

1003429 [2010] RRTA 649 (4 August 2010)

DECISION RECORD

RRT CASE NUMBER: 1003429

DIAC REFERENCE(S): CLF2010/5687

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Andrew Mullin

DATE: 4 August 2010

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 the People's Republic of China, 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 by letter dated the same day.
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 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 Departmental and Tribunal files relating to the Applicant. The Tribunal also has had regard to the material referred to in the delegate's decision.
20. The Applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
21. The Applicant was represented in relation to the review by his registered migration agent.

Summary of claims

22. In his protection visa application the Applicant claims to have been born in Hebei Province, China, and to have lived at an address in Village A, Town B, Hebei, from 1989. He gives his ethnicity as Han and his religion as Catholic. He claims to have received a total of six years of formal education in China and to have been employed as a farmer from 1982 to 1992 and in another occupation from 1993 to 2009. He claims to have been married in the late 1980s and lists his parents, wife and two children as living in China.
23. The Applicant's substantive claims are set out in an attached Chinese language statement, with an accompanying English translation. They may be summarised as follows:
 - He and his wife had two children believing it to be their human right to do so. As a result they were persecuted by the government. They hid themselves and dared not stay home during the second pregnancy for fear that village leaders would force them to abort the child. This had happened to another woman in the village who was six months pregnant.
 - Because they had to register the second birth in the household register the village leaders eventually discovered the truth. Three days after the second child was born he was fined for breaching the birth control policy. Even after paying the fine the birth was not registered, however, and he was detained for two days until his family paid an additional amount. While in detention he was tortured and his wife was forced to undergo a sterilization operation. To protect the family they dared not argue against these things.
 - He obtained employment soon after his son was born. His pay was good and the family had a happy life. One day in the mid 2000s a new work colleague named Person C arrived. Person C was happy and friendly with everyone. In his conversations with the Applicant and other co-workers he would sometimes mention words such as 'God' or 'Jesus.' As most of the workers were from rural areas they knew only about Buddha and they could not understand these words. Later Person C revealed that he was a Catholic and spoke to them about aspects of his faith. The Applicant could not understand

him fully but Person C told him one day that every child is a gift of God and that children must not be aborted. These words affected the Applicant strongly and he began to hate the Chinese government.

- Person C did not return to work after the New Year holiday and the Applicant heard he had been arrested by the PSB for attending an underground church and, allegedly, endangering public safety. The Applicant felt this was unfair and was afraid that his contacts with Person C would cause him to fall under the PSB's suspicion. He asked a friend to find a travel agency to apply for a visa for Australia for him.
- On arrival in Australia he ran away from the tourist group. He fears persecution in China.

24. Attached to the application are:

- A certified photocopy of a Chinese language document with an accompanying English language translation. The document purports to be a receipt for a fine imposed on the Applicant for breach of the birth control regulations and is dated.
- A certified photocopy of a Chinese language document with an accompanying English language translation. The document is dated and purports to be the registration of the Applicant's marriage.
- A certified photocopy of a Chinese language document with an accompanying English language translation. The document purports to be a 'sterilization certificate' issued in respect of the Applicant's wife for an operation performed in the early 1990s.
- A certified photocopy of a Chinese identity card with an English translation indicating that it belongs to the Applicant.
- A certified copy of pages from the Applicant's Chinese passport.

Further documents

25. Also on the Departmental file are:

- A report from a Chinese tourist agency explaining the circumstances of the Applicant's departure in Australia on a specific date from a tourist group organized by them. The report indicates that the agency investigated the Applicant's claim in his tourist visa application that he was employed by a named Chinese organisation in a specific capacity. The agency had been able to contact the Applicant on the business telephone numbers provided in the application and had been satisfied, on the basis of a discussion with him, that the proposed visit to Australia was genuine.
- A certified photocopy of a document in Chinese with an English language translation indicating it to be the Applicant's household register.

Departmental interview

26. I have reviewed the audio recording of a Departmental interview attended by the Applicant. He amended or added to his earlier claims by claiming, relevantly, that:
- His arrest for breach of the family planning law occurred in the early 2000s.
 - The arrest of his work colleague Person C occurred in the mid 2000s.
 - Person C was arrested because he was a member of an underground church. This made the Applicant very fearful and his parents advised him to leave the country.
 - He had not seen Person C since his arrest and he had resigned from the company for fear of being arrested. This fear arose because he had previously been arrested. He knew it would happen to him as well.
 - The Chinese authorities had been interested in him. Having once been arrested he would always be regarded as a trouble maker. Asked if the Chinese authorities had ever given him problems again he said the police kept harassing his wife and preventing her from going to work. It had not been easy for him to find work in the company but the local police kept visiting him there every two or three days. This was one reason he left, the other being the arrest of Person C. His neighbour had been harassed in the same way.
 - He feared the government would keep coming back to make more trouble for him and his family. They had, for example, withheld his household registration from him.
 - Asked why the government was harassing him he said it was simply that they found an excuse to keep asking him for money. He did not have much to give them. There was no other reason why they were harassing him.
 - He had no religion. Asked about the reference in his protection visa application to his being a Catholic he said Person C had spoken to him about his religion. However, he did not understand this religion.
 - He could not fight the local police and could not report their corruption to a higher authority.
 - If he returned the authorities would use the old file on him to detain him.
 - He denied he had ever been employed by the named organisation.

