

0908857 [2009] RRTA 1169 (18 December 2009)

DECISION RECORD

RRT CASE NUMBER: 0908857

DIAC REFERENCE(S): CLF2009/120147

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Linda Symons

DATE: 18 December 2009

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

1. 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).
2. The applicant, who claims to be a citizen of China (PRC), arrived in Australia [in] September 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2009. The delegate decided to refuse to grant the visa [in] November 2009 and notified the applicant of the decision and her review rights by letter [on the same date].
3. 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.
4. The applicant applied to the Tribunal [in] November 2009 for review of the delegate's decision.
5. 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

6. 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.
7. 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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

19. The Tribunal has before it the Department's file relating to the applicant. 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.

Information given to the Department by the applicant

20. The following personal information about the applicant and the written claims are contained in the Application for a Protection Visa and accompanying statement lodged [in] September 2009.
21. The applicant claims she is a citizen of China (PRC). She was born on [date deleted: s.431(2)] in Fuqing city in China. She was educated in Fuqing and undertook her primary school education between 1984 and 1989. She did not undertake any further studies or training after leaving school.
22. She worked on the family farm from 1995 to January 2005. She then worked as a factory hand in a cosmetics manufacturing factory from February 2005 to December 2007 and a factory hand in a clothing factory from January 2008 to March 2008. She worked as a farmer on the family farm from April 2008 to May 2008, a shop assistant at a supermarket from June 2008 to November 2008 and a farmer on the family farm from December 2008 to April 2009. She then moved to Urumqi and became a self-employed businessperson running a [goods] shop from [date deleted: s.431(2)] May 2009 to [date deleted: s.431(2)] July 2009.
23. She was married [in] May 1995 and has a daughter aged 15 years and a son aged 5 years. She speaks, reads and writes Mandarin and speaks Fuqing. She claims she is a Christian. The applicant left China [in] September 2009 and travelled to Fiji via South Korea. She left Fiji [in] September 2009 and arrived in Australia [in] September 2009. She left China on a Chinese passport issued in her name and arrived in Australia on a false passport.
24. In support of her Application for a Protection Visa the applicant made the following statement:

1, [the applicant], unemployed of [address], in the State of New South Wales, make this declaration under the Statutory Declarations Act 1959:

Citizenship-introduction

1. I am a citizen of China I do not have citizenship of any other country. I do not have a right to reside in any other country.
2. I was born in [Village 1], Fuqing City, Fujian Province, China.
3. I am 32 years of age. I have a husband and 2 children.

Why I left China

4. I left China on [date] September 2009 as I feared that I would be arrested, fined and imprisoned by the authorities.

Giving birth to a child while below the legal age-threatened abortion

5. I have two children. My daughter, [name] is 15 years of age and my son, [name] is 5 years of age.

6. I was married in 1995. I was living with my husband in his parent's house in [Village 1].

7. I was pregnant with my daughter, [name] in 1995. I was 17 years of age. I believe that the legal age for giving birth was 20 or 22. However, I am not certain.

8. I moved out of my husband's house to avoid being detained for violating the law and being forced to have an abortion. I left my house and stayed in a variety of different places in the village. At times I stayed in abandoned houses and at other times I stayed with my uncle, [name]. My neighbours told me that the authorities had come to my family's house about 7 times in 1995 searching for me. They told me that 7 or 8 officers from the Birth Control Office were looking for me. My neighbour's said the authorities wanted to take me to the [location] town centre and have a forced abortion.

9. On one occasion the authorities entered my house and took my stereo and television and damaged my furniture. I believed that they did this as I gave birth to a child while I was under the legal age.

10. After I gave birth to my daughter I moved back into my husband's parent's house. After 3 or 4 days of returning to my husband's parent's house 7 or 8 officers from the Birth Control Office arrived at the door and fined me. They said that as I had given birth to a child at a very young age I would be fined. They issued me with a fine for 8,000 Yuan. I borrowed that amount from my friends, family and neighbours. Of that amount I borrowed more than 1,000 Yuan from my mother and her brother, [name]. I borrowed more than 2,000 Yuan from my cousins, [name] and my aunt, [name]. I borrowed the balance from neighbours and other people in the village.

11. Other people who gave birth over the legal age were permitted to give birth to a second child within 5 years of giving birth to their first child. However, as I was under the legal age when I gave birth I was penalised and was not allowed to give birth to my second child, [name] until 8 years after I gave birth to my daughter. I feared that I would be forced to abort my son.

12. I was the only woman in my village who had a child below the legal age limit. I heard that one other woman in [village] had given birth to a child while she was below the legal age. I heard that she was forced to have an abortion.

13. Other women I knew were forced by the authorities to have abortions for giving birth to more than one child where the first child is a son in breach of the birth control policy.

Husband disappeared

14. One day in 2005 my husband told me that a friend of his asked him to go and work with him in another province. I do not know what the name of his friend was and I do not know what the name of the province was. Two months after my husband left with his friend he telephoned me and told me that something was wrong and that the police wanted to arrest him. He telephoned me twice over the next 10 days. Each time he repeated that the police wanted to arrest him. I do not remember what he said the reasons were. He was not very clear on the telephone.

15. The police from the local police station in [Village 1] came to my house and asked me whether my husband had returned home. I told them that he had not returned home from work.

16. Two months later the police came to my house again and asked me where my husband was. They said that he had violated the law. They did not tell me what law he had violated.

