

**071516380 [2007] RRTA 196 (5 September 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071516380

**DIAC REFERENCE(S):** CLF2007/65797

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

**TRIBUNAL MEMBER:** Hugh Wyndham

**DATE DECISION SIGNED:** 5 September 2007

**PLACE OF DECISION:** Sydney

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

**STATEMENT OF DECISION AND REASONS  
APPLICATION FOR REVIEW**

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

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

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

The applicant applied to the Tribunal for review of the delegate's decision.

The following are the reasons for that decision.

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

**RELEVANT LAW**

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

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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:

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] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (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.

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.

### **Primary claims**

The applicant claimed to have been born in Beijing, China. He had had many years of primary and secondary education and was employed by a company as a tradesperson for many years. His primary application was silent on the subject of his subsequent employment.

He stated in a typed, one-paragraph statement attached to his primary application, that he did not like to live in a one-party dictatorship. He said that his family suffered when he was a child because of his father's political opinion. His father was sent to the countryside for brainwashing for a few years.

He stated that, during the pro-democracy demonstrations in 1989, he supported the students and went to Tiananmen Square to join the demonstrations. Prior to coming to Australia, he was investigated about his political opinions and his support for Falun Gong. He was worried about his safety, so came to Australia.

### **Oral evidence**

I asked the applicant whether he had had any help completing his primary application. He said that he had asked someone who understood English to explain the form to him and he had filled in the content. In relation to the typed statement included with the application, he said that he had written out his claims in Chinese and they had been translated. I asked him if he had checked the translation. He said that he had not. He did not know what his friend had put in the English text.

However, what followed during the hearing was a largely different explanation for the problems he claimed to fear in China. The claims made at hearing were different in many respects but not inconsistent with the claims made in the primary application.

The applicant told me that he had worked in a factory for many years. When the factory ceased operations, he obtained a job in a manufacturing company, where he worked until coming to Australia.

I asked him why he had come to Australia and what he feared if he were to return. He said that sometimes he could not control himself and complained about the policies of the government. His comments were reported to the local police and he was visited by the police and the local street committee, which came to talk with him. Subsequently, he had the feeling that someone was monitoring him. His family became worried and told him to hide abroad. A friend in the security service also told him to go abroad.

I asked which policies of the Government he had criticised. He said that he had criticised the approach of the Government to the students in Tiananmen Square. I said that that had not affected him personally, with which the applicant agreed. I asked what was it then that had attracted the attention of the police and the neighbourhood committee. He said that he just chatted by the roadside. He had lost a good job. Some middle level leaders had been kept on salary even after the factory stopped production and the workers were sent home. They had also been given flats and cars.

I asked when the police had come to talk with him. He said that he could not remember. I asked when the street committee had visited him. He said it was some months before he travelled to Australia. Eventually, he said that the police had visited

him a few months before the street committee. On both occasions, he was taken to the street committee offices to be questioned. The police questioning lasted for less than an hour. He denied having said the things they had been told he had said. The police said that, if their investigations did not show the contrary, he was fine. If they showed he was not telling the truth, they would be back.

When I said that I found it hard to believe that he would still be complaining about his old employer when he had been working for his new one for several months and had found a new job quickly, he said that that was just one example. I asked what else he had been saying. He said that he had also criticised the cultural revolution and the family classification system which had resulted in his receiving no benefits as a youth. He referred again to the events of 4 June 1989.

I said that these events were a long time ago and did not explain why police should visit him in the mid 2000s.

I asked him whether he had anything else to tell me. He said that, as he was being monitored, he had left through another city in China, not through Beijing. If he went back, he could not control himself – he would make comments and would be in trouble.

## **FINDINGS AND REASONS**

I accept that the applicant is a citizen of China.

I believe that the claims made in the applicant's primary application and the claims made at hearing were all concocted to support a claim for protection but that they have no factual basis.

The family classification system of which he complained resulted in his family being classified middle level, according to the applicant, which resulted in his receiving no privileges. There was nothing in what he said to qualify this as persecution. The applicant was educated and has been in almost continuous employment.

His sympathy for the students of Tiananmen Square was widely held in Beijing at the time, but it is not credible that he has been expressing that sympathy for almost 20 years in terms which attract the unfavourable attention of the police only in mid 2000s.

As to his dissatisfaction with the discrimination in favour of middle managers in his previous place of employment, the police visit he claimed occurred came many months after he ceased employment with the company and after he had been employed in a new job for some months without problems. It had taken him just a number of days to find that job. I do not accept that he would be expressing in mid 2000s views which came to the hostile ears of the police which he had not expressed or which had not attracted their interest much closer to the date of his dismissal.

Accordingly, I do not accept that the applicant was visited by police and by his street committee or that he was asked to attend interrogations at the street committee

offices. Neither do I accept that there would be any security or police interest in him for these reasons should he return to China in the foreseeable future.

The applicant did not repeat at hearing the claim that his father had suffered several years' detention for his political views. Neither did he repeat the claim that he had himself been in Tiananmen Square on 4 June 1989. Neither did he repeat the claim that he supported Falun Gong. In relation to the first of these claims, I am unable to make a definite finding of fact on the claim. However, even if it were true, the applicant advanced no evidence that he had himself suffered as a result, even less that he would suffer if he were to return to China for this reason.

As to the second claim, the matter of whether or not he was in Tiananmen Square neither adds nor subtracts from his claim that it was his criticisms of the Government's approach to the students in the Square that drew the unfavourable attention of the police, not the question of whether or not he was in the Square at any time. I have already addressed the former point.

Finally, the applicant has not explained either in his primary application or at hearing why supporting Falun Gong would result in persecution or what exactly he meant by being a Falun Gong supporter. He has not claimed to be a Falun Gong practitioner himself or to have suffered in the past for his support. I do not accept, therefore, that any well founded fear of persecution arises from this all too brief and unspecific claim.

For all these reasons, I do not accept that there is a real chance of the applicant suffering harm amounting to persecution in China for reason of his political opinion or for any other reason should he return there in the foreseeable future.

I find that the applicant does not have a well founded fear of persecution in China for a Convention reason.

## **CONCLUSIONS**

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

## **DECISION**

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