FINDINGS AND REASONS

27. Asked if he recognised the protection visa application on his file the Applicant said he had never seen it before but confirmed that he understood an application had been lodged. He recognised the statement attached to the application and identified the signature on it as his. Asked how he had prepared the protection visa application and statement he said that after arriving in Australia he realized there were no human rights in China. He prepared the statement in Chinese, and the application form, with the help of his migration agent. He wrote the statement by hand and his agent typed it out for him then translated it into English. The agent read the application and statement back to him in Mandarin. He understood

everything in the application and statement and all the information they contained was true, as was the information he had provided at the Departmental interview. He did not wish to make any changes to the claims he had made.

28. Asked if he had been afraid of any harm at the time he left China to come to Australia the Applicant said he was always being picked on and he had been detained because of the One Child Policy. He still had scars on his body. Asked why he had left China to come to Australia he said he had had no choice because he had not been allowed to work. He had met someone named Person C at work whom he thought to be a believer in Falun Gong. Person C was arrested and the Applicant was so afraid that he would also be arrested that he resigned and stayed at home. He confirmed that he had met Person C while working for a specific company.
29. Asked when Person C was arrested the Applicant said it was in 2009. Asked if he was sure of this he said he was; he was still working in the company at the time. He found Person C was missing for a few days and the supervisor said he had been arrested by the PSB. As he and Person C had been 'buddies' he was very afraid that he would be arrested too. Asked why Person C was arrested he said that from the conversation he had had with him he said something about the deities of Falun Gong. Asked if Person C was a Falun Gong practitioner he said he did not know the detail but supposed this to be the case.
30. Asked in which month Person C's arrest occurred the Applicant said he could not remember. I put to him that he should be able to remember such a thing, given that it happened only last year and was the reason he had left the company. He said that from his recollection he thought it was probably in a specific month.
31. The Applicant agreed that he had resigned from the company when he learned of Person C's arrest. The situation was serious and he was afraid he would be affected. Asked what he had feared would happen he said he was afraid of being arrested and beaten; he had suffered in this way before. I asked how resigning from the company would stop the police doing this to him. He said that in China the PSB would go to the company and investigate who Person C's friends had been. I put to him that if they did so they would have discovered that he had been Person C's friend. He agreed this was so; this was why he had resigned. I put to him that the PSB could find out about the friendship whether or not he was still employed in the company. He said he had known it would not change anything but, at least, the PSB would not be able to find him. His parents had been very worried and this was why they obtained a visa for Australia for him.
32. I put to the Applicant that the PSB would have been able to find him as he was still staying in his own house. He said he had not dared stay there and did not have his household registration book with him. I noted that in his protection visa application he gave his address in Village A, Town B, Hebei. He agreed this was his address. I noted that he claimed to have lived there up to the point at which he left China to come to Australia. He said his child and wife were living there but he did not go back home. I observed that this was not what was claimed in the protection visa application and that he had nowhere mentioned that he had been living in hiding, an important point if it was true. He said he had nowhere to go and so was in hiding 'here and there.' Asked why he would not have mentioned this previously he said there were many people like him; if their house was demolished they would put down their old address. He did not know how to clarify the matter.

33. Asked when it was that he had left the company the Applicant confirmed that it was in a specific month, about four or five days after Person C was arrested. Asked how he had supported himself over the succeeding months until he departed for Australia he said he collected waste and garbage and sold it for money to buy food for himself. He had not told his family of this.
34. Asked what he feared would happen to him if he returned to China the Applicant said he was really afraid that he would be arrested and beaten up. He still had scars from his first beating and he did not believe anyone could stand it a second time.
35. Asked why the police would do this to him the Applicant said he could not say. People like him who were just citizens could not reason or argue with the government. I asked if he was saying there was no particular reason why he would be arrested and beaten. He repeated that he was very scared because of what had happened in the past over the One Child Policy. He did not want this to happen again.
36. The Applicant confirmed his date and place of birth in China. He said he owned the house at the address in Village A. His wife and two children were presently living there. His wife was not employed as she had suffered a work injury.
37. Asked if he had any religion the Applicant said he did not. He was not a member of an underground church or the Catholic church.
38. Asked when he had joined the company the Applicant said it was in the mid 2000s. Asked if he was certain of this he said he was. Noting that in the statement attached to his protection visa application he claimed that this was not long after the birth of his second child, and that he had also indicated that he began work there in the early 1990s, I asked why he was now saying that it was the mid 2000s. He said Person C started work in the mid 2000s. I put to him that the question had been when he himself had started work. He said he meant that he had met Person C in the mid 2000s and this made a big impression on him. He himself had started work there in the early 1990s. I put to him that the question he had been asked had been very simple and that his responses raised possible doubts about the credibility of his claims to have been employed in the company. He said that the Tribunal could investigate this with the boss of the company, whose name he gave. This person had migrated to Country Z but his son occasionally came back to China and the Tribunal could contact him. I explained to the Applicant that there was no obligation on the Tribunal to carry out such investigations and there did not appear to be a sufficient basis for trying to contact the people he had described.
39. The Applicant confirmed his claim that Person C was a Falun Gong practitioner or had something to do with Falun Gong. I put to him that in his protection visa application he had stated something quite different – that Person C was a Catholic who had been telling him about Christian things. Asked why there should be such a difference the Applicant said he had mentioned that Person C told him about deities. He did not understand this and had asked his migration agent about it. I asked if he was saying that Person C was a Falun Gong practitioner as well as being a Christian. He said he did not know all the details. Person C told him about deities but he did not believe in any religion.
40. The Applicant confirmed that his wife gave birth to their children in named years, that she was forced to undergo a sterilization operation, that he was fined and that he was arrested and detained for two days. Asked when his arrest occurred he said he could not remember