17. I never heard from my husband again. I never saw him again. I do not know what happened to him.

Community riot-police confrontation

18. In May 2009 I established a business in [address], Urumuqi City. I owned a [goods] shop called [name]. The shop was about 2 or 3 streets behind the Central Business District (CBD).

19. On [date] July 2009 opened the shop by 9am. Half an hour later I heard people in the streets screaming. I believed that the noise was coming from the CBD. The noise got louder. I heard many people screaming and crying. I went outside and saw about 40 or 50 people running in a disorganized and chaotic fashion.

20. I saw many police in the streets. The police were trying to keep order.

21. I believe 2 groups of people were in a dispute with each other and were fighting each other. I do not know what the dispute was about.

22. When I returned to my shop 20 minutes later I heard from some other shop owners that several shops had been lit with fire. I decided to close the shop. I saw a person inside my shop. He was very nervous and scared. He asked me if I would let him stay in the shop. I let him stay for the night. I do not know his name. He left the next morning.

23. At about midday, several police officers came to my shop and said that someone had made a report to them that they had seen a participant in the riots leaving my shop. In anger the police threw [goods] around my shop. They asked me to provide information about that person. They said that if I did not provide them with the information they wanted they would return to my shop and imprison me.

24. I feared that the police would arrest me and imprison me. I had heard from one of my neighbours in [Village 1] that the police had accused one of their relatives of violating the law. Their relative was staying with them to evade capture by the

authorities. The authorities returned and arrested the neighbour as they believed that he was hiding a suspected criminal.

25. About 3 hours after the police left my shop I left Urumqi and went to [location]. I made plans to leave China.

Leaving with smuggler

27. I stayed with a friend called Person 1] in Fuzhou city. I stayed with her between [date deleted: s431(2)] July 2009 and the end of August 2009. She told me that she would give my telephone number to some people who would contact me and help me leave China and travel to other countries.

28. [Person 1] said that I would not have to pay any money for the trip to leave China. However, she said that I must pay her the money when I reached my destination. [Person 1] said that I was travelling to Fiji and would make a stopover in South Korea. She did not say anything about travelling to Australia.

29. I caught a bus to Shenzhen city where I stayed for 4 days. [Person 1] told me that a person would contact me at the [Hotel] in Shenzhen city. He gave me a plane ticket to Shanghai. I do not know his name.

30. [In] September 2009 I caught a plane to Shanghai where I stayed for 1 night. I met a man at the airport who handed me my own passport and a plane ticket to Fiji. I boarded a plane to Seoul, South Korea. I stayed in South Korea for 2 hours. I did not leave the airport and I did not meet anyone.

31. I used my own passport and boarded a plane to Fiji. I stayed in a hotel in Fiji for 2 nights. I do not know the name of the hotel. I met a woman at the hotel. We travelled to the airport together. I do not know her name. She gave me 2 false passports. One of the passports was a Hong Kong passport. I do not know what country the second passport was from.

32. I used the Hong Kong passport and caught a plane to Brisbane, Australia. Immigration at Brisbane airport took my passport and the 2 false passports. I have not seen these passports since that time.

Who I think will harm/mistreat me if I was forced to go to China

33. The authorities and the police will arrest me and imprison me as I have been accused of hiding a suspected criminal.

34. I fear that the authorities will arrest me and put me in prison for giving birth to my daughter while I was below the legal age.

What I fear may happen if I go back to China

35. I will be arrested, fined and imprisoned by the authorities if I return to China. Why I think I will be harmed / mistreated if I was to go back to China

36. I will be arrested and imprisoned as I have been accused of hiding a suspected criminal during recent riots.

37. I will be arrested, fined and imprisoned for giving birth to a child while I was below the legal age.

Why I think the Chinese authorities will not protect me if I am forced to go back to China

38. I have been accused by the authorities for hiding a suspected criminal in my shop and will be arrested and imprisoned for this.

39. I will not be protected as I have given birth to child while I was below the legal age.

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the Statutory Declarations Act 1959, and I believe that the statements in this declaration are true in every particular.

Declared at Villawood IDC

On this [date] day of September 2009 Before me

25. The applicant was interviewed by an officer of the Department of Immigration and Citizenship [in] November 2009. The Departmental officer summarised the interview as follows:

The applicant was interviewed on [date] November 2009, and was asked a number of questions about her life in China and about her claims. When asked at interview what she believed would happen to her if she returned to China and why, the applicant responded that she would be arrested and sent to prison by the police if she returns, because she has been accused of harbouring a criminal.

Information given to the Tribunal by the applicant

Application for Review

26. The applicant lodged an Application for Review [in] November 2009. No further information, documents or submissions were lodged in support of the application at that time.

27. Invitation to Hearing

28. [In] November 2009, an officer of the Tribunal wrote to the applicant advising that the Tribunal had considered all the material before it relating to the application but it was unable to make a favourable decision on that information alone. The applicant was invited to give oral evidence and present arguments at a hearing of the Tribunal [in] December 2009. The Tribunal received a response to the hearing invitation [in] November 2009.

