

**071285153 [2007] RRTA 99 (27 June 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071285153

**DIAC REFERENCE(S):** CLF2005/76272

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Sue Zelinka

**DATE DECISION SIGNED:** 27 June 2007

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

## **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 a citizen of 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 his review rights.

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 sought review of the delegate's decision before the Tribunal.

### **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 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 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.

### *To the Department*

The applicant lodged a protection visa application (PVA) in the name on the passport on which he travelled. Information on the PVA indicated that he was a single man, in his thirties, and came from Yunnan Province. His claims were set out in a separate typewritten statement (in English). The applicant claimed that he was born into a Catholic family and baptised in the underground church. In the late 1990's his family's underground church was forced to close after the government became even more watchful. Some years later the police arrived and took away the applicant's sibling: the sibling was still in police custody at the time of the applicant's departure, despite not being charged with any offence. The stress of the situation caused the applicant's father to have a stroke. However, his father wanted him (the applicant) to get away from China and with the assistance of a number of people the applicant got a passport and visa.

After arriving in Australia, the applicant contacted the local church and is now a member of a Chinese Catholic Church in Sydney.

The Department invited the applicant to an interview but he did not respond to the invitation, nor attend the interview. The departmental officer was not satisfied that the applicant had a well-founded fear of persecution.

The applicant lodged a review application accompanied by a written statement in which he noted that the passport on which he came to Australia was not his, and neither was the name which appeared on his PVA. The applicant stated that his real name and that he was a married man, with one son, from Fujian Province. He restated his claim that he was a Catholic and that his religion was the reason for his departure from China. He also stated that he felt very guilty about "telling lies": he has prayed for forgiveness, as his Catholicism demands that he tells the truth.

There followed a period when the Tribunal sent several letters to the applicant, seeking further information (including a correct filling in of the review application); these letters were returned to the Tribunal. The applicant later contacted the Tribunal noting that he had changed his address; he also noted that he had lodged an application for review some time earlier and to date had heard nothing from the RRT. The Tribunal sent a copy of its past correspondence to the new address.

The applicant attended a hearing, presenting the Tribunal with two letters from two different Catholic clergymen, each attesting that he knew the applicant as a practising Catholic.

In his oral testimony, the applicant outlined his past attendance at an underground church, and noted an incident in the late 1990's when he suffered an injury while running away from people whom he thought were going to question him about his proselytizing activities on a building site. He believes he was denied the medical attention he needed because of pressure exerted by the authorities on the local hospital.

The applicant also claimed that he was arrested some years later and sent to a “re-education through labour” camp for a period of two to three years. However, he was released on medical grounds. He then stayed home, subject to daily monitoring and visits by the PSB and local neighbourhood committees. The monitoring became less intense and with the assistance of religious friends, he was able to obtain a passport and depart China illegally.

The applicant claimed that he attends church weekly in Australia.

After the hearing, the Tribunal received a further submission in which the applicant clarified a number of points made during the hearing. He stated that the police caught him and beat him in the incident but were persuaded not to formally arrest the applicant as he had a broken bone and needed hospitalisation. However, in hospital, the police segregated him and prevented the doctors from giving him “proper treatment”.

He elaborated on other aspects of his testimony. He also stated that since his departure from China, “all my family members were transferred to the families of other church members. They hid themselves there and dared not to show in the public any longer. The local police are searching me and my families every day now. I cannot return to China as I know that death is waiting for me over there”.

The applicant appeared before the Tribunal again to give further evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Prior to hearing, the applicant (through his newly appointed agent) sent a Statutory Declaration setting out his claims in some detail. The applicant was represented in relation to the review by a registered migration agent, who had become the applicant’s agent only shortly before the hearing. The representative did not attend the Tribunal hearing.

At the beginning of the hearing, I asked the applicant about his previous interaction – or lack of it – with the Department and the Tribunal, referring to his non-attendance at the interview and his failure to respond to several Tribunal letters. The applicant said that he was duped by his first agent to whom he spoke shortly after his (the applicant’s) arrival in Australia. He explained his story to the agent but clearly the latter had not written up the claims according to the applicant’s instructions. He advised the agent of his real name, but the agent used the name on the passport (not the applicant’s real name) on the PVA. The applicant claimed that he did not know the false name was the only name in use until he finally received the Tribunal’s letter some time after it was sent. This meant that the agent had sent the “confession” about the false name without the applicant’s knowledge. The applicant said that he did not know the extent of the agent’s deceptions until the first Tribunal hearing.