exactly. Asked in which month or year this was he repeated that he could not remember. After some discussion in which he advanced the proposition that rural villagers would not remember when an arrest occurred the Applicant suggested that it was one month after his son was born.

41. Asked if the police ever did anything to him after his release the Applicant said they only wanted money. They had already beaten him up to get the money and they had not done anything to harm or harass him after his release. I reminded him that when asked at the beginning of the hearing if he had feared any harm at the time he left China he had claimed that he was always being picked on. He said he had meant that if he returned to China they would do things to him. I asked why, if nothing had happened to him for eighteen years after a two-day detention, he was afraid that something would now happen to him. He said that because of the arrest of Person C he was really afraid because of his past experience.
42. I suggested to the Applicant that there could be doubt that there was any reason to believe the police would harm him if he returned to China. He said he had suffered in the past and the next time his suffering would be worse. Asked if the police were looking for him he said his family were worried about this and so they never told him anything about it. He confirmed he believed they were looking for him. Asked what made him believe this he said he had feelings. Asked if he had any evidence of this he said he did not have evidence but did have facts. Asked what these facts were he said that in China one had to pay money to find the facts. I put to him that there appeared to be no evidence that the police had ever searched for him, issued an arrest warrant for him or stopped him from leaving the country. He said he could not explain this.
43. Asked if there was anything else he wished to raise the Applicant said he felt that if he returned to China he would be detained once more and he could only stay in Australia.

FINDINGS AND REASONS

44. On the basis of the passport which he submitted at the hearing I accept that the Applicant is a citizen of the People's Republic of China, as he claims to be.
45. The Applicant claims to fear harm in China because of his past breach of the One Child Policy and the arrest of a work colleague.
46. In the present case the Applicant proved to be an unimpressive witness at the Tribunal hearing. His responses to questions were generally vague and uninformative and on some issues gave a clear impression of evasiveness. At the hearing he appeared unclear about the timing, even to the year, of his second child's birth and the alleged arrest which followed it. There were inconsistencies between his oral evidence at the hearing and the claims in his protection visa application statement. One notable instance of such inconsistency is his account of the religious beliefs said to have been held by his co-worker Person C, a man who is said to have been a member of an underground Catholic church who was arrested by the PSB for this reason and then, at the hearing, as a supposed Falun Gong practitioner. Another is in his claim at the hearing that he lived in hiding for nine months before arriving in Australia, a claim which is not only contradicted by the information in his protection visa application but which was not mentioned at any point in his written statement. There is a major implausibility in his claim that, having heard that Person C was arrested, he immediately quit his job - for no better reason than that they had been friends - and existed for the next nine months only by collecting garbage.

47. These are not marginal or unimportant aspects of the Applicant's account but are instead central to his claim to fear persecution in China. I am not satisfied, on the basis of the information before the Tribunal, that any reliance can be placed on his account of his experiences in that country relating to his alleged arrest and detention in the early 1990s and the alleged arrest of a co-worker in 2009. I am not satisfied that the information provided by the Applicant provides any basis to believe he would suffer harm if he returned to China.
48. In reaching this conclusion I note that even if I were satisfied that the Applicant's claims about his experiences in China are credible (and I am not satisfied of this) they would not establish that there is any risk of his suffering harm there. By his own account he suffered no harm of any kind at the hands of the police or anyone else from the time of his alleged arrest and detention in the early 1990s until he left China. He could offer no evidence to substantiate his 'feeling' that he is now wanted by the police and the only reason he could suggest as to why they would have any adverse interest in him was the alleged arrest of his friend Person C, a connection which I reject as far-fetched in the extreme.

Summary

49. In the light of all the information before the Tribunal I am not satisfied there is a real chance that the Applicant faces serious harm in China because of any past breach of the One Child Policy or the arrest of a co-worker. He does not claim to fear harm in China for any other reason and no other reason is apparent on the face of the information before the Tribunal.
50. I am not satisfied that the Applicant has a well-founded fear of persecution for a Convention reason should he return to China now or in the reasonably foreseeable future and I am not satisfied that he is a refugee.

CONCLUSIONS

51. 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

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