At the Hearing [in] December 2009

29. The applicant appeared before the Tribunal [in] December 2009 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

The evidence of the applicant is summarized as follows:

30. She was born on [date deleted: s431(2)] in Fuqing city in China. She is a citizen of China and is not a citizen of any other country
31. Her parents live in [Village 1] and have lived there since their birth. She has a younger brother. If he is at home, he lives at the same address. He changes his address regularly. He is poorly educated and cannot find a stable job in Fuqing city. He goes to Guangzhou city and works in a construction job.
32. She was married in 1995. She has two children aged 15 years and 6 years. They are in [Village 1] and are cared for by her parents in law.
33. She went to school when she was 8 years old and studied for 5 years. She graduated from Primary School in 1986 when she was 13 years old. She did not do any further studies or training after she left school
34. After she left school and before she got married, she helped her parents on the farm. After she got married, she spent most of her time helping her parents in law with their farmland and looking after her daughter. From 2005 to the end of 2007, she worked in a cosmetic factory as a casual worker. From January 2008 to March 2008, she worked in a clothing factory for two months. From June 2008 to the end of 2008, she worked in a supermarket. The supermarket then closed and she did not have any paid work again until April 2009. From April 2009, she went to Xinjiang Province to open a shop. She was there until the beginning of July 2009.
35. During her marriage, her husband did not have a regular job other than helping his family on the farm. He has a difficult personality and cannot hold a job for a long time. She does not know where he is currently and has not had any contact with him for quite a long time.
36. At the time, she left China to come to Australia she was living at [Village 1] with her parents in law. When she got married in 1995, she moved from her parents' home to the home of her parents in law. She has lived with her parents in law for about 15 years. When asked whether, since 1995, there had been a time when she had not lived with them she answered no. When she left to come to Australia, she was still living with them.
37. She left China [in] September 2009. She left Shanghai [in] September 2009 and went to Korea and Fiji. From Fiji, she went to Brisbane. When asked why she went to all these places, she answered that her friends bought the ticket for her and suggested this route. She caught a bus from Fuqing to Shenzhen and traveled by air from Shenzhen to Shanghai. She arrived in Shanghai [in] September 2009 and went to Shanghai [in] September 2009
38. When asked why she stayed in Shenzhen for five days, she stated that she did not know. Her friends asked her to wait there until they arranged for her to leave China. She stayed in Shanghai overnight and was told she could leave the following morning. She never met the people who made the arrangements. She was just contacted by telephone and given instructions.
39. When asked how she organized tickets, passports and accommodation, she stated that they were given to her by her friend [Person 1] when she was in [Town A]. Her friend organized other people to make the arrangements. Her friend [Person 1] gave her the airline ticket for

her flight from Shenzhen to Shanghai. In Shanghai, someone else telephoned her at about 10am and gave her instructions to go to the airport She left China at 1.30pm.

40. When she was in a hotel in Shenzhen she received a telephone call and was informed that documents had been left for her at reception. She picked up the documents. There was a passport in her name and tickets for all her flights. When she was in Fiji, she received two more passports
41. She was asked a few questions like what she was going to do in Fiji when she was at Shanghai airport She traveled by herself to Fiji. When she was given her passport, she was also given a telephone card. When she got to Fiji, she put the telephone card in her telephone. When she got to Fiji, she received a telephone call. She stayed in a hotel in Fiji for two days. She was given instructions to wait in Fiji.
42. A woman came to her hotel in Fiji and gave her two passports. The passports were not in her name. She did not get a good look at them. She was nervous. She was instructed to use one passport to get on board the plane and the other passport when she arrived in Australia.
43. The arrangement she had was that if she left China successfully and arrived in Australia successfully she was to pay her friend 100,000 RMB. Her friend would then pay the other people. She has made a part payment of 10,000RMB. When asked where she got the money from, she stated that her friend is a very good friend. She paid the money for her When asked what the time frame was to repay the money to her friend she stated that she has to pay her friend 10,000RMB if she has the money. She is a really good friend. They worked together at the cosmetic factory When she had financial difficulties, her friend would help her.
44. She has not held a passport prior to the passport on which she left China in September 2009. She arrived in Australia [in] September 2009 at Brisbane. She was told she would be going on to Cairns but she did not get there. When she arrived at Brisbane airport, an Immigration officer asked her some questions. She was sent to a place where she stayed overnight. On the following day, she was sent to the Villawood Detention Centre and has been there since then
45. She lodged an Application for a Protection Visa [in] September 2009. At the airport, an Immigration officer asked her whether she was going to apply for a protection visa. She did not know what it was at the time so she answered yes. She was quite scared and nervous When she heard 'protection', she said yes. She had the help of a lawyer to fill out the application form. The lawyer asked her questions. The security guard gave her the application form. She signed the application form. She identified her signature on the application form and stated that everything she told the lawyer was true and correct. She identified her signature on the written statement and said that everything she said to the lawyer to prepare the statement was true and correct
46. In the first half of 2005, her husband told her that a group of people helped him to get some work. For the first two to three months after her husband left to do this work, he made two to three calls to her. After that, she has not received any telephone calls. She does not know why but some told her that he was having an affair with another woman. He has not returned home since then.
47. She has not tried to contact her husband. She does not know if he is in trouble with the police. Her husband spoke to his parents when he contacted her but he has not spoken to his parents since then. He spoke to his children just two to three times. When her husband left, he did not

give her an address or contact number to contact him. She has not been to the police to find him because she had no idea whether he was telling the truth or not.

