

1213772 [2012] RRTA 1081 (11 December 2012)

DECISION RECORD

RRT CASE NUMBER: 1213772

DIAC REFERENCE(S): CLF2012/74414

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Irene O'Connell

DATE: 11 December 2012

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 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) applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2012. The delegate refused to grant the visa [in] August 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

3. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

4. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
5. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
6. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
7. 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.

8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.
10. 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.
11. 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.
12. 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 being persecuted 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.
13. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of 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.

Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

18. The Tribunal has before it the Department's file relating to the applicant and the application for review. The applicant provided the following relevant information in his application. He stated that he is a [age deleted: s.431(2)] year old single male from Fuqing, Fujian Province. He lists his ethnic group as Han Chinese and does not nominate a religion. He was issued with a student visa [in] June 2007 and arrived in Australia [in] June 2007.
19. In a statement of claims the applicant states that whilst he has been in Australia his parents shop was confiscated by the local authorities and that when his father attempted to resist this his father was arrested, and detained for two weeks and fined. His father sustained injuries and required hospitalization when he clashed with the police. His father unsuccessfully attempted to petition the authorities as he believes the businessman who is acquiring the family property has connections with the local government. The applicant claims that should he return to China he will be questioned and persecuted by the local government.
20. The applicant did not make any written submissions to the Tribunal however he gave oral evidence to the Tribunal at a hearing [in] December 2012 with the assistance of an interpreter.
21. The applicant provided his passport to the Tribunal. His passport was issued [in] March 2007, the applicant stated that this was his first and only passport. He stated that he was granted a student visa [in] June 2007 and arrived in Australia to study. He stated that he completed Year 11 at [education provider deleted: s.431(2)] in 2008. The applicant stated that thereafter he remained in Australia on a bridging visa.

22. In regards to his family the applicant stated he has one sister. He stated that she could not continue studying after the incident in China and that she moved to Shanxi Province where she currently works in a restaurant and has done so for the past two years and 10 months. The applicant stated that he maintains contact with his sister.
23. In regards to his parents the applicant stated that after the incident they took up farming. He stated that his father is [age deleted: s.431(2)] years of age and his mother is [age deleted: s.431(2)] years of age so they are getting too old for farming He stated that his parents own the land they are farming.
24. The applicant stated that he maintains contact with his parents and that they continue to be harassed. When asked if he could to elaborate on this the applicant stated that after their property was taken they continued to appeal and because they continue to appeal they will also continue to be harassed. The applicant stated that his parents have appealed some six or seven times since the incident but each time that they attempt to lodge an appeal they are simply disregarded.
25. I asked the applicant why he had applied for a protection visa. The applicant stated that he applied because he wishes to bring his parents to Australia so that they can avoid any future harassment. He stated that appealing to the Chinese authorities does not solve any problems for his parents and that the only solution was for them to come to Australia. I pointed out to the applicant that Australia's protection obligations do not extend to his parents. The applicant stated that he also was concerned that he would be harassed if he was to return. I asked him in what way he thought he would be harassed. He stated going back to China would be difficult for him that he would need to go and live with his family and he believed he would face harassment because of this.
26. I indicated to the applicant that his sister has resided in China unharmed and has not been subject to any harassment and therefore it was difficult to see why he would be subject to any harm or harassment. I also indicated to the applicant that I was not satisfied that even if I did accept his claims that the applicant faced harm on return as he had not indicated any events post the initial incidents which would that indicated that he would be subject to any harm on his return to China.

FINDINGS AND REASONS

27. On the basis of the applicant's passport present at the hearing I accept that the applicant is a national of China and find that the applicant does not have a right to enter and reside in a third country. In respect to complementary protection I find the country of reference to be China.
28. I am not satisfied that the applicant is in genuine fear of persecution or that there is a real chance of persecution on his return to China. My reasons for this finding are as follows.
29. The applicant claims to fear harm as a result of his parents encounter with a local official over the confiscation of their property. The applicant's evidence about his parents' experiences was unpersuasive and lacking in detail such that I do not accept that the applicant's parents have had difficulties with the local authorities as he so claims. Nor do I accept that the applicant faces harm on return by reason of any experiences of his parents. As discussed with the applicant at the hearing the applicant was unable to provide any insight as to why he would face harm given that his sister is currently residing in China had not

experienced any threats of harm or actual harm by reason of their parents' claimed experiences.

30. The applicant has not made any other claims for protection. In these circumstances I do not accept that the applicant has a well-founded fear of persecution for a Convention reason on his return to China now or in the reasonably foreseeable future. Nor do I accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to a receiving country that there would be a real risk of the claimant suffering significant harm.

CONCLUSIONS

31. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
32. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
33. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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