if she were to require to return to China if she appears to have abandoned her religion. The applicant said that she did not abandon religion, but she needs a bit of time. She said that she found a pastor in Australia and they had a long chat. The Tribunal pointed out that the applicant had lived in Country A for a year and a half and she had not been to a church. The applicant said that she had only lived there for a year and she went to the church about two to three times. The Tribunal pointed out that the applicant may be able to attend a church in China, given her low level of religious activity in the past eighteen months. The applicant agreed, but she said that she got to know her husband at a church and she did not think she could get over it in such a short time.

The Tribunal asked the applicant if she had any reason to believe that she would be removed to China as a holder of an indefinite permission to remain in Country A. She said no.

The Tribunal noted that the purpose of the Refugee Convention is to offer protection to people fearful of persecution for one of the five Convention grounds. The Tribunal pointed out that the applicant appeared to have a right to remain in Country A indefinitely and she stated that she did not fear persecution in Country A and also that she would not be removed. The applicant said that the situation for her was not good, she could not look for her husband and she moved to three different places. The Tribunal pointed out that this was a family matter and it was not the purpose of the Refugee Convention to offer protection for such. The applicant said that she may not have a right to re-enter Country A. The Tribunal pointed out that it must first determine whether the applicant has a right to enter and reside in Country A, whether she had a well-founded fear of persecution in Country A and whether she may be removed to her country of nationality, China. With respect to the last two points, the applicant stated that she did not have a fear of persecution in Country A and that there is no likelihood of her removal to China. The Tribunal also noted that from the documents presented it appeared that she did have a right to enter and reside in Country A. The applicant

said that she did not apply for return visa before leaving Country A. The Tribunal noted that it needed to determine whether she needed such a permission and what was required for its grant.

The applicant said that it did not matter to her whether she returned to Country A or China, it was all bad. The Tribunal noted that she appeared to be reluctant to return to Country A because of her family circumstances and not because of any fear for a Convention basis. If the Tribunal assessed her against China, it was concerned about the applicant's low level of religious activity recently. The applicant said that she did not want to return to Country A and she was fearful of residing in China. The Tribunal again explained the operation of s 36 of the Migration Act to the applicant. The Tribunal noted that if it assessed the applicant against China, her low level of religious involvement since coming to Country A may cause the Tribunal to find that she would not engage in religious activity, if she were to return to China. The applicant said that she did not say that she did not want to go to the church anymore. She spoke to the pastor and from this week she would go to the church every week. The Tribunal asked the applicant why she only visited the church two to three times while living in Country A since last year but she now wants to attend every week. The applicant said that the environment was different, every time she went to the church there, she would think about her husband as she met him in a church. The applicant said that the environment in Australia was different than in Country A and she wants to restart her life. In Country A her nerves nearly broke down as she cannot stop looking for her husband. She moved to three places and she did not have a life. The Tribunal asked the applicant if she decided not to pursue this since coming to Australia. The applicant agreed, saying that the environment was different, she wanted to start a new life.

The Tribunal asked the applicant if she would be able to attend a registered church if she were to return to China. The applicant said that she could because she had the baptism certificate. She said that she was detained in China for a couple of weeks and she was physically and mentally damaged, she is scared. The Tribunal noted that there were millions of people in China who attend registered and unregistered churches who were not persecuted for their religious activities. The Tribunal asked the applicant if she could not do the same. The applicant said that she was persecuted in the past and she was scared. The Tribunal again asked the applicant if there was any reason she could not attend a registered church. She said that even though she would be scared, she would still attend the church. The Tribunal asked the applicant why she would be scared attending a registered church. She said that she is scared of the authorities, she could not sleep during the detention. The Tribunal noted that it was referring to churches registered by the authorities. The Tribunal asked the applicant why she would be scared attending such a church. The applicant said that she would not go to a registered or a big church, but she may go to a smaller church. The Tribunal again asked the applicant why she would be scared to attend such a church. She said that she was detained in the past. The Tribunal noted that the applicant claimed that she was attending an underground church and faced persecution on that basis and she may not face any harm if she attended a registered Church. She said that she did not attend an underground church but a family gathering, which was not registered. The Tribunal again noted that the applicant claimed to have been persecuted in the past for attending a non-registered church. The Tribunal asked the applicant why she thought she may be persecuted if she attended a registered church. The applicant said that she was investigated, she did not know what may happen to her. The Tribunal pointed out that if the Tribunal were to find that she would return to China, the Tribunal may find that she may attend a registered church and there is nothing to suggest that those attending registered churches are persecuted. She said that she did not know what may happen to her.