48. The Tribunal noted that in her written statement the applicant had claimed that she fears that the Chinese authorities would arrest her and put her in prison for giving birth to her daughter while under the legal age. When asked why she had these concerns, she stated that it is illegal to have a baby under the legal age. If a person is pregnant under the legal age, she is forced to have an abortion.
49. The Tribunal noted that in the applicant's written statement she said that she was able to have her daughter, that she was fined 8,000 RMB and was not able to have her second child for eight years. The applicant stated that if someone had their first child while over the legal age they could have their second child within three to four years after that. In her case, she was not allowed to have her second child for eight years.
50. She paid a fine of 8,000 RMB within a few days after her daughter was born. Her daughter is registered on the hukou. She got permission to have her second child who is a boy. He is also registered on the hukou. When asked what her concerns were, she stated that when she was pregnant with her first child she could not live at home. If she were caught, she would have been forced to have an abortion. She escaped from home. She had to hide here and there. Sometimes she lived in the mountains and sometimes she lived in empty houses. Even though this incident happened a long time ago, she is still scared.
51. When asked what she was scared of, she stated that she had a very difficult delivery. The midwife told her that if she had not delivered her baby when she did, both she and the baby could have died. This incident was quite difficulty for her and it is still in her mind. She has no other concerns in relation to this issue.
52. When asked about her move to Urumqi, she stated that she opened a shop in Urumqi and lived there. She did not move her family there. She went to Urumqi [in] April 2009. She has a friend in her village that has a friend doing business in Urumqi. Her friend was aware of her situation and asked her to join her friend in Urumqi.
53. She did not take her children with her to Urumqi because they were in school. When asked whether they would have been able to study in Urumqi, she stated that they could but she had to run the shop and did not have enough energy to look after her children. If her children lived with her in Urumqi, it would have been a big expense.
54. When asked whether she changed her hukou, she stated that she did not because it was not necessary. When asked how she was able to open the shop in Urumqi, she stated that she could not find a job in her hometown. Her daughter's academic performance is quite good and she wants to educate her. She hopes that her daughter can receive a better education and find a stable job unlike her. The school tuition fees are too much for her. Her parents in law are too old to work. All the financial difficulties she has had to be solved by her. She went to Urumqi to work hoping that her family's financial status can be improved.
55. When asked why she did not open a shop closer to home rather than Urumqi, which was so far away, she stated that she does not have friends in cities that were closer to home. She did not inform the Fuqing police that she was relocating to Urumqi. She informed the Urumqi police that she was relocating there and obtained a temporary residence card.

56. She opened a small [goods] shop in Urumqi. When asked what knowledge she had about the [goods] business, she stated that her friend asked her to join her in Urumqi. She told her that there were few [goods] shops in that area. She told her that the business could be profitable. When asked where she got the money to set up the business, she stated that she borrowed 20,000 RMB from her cousin. She borrowed some money from her mother and the balance from her cousin.
57. She opened the business [in] May 2009. She sold [goods] for [houses]. She knew someone who worked in a [goods] factory. She lived in [address deleted: s.431(2)]. She lived by herself. She gave the address of her shop. She ran the shop by herself. She paid rent of 800 RMB per month. It cost almost 20,000 RMB to establish the business.
58. When asked the name of the main street in Urumqi, she stated that she was on [address deleted: s431(2)]. There were streets called Qing Nian Road, Hetan Highway, Youyi Road, Zhong Sha Road and Tian Shin Road. When asked how far the canal was from her shop, she stated not very far. There are shops near her place where she can shop. The street she was on was mainly Han people.
59. She stated that [in] July 2009 she heard many people outside. It was very noisy. She walked outside to find out what had happened. She saw many people were gathered on [address deleted: s431(2)]. She saw a few people with blood on their faces and a few shops were on fire. She also saw buses on fire and a police car. There was chaos. The police were trying to control the people.
60. As the situation became worse and worse, they got quite scared and some of the shop owners decided to close their shops. She went back to her shop and tried to close her front door. The glass on shop fronts in front of her shop was broken. When she was about to go home she found a person hiding behind one of the curtains. That person was quite scared. She asked him why he was there and he said it was quite messy and unsafe to be outside. He requested to stay in her shop overnight.
61. She thought that if she forced him to go outside he could be injured as well so she agreed that he could stay in her shop. She took all the money, closed the door and went home. The next day she went to the shop at midday and when she opened the door, she found that the person had disappeared. She did not know this person.
62. When asked why she allowed a strange man to stay in her shop, she stated that they were both scared. She thought that if she forced him to go out he might be injured She did not live in the shop. She thought that allowing him to stay overnight would not be a problem. When asked whether she had any concerns that he might steal something from the shop, she stated that all the [goods] in her shop were samples. She took the money with her
63. When asked why she did not ask him to go to his own home, she stated that things were out of order outside so she did not question him. At midday the police came to her shop and asked her who the person was who stayed in her shop overnight They said that someone had reported to them that they saw a person walk out of her shop. When asked why they would report that when it could have been a customer, she stated that she did not know.
64. The police asked her the name and address of this person. She told them exactly what happened. They did not believe her and insisted that she disclose some personal information about that person. They told her that if she did not tell them the information she might be

committing an offence of illegally hiding a person. She told them she had no idea who he was. She did not know his name and address and could not provide the information they wanted. The police did not believe her and told her to consider it further. They said they would return and warned her that if she did not tell them the information they would arrest her for illegally hiding a person.