I proceeded with the substance of the applicant’s claims, asking him to tell me about his early religious activities. He said that his parents were Catholic and he had been “baptised” (informally, not by a priest in a church) as a baby. As he was growing up, his family prayed before each meal. There was no Bible in the house, but the family met with other Catholic friends and they would conduct their version of mass. The applicant noted that priests and nuns would occasionally come to the village, giving the believers access to a Bible.

The applicant said that when he was 18 or 19, he really wanted to learn more about Catholicism. He started to seek out “godfathers” to teach him more. I had a discussion at this point with the applicant about the use of the term “godfather”. The applicant used the term to

describe what could be called a church worker – not a priest, but a person knowledgeable about Catholicism and its rituals, operating with the sanction of the church. Like the priests and nuns, they are not approved of by the Chinese Government, and therefore they operate covertly. They travel around assisting the underground churches. A “godfather” might only come to a village a couple of times a year. On arrival, he will baptise any babies, conduct mass, and explain religious dogma so that the underground church adherents can carry on by themselves until the next time. Clearly, the priests, nuns and godfathers to whom the applicant refers are outside the state-sanctioned Patriotic Church: they are Roman Catholics, followers of the Pope.

The applicant stated that when he himself had gained some knowledge and understanding, he felt compelled to share it. He said that telling people about the gospel is “his life-long undertaking”. He described the establishment of a Christian group in the early 2000’s. He said that he was working on a construction site, which was away from his hometown where his wife and son lived with his parents. He sounded out the other workers and found some people willing to attend a Christian study group. They then met together to study and pray. Sometimes the applicant could get priests or nuns to come and talk to the group, and conduct proper services and rituals. Priests and nuns could only be contacted by word of mouth, as they were not in a fixed abode (as explained already).

I asked the applicant if he ever attended a state-sanctioned church, given the difficulties of attending the underground churches. He said he did not, and would not, attend the state-sanctioned church as it is “not the real thing”.

The applicant said he established his group and it kept going, meeting about once a month, for about two years. At that time, during a meeting, they saw vehicles approaching their building and so the group scattered, fearful that the vehicles would contain police. Some months later, some other Catholics were caught by the PSB and the applicant believes that his own name must have been given under duress to the authorities by those detained Catholics. The PSB subsequently went to the applicant’s home, but he was not there, being away where he worked at the time.

The police raided the house where the applicant and a number of other workers lived. All the people in the house were arrested, handcuffed and taken to the detention centre. The applicant was interrogated about the identity of priests, nuns and “godfathers”. The applicant said that he was never formally charged and did not appear in any court. He was, however, sent to a labour camp with the prospect of three year sentence. Initially he was not allowed to contact his family, but later he could do so and they visited him once a month. The applicant became very ill and was released some time later.

The applicant became very upset remembering that his return home brought a lot of suffering to his family. The house was frequently searched, often late at night, until his small son became very disturbed. He himself was monitored. It was the thought that his presence was making life very hard for his family that finally prompted him to leave China. He then found that Catholic friends had discussed the prospect of his leaving the country with his parents, but the latter did not believe it was possible to do so. However, after the monitoring lessened off, various Catholic friends used their contacts and relatives to organise his departure, which involved going to a third country, where he received his passport (in another name) and caught a plane to Australia.

Since being in Australia, he has learned that his family did not stay in the family home much after his departure. His wife and son went to her mother's: the son now resides with his maternal grandmother while the applicant's wife goes elsewhere – even to other provinces – in order to work. His parents, who are retired, stay with different people – Catholic friends or relatives – only returning to their own home occasionally and discreetly to check on it.

The applicant said that on arrival in Australia, he found a place to stay through the columns of a Chinese-language newspaper. A person in the house was a Catholic and the applicant accompanied him to his church in a suburb of Sydney about ten days after the applicant's arrival. The applicant still attends that church. He has also added attendance at another Chinese Catholic church in a different suburb. His two witnesses spoke in support of his claims. A Priest at the first Church said he had a big Chinese congregation. He noted that the applicant currently attends the vigil mass every Saturday evening, and has been doing this for some time, more than a year. The Priest said there was no doubt that the applicant was a practising Catholic at the time of his arrival. The Priest from the second Church said that he has known the applicant personally for over a year. He comes to bible study on Friday evenings, plus Sunday mass.

I put it to the two priests that Fujian had a reputation of being less repressive towards underground churches than other places in China. In relation to the treatment of Catholics in Fujian, the Priest from the first Church noted that he serves on an NGO in Australia which has connections to DFAT, and hence keeps abreast of country information. He said he knew that the Roman Catholic Church (the Vatican) was going to form an agreement of some sort with the Chinese Government. However, the Priest also understood that this impending agreement had antagonised the state-sanctioned Patriotic Church and that this church, in connivance with the authorities in Fujian and Hebei especially, was instigating actions against the current underground Roman Catholics. He noted some fairly horrendous examples of mistreatment of underground Catholics.