The applicant said that she wanted to remain in Australia and did not want to return to China. The Tribunal again explained to the applicant that it would first consider whether she had a right to re-enter and reside in Country A and whether she will be persecuted there or returned to China and it may also need to consider whether she may face persecution in China. The applicant said that her Chinese passport stated that she was given protection and she cannot return to China.

The applicant subsequently provided, at the Tribunal's request, an authorisation to contact Country A authorities to make inquiries about her residence status.

Information from other sources

The Refugee Travel Document is a type of travel document issued by a Country A Department. Refugee Travel Documents may be issued to a refugee, asylee or permanent resident who obtained such status as a result of being a refugee or asylee in Country A who wishes to travel outside Country A and to return. It is issued to implement Article 28 of the United Nations Convention of July 28, 1951.

[Information deleted in accordance with s.431 of the Migration Act as this information could identify the applicant.]

A visa assistant at Country A Consulate-General in Sydney also confirmed that a person who departed the country on a travel document of the kind held by the applicant may re-enter the country at any time before the expiry of the document irrespective of whether or not such person informed the authorities of her departure before departing Country A.

FINDINGS AND REASONS

The applicant travelled to Australia on a Chinese passport and claims to be a national of China. The Tribunal accepts that the applicant is a national of China and has assessed her claims against China as her country of nationality.

Section 36(3) of the Act provides that Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. The term "right" in subsection 36(3) refers to a legally enforceable right.

In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country, Country A, either temporarily or permanently; whether she has taken all possible steps to avail herself of that right; whether she has a well-founded fear of being persecuted for a Convention reason in Country A; and whether there is a risk that the third country will return the applicant to another country where she has a well-founded fear of being persecuted for a Convention reason, such as China.

The applicant presented to the Tribunal a copy of her travel document issued by Country A Department which indicates that the applicant has been recognised as an asylee and is legally entitled to remain in Country A indefinitely. Information before the Tribunal, including country information and the applicant's oral evidence, confirm that the applicant has permission to reside and to work in Country A. The copy of the document presented to the

Tribunal by the applicant indicates that it expires in a year time and it remains valid at the time of the Tribunal's decision.

The applicant submitted that because she had not sought permission to re-enter Country A before her departure, she may be unable to return. However, the country information cited above indicates that a person holding the type of the travel document held by the applicant will have permission to re-enter Country A, during the validity of the travel document, whether or not such a person had sought prior permission to depart the country. On the basis of this evidence the Tribunal finds that at the time of the Tribunal's decision the applicant has a legally enforceable right to enter and reside in Country A.

The applicant stated in oral evidence that she did not have a fear of persecution in Country A. The Tribunal accepts that evidence and finds that the applicant does not have a well founded fear of being persecuted for a Convention reason in Country A. The applicant stated that she did not think that there is any risk that she may be returned to China from Country A. The Tribunal notes that the applicant has been recognised as an asylee in Country A and that Country A is a signatory of the Convention. The Tribunal is of the view that Country A is likely to comply with its obligations under the Convention, including Article 33(2) and that there is no risk that Country A will return the applicant to another country, including China, where she has a well-founded fear of persecution for a Convention reason.

The Tribunal finds that the applicant has not taken all possible steps to avail herself of a right to enter and reside in Country A. The Tribunal finds that Australia is taken not to have protection obligations to the applicant in accordance with s 36(3) of the Act. In light of this finding, the Tribunal considers it unnecessary to make findings on the applicant's claims of a Convention related persecution in relation to China.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.

Sealing Officer's I.D. prrt44