65. When asked why the police would imprison her if she had nothing to do with the riots and did not know the man, she stated that she felt quite fearful and scared at that time. On the afternoon [in] July 2009, she caught a train home. The riots in Urumqi were very serious. In China if a person commits an offence of illegally, hiding a person then this person would have the same penalty as the person who committed the offence.
66. She traveled from Urumqi to Fuzhou city. There was no direct train so she transferred at Beijing station. The trip from Urumqi to Beijing was direct and took about forty-one hours. The trip from Beijing to Fuzhou took a little over twenty hours. She did not return to her village. She went to her friend [Person 1]'s home at [Town A]. She stayed there until [date deleted: s.431(2)] September 2009. From there she went to Shenzhen.
67. When asked why she felt she needed to leave China, she stated that after she lived at her friend's place for several days she became worried about her parents in law and her children. She asked her parents to visit her parents in law. Her parents in law told her parents they were worried about her because the police had come to the house to investigate her. They asked her parents for the reason. Her family tried to persuade her to go back home and go to the police station herself. She did not go back home.
68. When asked what her intention was when she came to Australia, she stated that the police told her family that she had committed an offence of illegally hiding a person. She is afraid that she would be put in prison. When asked why she did not seek asylum when she was in Fiji, she stated that she was told to wait in Fiji for two days. She trusted her friend completely and did as she was told. Her friend told her to go to Fiji so she did. She told her she would be contacted about what to do next and she followed this advice.
69. When asked what she thought would happen if she returned to China, she stated that she thought she would be arrested and put into prison. This is because in the past a person in her village allowed some of his relatives to stay in his house. After that, one of his relatives was arrested and he was arrested as well because he committed the offence of illegally hiding someone.
70. When asked whether there was anything else she would like to tell the Tribunal, she stated that because of the one child policy in China she has memories of the government trying to arrest her. If she returns to China and is arrested and put into gaol, it would have a negative impact on her children's future and their lives. In China if a person is in gaol, his or her children will be discriminated against and their life will be negatively influenced.
71. If she were sent to gaol it would be difficult for her to find a job in the future when she is released. In China, employers do not want to employ a person with a gaol record. Her parents in law and her parents have no other income except from farm work. If she is arrested, how could she support them financially? They would have a very hard life. How could she pay the money that she borrowed for opening the shop? Her younger brother does not have a stable income as well. He does not live with her parents. Her mother's health condition is bad. She had surgery. Her parent in laws' condition is quite bad. She has two children who are

underage. It is reasonable for her to leave them at this time. All of these people are in need of her support and her care.

72. The Tribunal then informed the applicant that it had a number of concerns in relation to inconsistent evidence given by the applicant to the Tribunal, in her written statement to the Department of Immigration and Citizenship and in her interview with a Departmental officer [in] November 2009. The Tribunal explained to the applicant that this was important because it could result in the Tribunal forming a view that she was not a witness of truth and that this could lead the Tribunal to the conclusion that she was not a refugee. The Tribunal explained to the applicant that if it reached this conclusion the Tribunal would have to affirm the decision made by the Department of Immigration and Citizenship and that that would mean that she would not be entitled to a protection visa and her application would be unsuccessful.
73. The Tribunal then invited the applicant to comment on or respond to the concerns raised and advised the applicant that she did not have to comment on or respond immediately. The Tribunal informed the applicant that she could seek additional time to do so. The Tribunal asked the applicant whether she understood what had been explained to her and she answered yes. The applicant indicated to the Tribunal that she would like to comment on or respond to the information immediately and she did not request any additional time to do so.
74. The Tribunal informed the applicant of country information on China obtained by the Australian Department of Foreign Affairs and Trade, which indicates that China's Entry and Exit laws prevent certain groups of people from obtaining passports or from leaving the country. She gave evidence to the Tribunal that she was wanted by the police, she was being investigated for harbouring a suspected criminal and she is likely to face arrest and imprisonment if she returns to China, and yet she was able to obtain a passport in her own name and leave China without any problems.
75. The applicant responded that it was true that a person in that situation would not be able to leave China. However, in some situations arrangements can be made with money. If you spend the money things can be done. That is China. In China if a person commits an indictable offence the person can pay money and be released.
76. The Tribunal noted that in her written statement to the Department of Immigration and Citizenship the applicant claimed that the friend who helped her to leave China is called [Person 1]. However, she gave evidence to the Tribunal that the friend who helped her to leave China is called [Person 1]. The applicant responded that she might have said [Person 1] at the beginning because she was extremely nervous. She calls her [Person 1]. Maybe she gave the incorrect surname. The Tribunal noted that she gave evidence to the Tribunal that this friend was a very good friend yet she gave an incorrect surname for her. The applicant responded that her friend is a very good friend. She is like family. When she calls someone aunty, she leaves out her surname. Their relationship is quite intimate.
77. The Tribunal noted that in her written statement to the Department of Immigration and Citizenship the applicant claimed that her husband telephoned her and told her he was in trouble with the police and that the police wanted to arrest him. The police then came to her house and made inquiries about her husband. They returned two months later and asked her where her husband was. They told her that he had violated the law. The Tribunal further noted that the evidence she gave the Tribunal was very different and that she told the Tribunal that her husband was having an affair with another woman. She did not refer to the police.