### *External evidence*

During the period covered by this report, the Government's respect for freedom of religion and freedom of conscience remained poor, especially for religious groups and spiritual movements that are not registered with the Government. Unregistered religious groups continued to experience varying degrees of official interference and harassment. Members of some unregistered religious groups were subjected to restrictions, including intimidation, harassment, and detention. Unregistered religious groups were pressured to register with government organs and government-sanctioned "patriotic" religious associations linked to the five main religions--Buddhism, Islam, Taoism, Catholicism, and Protestantism.

Religious practice and worship in officially sanctioned and unregistered places of worship continued to grow throughout the country, as did the number of religious believers. The extent of religious freedom varied widely within the country. ...

Repression of unregistered Protestant church networks and "house" churches continued to be widely reported. Central Government officials stated that friends and family holding prayer meetings at home need not register with the Government, but China's regulations on religious affairs (RRA) state that formal worship should take place only in government-approved venues. Sources in many locations continued to report that police and officials of local Religious Affairs Bureaus (RABs) interfered with house church meetings, often accusing the house church of disturbing neighbors or disrupting social order. House church leaders asserted that police routinely used noise complaints as a pretext for raiding their meetings. When police disrupted meetings, they sometimes detained worshippers attending such services for hours or days and prevented further house worship in the venues. Leaders sometimes faced harsher treatment, including detention, formal arrest and sentencing to reeducation or imprisonment. Again, treatment of unregistered groups varied regionally. For example, some local officials in Henan Province often mistreated unregistered Protestants, and some local officials in Hebei Province tightly controlled Roman Catholics loyal to the Vatican. In many localities, however, officials worked closely with registered religious groups to accomplish religious and social goals. ...

"Underground" Catholic bishops also faced repression, in large part due to their loyalty to the Vatican, which the Government accused of interfering in the country's internal affairs. The Government showed some signs of willingness to improve relations with the Vatican after the appointment of Pope Benedict XVI, but Beijing and the Vatican clashed in April 2006 over control of the process of ordaining bishops. ... There were thought to be approximately forty bishops operating "underground," some of who were likely in prison or under house arrest. There was little evidence that China's regulations on religious affairs, which took effect in 2005, improved the situation of religious freedom. While the regulations brought regulatory activities governing religious affairs within a legal framework, they continued to define only government-approved practices and faiths as normal or legitimate.

(US Department of State, *International Religious Freedom Report 2006: China*)

## **FINDINGS AND REASONS**

Although the applicant came on a false passport, I nevertheless find that he is a citizen of China and assess his claims against that country.

I accept that the applicant had the difficulties he said with his first agent, and for that reason failed to attend a departmental interview or reply to several letters from the Tribunal. I note that since the applicant has been before the Tribunal, his written and oral testimonies have been consistent. He has been able to expand on, or clarify, points of his story when requested. I note that his claims of being a practising Roman Catholic (and of having been one before arriving in Australia) are supported by his witnesses – two priests at hearing, and (earlier, at the first hearing) two written statements from two different priests (one from the same church as the priest who came to the hearing). I accept from the first Tribunal hearing that the applicant was a practising Roman Catholic, after asking him a number of questions about the church, including the names and nationalities of recent popes.

I accept the applicant's claims as explained orally at hearing and as set out above. It follows that I accept that the applicant has suffered serious harm amounting to persecution (his detention for a significant period in a labour camp). The reason for this harm was his adherence to a non-state sanctioned church; namely, the underground Catholic church.

On the evidence of the witnesses – both priests - I accept the applicant's claim that he is sincere in his practice of the faith and will continue to practise Roman Catholicism (as opposed to attendance at the state-sanctioned church) if he returns to China. I note evidence that the applicant was versed in church rituals and beliefs before his arrival in Australia, and that he has availed himself of the opportunity to practise and study his faith freely since arriving here.

I accept the external evidence, as set out above, that the practice of non-state-sanctioned religion in China can attract the adverse attention of the authorities. I accept that this adverse attention can involve serious harm amounting to persecution. I am satisfied that there is a real chance that the applicant may suffer serious harm amounting to persecution for a Convention reason if he were to practise his Roman Catholicism in China.

For the reasons above, I am satisfied that the applicant has a well-founded fear of persecution.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.



## DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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