78. The applicant responded that she and her husband were married when they were young. They always quarreled with each other because of financial problems. He went gambling occasionally and when he returned, he had no money. He tried to cheat her to get money from her. He told her he wanted money for something. Because of their financial difficulties, her parents cannot stand him. His relationship with her parents is bad. Because of what had happened in the past, she did not believe what he told her.
79. When asked whether the police came to her house and questioned her about her husband, she stated that the police did come and she told them she did not know where he was. She stated that it is true that her husband telephoned her during the first couple of months and stopped after that. Her husband had been unreasonable to her family. He did not make any money for their family.
80. When asked why she told the Tribunal earlier in her evidence that she had no contact with the police in relation to her husband's whereabouts, she stated that she did not know her husband's whereabouts and that this is true.
81. The Tribunal noted that in her written statement to the Department of Immigration and Citizenship the applicant claimed that she had concerns that if she returns to China the Chinese authorities would arrest her and imprison her for giving birth to her daughter while she was below the legal age. This was different to the evidence she gave the Tribunal. The applicant responded that the department in charge is the Family Planning Office. This has nothing to do with the police. What she meant was that she was scared of the Chinese government because, at that time, they would have forced her to have an abortion. To avoid a forced abortion she lived in an empty house during her pregnancy. When she lies in bed, she gets flashbacks of that time and gets scared.
82. When asked whether she has concerns that if she returns to China she could be arrested and imprisoned because she gave birth to her daughter when she was below the legal age, she stated that she did not. She was fined and this issue is gone. They will not arrest or imprison her now for this reason. The only concern she has is in relation to being accused of hiding a suspected criminal.
83. The Tribunal noted that in her written statement to the Department of Immigration and Citizenship she made no mention of the police questioning her parents in law in relation to her whereabouts. The applicant stated that she thinks she mentioned it. She thinks she told her lawyer that the police came to her house and asked about her whereabouts. The written statement was compiled by her lawyer. He asked her questions and she answered them. If he did not ask her the question, she did not answer it.
84. The Tribunal noted that there were a number of inconsistencies between the oral evidence she gave the Tribunal at the hearing and the oral evidence she gave the Department of Immigration and Citizenship at the interview. The Tribunal noted that she told the Departmental officer that she did not go to the police at Urumqi and inform them that she was relocating to Urumqi. She told the Tribunal that she went to the police at Urumqi, informed that that she was relocating to Urumqi and obtained a temporary residence permit.
85. The applicant responded that she told the Departmental officer that she went to the police at Urumqi. In the city, it is essential for a person to have a temporary residence permit. Even you do not go to the police yourself the police will come to your place.

86. The Tribunal noted that the applicant told the Departmental officer that she borrowed money from friends to set up the shop in Urumqi. She told the Tribunal that she borrowed some of the money from her cousin and some from her mother. The applicant responded that her friends lent her most of the money and her mother gave her a small amount. She stated that the Tribunal asked her the question in a general way and she answered it in a general way. The Tribunal reminded the applicant that she told the Tribunal she borrowed the money from her mother and her cousin and made no mention of friends. The applicant then responded that she borrowed money from her cousin.
87. The Tribunal noted that the applicant gave evidence to the Tribunal at the start of the hearing that she was living with her parents in law in her village at the time she left China to come to Australia. She subsequently gave evidence to the Tribunal that when she returned from Urumqi she did not go back to her village but stayed with her friend [Person 1] in [Town A]
88. The applicant responded that she did not understand the question. She should have been asked a specific question. The Tribunal reminded the applicant that the specific question she was asked was “where were you living at the time you left China”. The applicant responded that she misunderstood the question.
89. The Tribunal informed the applicant that it had difficulty accepting that she, a young woman on her own, far from home, family and friends, would allow a strange man to stay overnight in her shop. The applicant responded that the man stayed in her shop. She did not stay there. She went to her home.
90. The Tribunal noted that if the applicant’s intention in leaving China were to seek protection, the Tribunal would expect her to do so at the first available opportunity. She was in Fiji for two days and did not make a claim for asylum. The applicant responded that she just followed her friend’s arrangements and the route she arranged for her. As a woman with poor education and knowledge, she just followed other people’s advice. She did not know what was right. There was then some discussion in relation to her seeking asylum at the airport in Australia.
91. When asked whether there was anything else she wished to tell the Tribunal, the applicant stated that what she told the Tribunal was her true experience. If she goes back to China, she will definitely be arrested and put in prison. It will have a negative impact on her children and her family. The Tribunal’s decision could help her and her family. On the other hand, the Tribunal’s decision could put her family in a worse situation. She hopes that the Tribunal would have sympathy for her situation. She thanked the Tribunal and the interpreter for their time.

FINDINGS AND REASONS

92. The Tribunal finds that the applicant is a citizen of the People’s Republic of China based on the evidence given by the applicant at the hearing and will assess her claims on this basis. The Tribunal finds that the applicant is outside her 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 her country of nationality.
93. When assessing claims made by an applicant the Tribunal needs to make findings of fact in relation to those claims. This usually involves an assessment of the credibility of the applicant. When doing so it is important to bear in mind the difficulties often faced by asylum

seekers. The benefit of the doubt should be given to an asylum seeker who is generally credible but unable to substantiate all of his or her claims.

94. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence it must proceed to assess the claim on the basis that it might possibly be true. (See *MIMA v Rajalingam* (1999) 93 FCR 220).
95. However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451 per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.)
96. In dealing with this application the Tribunal finds that the applicant's material claims lack credibility and cannot be accepted. There were a number of inconsistencies between the applicant's evidence and independent country information, between the written and oral evidence given by the applicant to the Department of Immigration and Citizenship and her oral evidence to the Tribunal and within the oral evidence she gave the Tribunal.
97. In her written statement to the Department of Immigration and Citizenship, the applicant claimed that she feared that the Chinese authorities would arrest and imprison her for giving birth to her daughter while she was below the legal age. The applicant gave evidence to the Tribunal that she gave birth to her daughter fifteen years ago. At that time, she was fined 8,000 RMB, which she paid. She was also penalized by not being given permission to have her second child for eight years. Both her children are registered on the hukou and are attending school.
98. When questioned about her concerns in relation to this issue, the applicant stated that she had been fined and this issue is now gone. She stated that the police will not arrest or imprison her now for this reason and she has no concerns in relation to this matter. She gave evidence that the circumstances surrounding her pregnancy and the birth of her first child were quite traumatic and that she still has flashbacks of that time. In view of the above, the Tribunal finds that the applicant has abandoned this claim and that she does not fear any future harm based on this.
99. In her written statement to the Department of Immigration and Citizenship, the applicant claimed that her husband left the family home in 2005 to seek employment in another Province. He telephoned her two months later and told her that the police wanted to arrest him. He telephoned her again twice and repeated that the police wanted to arrest him. He did not indicate the reason. The police attended her home on two occasions inquiring as to her husband's whereabouts. On the second occasion, they informed her that he had violated the law.
100. At the hearing, the applicant's evidence was that her husband went to another Province for work. For the first two to three months after he left he made two or three telephone calls to her. She has thereafter not heard from him or seen him. She was told he was having an affair with another woman. When questioned about any police involvement she stated that she does not know if he is in trouble with the police. She subsequently stated that the police did come to her home and she told them she did not know the whereabouts of her husband. These events took place in 2005 and nothing has happened since then. The Tribunal is satisfied that

the applicant is not at risk of persecution by the Chinese authorities in relation to her husband's activities or his disappearance.

101. In her written statement to the Department of Immigration and Citizenship, the applicant claimed that she moved from Fuqing to Urumqi and set up a business there in May 2009. [In] July 2009, there were riots in Urumqi and a man hid in her shop. She allowed him to stay in her shop overnight. On the following day, she was questioned and threatened by the police. She fled Urumqi, returned to Fujian Province and went into hiding with a friend. This friend organized for her to leave China and travel to Australia. She fears that if she returns to China the Chinese authorities would arrest and imprison her as she has been accused of hiding a suspected criminal.
102. The applicant does not claim that she fears persecution because of her race, religion, nationality, membership of a particular social group or political opinion. There is therefore no direct nexus between her claim and the Refugees Convention. However, there may be some argument that her claimed actions may imply perceived political opinion and the Tribunal will assess this claim on that basis.
103. The applicant was interviewed by an officer from the Department of Immigration and Citizenship [in] November 2009. During the course of that interview she stated that she did not go to the police at Urumqi and inform them that she was relocating to Urumqi. However, she gave evidence to the Tribunal that she informed the Urumqi police that she was relocating there and obtained a temporary residence card.
104. When this inconsistency was put to the applicant, she responded that she told the Departmental officer that she went to the police at Urumqi because in the city it is essential for a person to have a temporary residence permit. The Tribunal has listened to the recording of the interview between the applicant and the Departmental officer. The Departmental officer questioned the applicant at length in relation to this issue. When questioned, the applicant initially stated that she did not go to the police at Urumqi in relation to her relocation to Urumqi.
105. She questioned the Departmental officer as to why she needed to inform the Urumqi police of her relocation. When questioned further she stated that she went to the police at Urumqi and told them that she was going to be living there temporarily. She subsequently stated that she did not need to go to the police. She had to talk to the Industry and Commercial Management Bureau. She made no mention of obtaining a temporary residence permit to the Departmental officer.
106. These inconsistencies in the applicant's evidence to the Departmental officer and to the Tribunal raise serious concerns in relation to her credibility. The applicant told the Tribunal that it is essential for a person to have a temporary residence permit to move to a city. The Tribunal is of the view that if the applicant was aware of this and had obtained a temporary residence permit from the Urumqi police she would not have questioned the Departmental officer as to why she needed to go to the Urumqi police in relation to her relocation there.
107. The Tribunal is of the view that it is reasonable to expect that the applicant would remember whether she went to the Urumqi police and obtained a temporary residence permit. The Tribunal is also of the view that if the applicant had obtained a temporary residence permit she would have told the Departmental officer that information. These inconsistencies in the applicant's evidence cause the Tribunal to doubt whether she moved to Urumqi.

108. When the Tribunal asked the applicant the name of the main street in Urumqi, she did not answer the question. Instead, she named a number of streets. Researchers in the Research Department of the Tribunal were unable to find most of the named streets on a street map of Urumqi. This raises further doubts in relation to whether the applicant ever lived in Urumqi.
109. The Tribunal is of the view that it is highly improbable that a young woman from a rural village in Fujian Province with very limited education, no financial resources and no experience in business would relocate to a city very far from Fujian Province, away from her two children, her family and her friends and set up a business she knew very little about.
110. During the course of her interview with the officer from the Department of Immigration and Citizenship [in] November 2009, the applicant stated that she borrowed money from friends to set up the shop in Urumqi. The applicant gave evidence to the Tribunal that she borrowed some of the money from her cousin and some from her mother. When this inconsistency was put to the applicant, she responded that her friends lent her most of the money and her mother gave her a small amount. She stated that the Tribunal asked her the question in a general way and she answered it in a general way. The Tribunal does not accept this explanation. The applicant was asked a specific question as to where she got the money to set up her business.
111. When the Tribunal reminded the applicant that she told the Tribunal she borrowed the money from her mother and her cousin and made no mention of her friends, the applicant then responded that she borrowed money from her cousin. These inconsistencies raise serious concerns in relation to the applicant's credibility and causes the Tribunal to doubt whether she set up a business in Urumqi.
112. In her written statement to the Department of Immigration and Citizenship, the applicant claimed that she left Urumqi [in] July 2009, traveled to Fuzhou city and stayed there with a friend named [Person 1] until the end of August 2009. In her evidence to the Tribunal, the applicant claimed that she left Urumqi, traveled to [Town A] and stayed there with a friend named [Person 1] until [date deleted: s431(2)] September 2009. When the inconsistency in the name of her friend was put to the applicant, she responded that she might have said [Person 1] at the beginning because she was extremely nervous. She calls her friend [Person 1] and maybe she gave the incorrect surname. She stated that when she calls someone aunty she leaves out her surname.
113. The Tribunal does not accept this explanation. The applicant gave evidence to the Tribunal that this friend was a very good friend, she was like family and that their relationship was quite intimate. The Tribunal would expect that if she was a very good friend and she was like family the applicant would know her surname and would be unlikely to make a mistake with her surname. This inconsistency raises serious concerns in relation to the applicant's credibility. It causes the Tribunal to doubt that this person was a friend, that the applicant was living in her house and that this person helped her to leave China because of their friendship.
114. The applicant gave evidence to the Tribunal that when she was living with her friend at [Town A] she asked her parents to visit her parents in law. Her parents in law told her parents they were worried about her because the police had come to the house to investigate her. Her family tried to persuade her to return home and go to the police herself. She did not return home. In her written statement to the Department of Immigration and Citizenship, the applicant made no mention of the police going to the home of her parents in law and questioning them as to her whereabouts or of her family trying to persuade her to return home and go to the police.

115. When this issue was raised with the applicant, she stated that she thinks she mentioned it to her lawyer. The Tribunal has difficulty accepting that the applicant told her lawyer about this and her lawyer omitted to mention something of this importance in the written statement. However, the Tribunal accepts that it is possible that the applicant did not mention this to her lawyer and that is why it is not referred to in her written statement. The Tribunal is of the view that this is an important claim that, if true, the applicant would not have omitted to mention to her lawyer. The omission of this claim in her written statement raises concerns about the genuineness of the applicant's claims.
116. At the hearing, the applicant initially gave evidence to the Tribunal that when she got married in 1995 she moved from her parent's home to the home of her parents in law. She lived with her parents in law for about 15 years and was living with them at [Village 1] at the time she left China to come to Australia. The Tribunal then asked her whether, since 1995, there had been a time when she did not live with her parents in law and the applicant answered no. The applicant subsequently gave evidence to the Tribunal that when she left Urumqi she went to her friend's home in [Town A] where she lived until she left China. She did not return to her village.
117. When this inconsistency was raised with the applicant, she responded that she did not understand the question and stated that she should have been asked a specific question. The Tribunal reminded the applicant that the question she was asked was "where were you living at the time you left China to come to Australia" and that that was a specific question. Her answer to the question was [Village 1]. The applicant then responded that she misunderstood the question. The Tribunal does not accept that explanation. The question was very specific and the applicant answered it. This inconsistency in the applicant's evidence raises serious concerns in relation to her credibility. It suggests that the applicant never left the village of [Village 1] for Urumqi. It causes the Tribunal to doubt whether the applicant ever went to Urumqi or lived in [Town A] prior to her departure from China.
118. The Tribunal raised with the applicant its concern that she was in Fiji prior to coming to Australia and did not seek asylum in Fiji. The applicant responded that she just followed her friend's arrangements and the route she arranged for her. As a woman with poor education and knowledge, she just followed other people's advice. The Tribunal accepts that the applicant has a poor education and limited knowledge. However, the Tribunal is of the view that, if the applicant's intention in leaving China were to seek protection, she would have done so at the first available opportunity. She was in Fiji for two days and did not make a claim for asylum there. This raises concerns in relation to the applicant's credibility and the genuineness of her claims.
119. When considering the evidence as a whole, the Tribunal finds that the inconsistencies between the written evidence given by the applicant to the Department of Immigration and Citizenship, the oral evidence given by the applicant to the Department of Immigration and Citizenship and Citizenship, the oral evidence given by the applicant to the Tribunal and within her oral evidence to the Tribunal raise serious concerns in relation to the applicant's credibility. For the reasons referred to above, the Tribunal finds that the applicant is not a witness of truth and was prepared to fabricate her claims to give herself the profile of a refugee.
120. The Tribunal does not accept that the applicant moved to Urumqi, that she set up a business in Urumqi in May 2009, that [in] July 2009 she hid a man in her shop overnight, that on the following day she was questioned and threatened by the police, that she fled Urumqi, that she

returned to Fujian Province, that she went into hiding with a friend, that she fled China because of her fear of being arrested and imprisoned by the Chinese authorities and that she will be arrested, imprisoned and persecuted if she returns to China

121. In view of the above findings, the Tribunal finds that there is no real basis for the applicant's claims to fear persecution. The Tribunal is satisfied that if the applicant returns to China there is no real chance that she will be arrested and detained by the Chinese authorities for a Convention based reason. The Tribunal is therefore satisfied that there is no real chance that the applicant will be at risk of persecution should she return to China.
122. Accordingly, the Tribunal finds that the applicant does not have a well founded fear of persecution on the grounds of religion or any other Convention ground now or in the reasonably foreseeable future and that there is no real chance that she will be at risk of persecution if she returns to China now or in the reasonably foreseeable future.

CONCLUSIONS

123. 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

124. 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