

1213050 [2013] RRTA 197 (12 March 2013)

DECISION RECORD

RRT CASE NUMBER: 1213050

DIAC REFERENCE(S): CLF2012/77075

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Sue Raymond

DATE: 12 March 2013

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the matter for reconsideration with the following directions:

- the applicant satisfies s.36(2)(b) of the Migration Act; and
- cl.866.221(3) of the Schedule 2 of the Regulations

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 and Citizenship (DIAC) for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2012.
3. The delegate refused to grant the visa [in] July 2012, and the applicant applied to the Tribunal for review of that decision. The delegate considered the applicant's claims under the Refugees Convention and the complementary protection provisions.
4. 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, in particular other material about the applicant's circumstances which form part of the DIAC file. The following material was produced at the hearings with the first two items produced at the first hearing [in] January 2013 and the next four items produced at the second hearing [in] February 2013:
 - A list of transactions from [2012] to [2013] for a [bank] account in the name of [the applicant]; and
 - Medical information dated from [2012] relating to the applicant's mother which establishes a condition needing monitoring with the potential for further treatment.
 - Payment confirmation-[mobile] account in name of [Ms A]
 - A list of transactions from [a second time period in] 2012 to [2013] for [the same bank] account in the name of [the applicant]; and
 - Seven pages of medical information related to the applicant's mother which evidence [details of] a medical condition
 - Five receipts for grocery, chemist and rent.
5. The applicant appeared before the Tribunal [in] January 2013 and [February] 2013 to give evidence and present arguments. On the first occasion the hearing was conducted via video-link and on the second occasion the hearing was conducted in person. The Tribunal also received oral evidence on both occasions from [Ms A], the applicant's mother. The Tribunal hearing was conducted on both occasions with the assistance of an interpreter in the Mandarin and English languages.

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. 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).
7. 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.
8. In his visa application the applicant makes a claim on the basis of religious persecution. Set out below are the relevant provisions related to such a claim.

Refugee criterion

9. 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.
10. 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.
11. 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.
12. 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').

The relevant criteria in the Act and the Regulations

13. The delegate found that the applicant had not satisfied section 36(2)(a) or (2)(aa) of the Act. The delegate also found that the applicant did not satisfy subclauses 866.221(2)

and 866.221(4) of Schedule 2 to the Migration Regulations. The delegate concluded that the applicant is not a person to whom Australia has protection obligations under section 36 of the Act and clause 866.221 of Schedule 2 of the Migration Regulations. This case involves a consideration of some of the other provisions of both section 36 and clause 866.221.

14. Given that the Tribunal decision relies on a different subsection and subclause than that determined by the delegate the Tribunal will set out the relevant provisions hereunder.

15. Section 36(2) of the Act provides:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol ; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to 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 non-citizen being removed from Australia to a receiving country , there is a real risk that the non-citizen will suffer significant harm ; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a) ; and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa) ; and

(ii) holds a protection visa.

16. Clause 866 of Schedule 2 of the Regulations requires certain criteria to be satisfied both at the time of the application [the visa application] and at the time of decision.

866.21 *Criteria to be satisfied at time of application*

866.211

(1) One of subclauses (2) to (5) is satisfied.

(a) claims to be a person to whom Australia has protection obligations under the Refugees Convention; and

(b) makes specific claims under the Refugees Convention.

(3) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (2); and

(b) an applicant for a Protection (Class XA) visa.

(4) The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable

consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

(5) The applicant claims to be a member of the same family unit as a person who is:

- (a) mentioned in subclause (4); and
- (b) an applicant for a Protection (Class XA) visa.

866.22 *Criteria to be satisfied at time of decision*

866.221

- (1) One of subclauses (2) to (5) is satisfied.
- (2) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

Note See paragraph 36(2)(a) of the Act.

- (3) The Minister is satisfied that:
 - (a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and
 - (b) the applicant mentioned in subclause (2) has been granted a Protection (Class XA) visa.

Note See paragraph 36(2)(b) of the Act.

- (4) The Minister is satisfied that the applicant:
 - (a) is not a person to whom Australia has protection obligations under the Refugees Convention; and
 - (b) is a person to whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note See paragraph 36(2)(aa) of the Act.

- (5) The Minister is satisfied that:
 - (a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and
 - (b) the applicant mentioned in subclause (4) has been granted a Protection (Class XA) visa.

Note See paragraph 36(2)(c) of the Act.

17. There is an interrelationship between the relevant provisions of the Act and the Regulations with the Regulations expressly noting the relevant provisions of the Act. There is also much overlap between them.

18. There is a slight difference in the wording of section 36(2)(b) and subclause (3) of clause 866.221 of the Regulations. Essentially they are the same but the provision of the Act makes no reference to an “applicant” in the context of the other person. The

Tribunal determines that nothing turns on the difference in wording and essentially to satisfy this criterion the applicant needs to be dependent on a person to whom Australia has protection obligations and who holds a protection visa.

19. In its consideration of the provisions of both the Act and Regulations the Tribunal concludes that there is nothing which prevents a claim being made on one basis at time of application and the decision-maker deciding the matter on a different basis at the time of decision.

The applicant's claim

20. The applicant essentially made an application for a protection visa in his own right. He made the claim on the basis of religious persecution suffered by his parents in China. The applicant, in a statement attached to his visa application, stated that '[t]here is no religious freedom in China. The Chinese government did not allow us to worship God and go to gatherings.'

21. A summary of his claims is outlined below:

He had been told by his mother that his parents were taken to a police station for interrogation and the police tortured them and forced them to admit that they were criminals. He stated that his father arranged for his mother and him to come to Australia to avoid persecution. He outlined being contacted by his uncle on [date deleted: s.431(2)] to tell him that his father was caught by the police while they were attending a gathering and that he was detained for three months. He and his mother thought about going back to China but his uncle asked them not to go back or 'we may be arrested by the police' He stated his father lost his job and did not go to work for three months He said that his father asked he and his mother to stay in Australia and have a peaceful life here. He and his mother are scared to go back to China. He indicated that his mother applied for refugee status and that she was protected by the Australian government and got permanent residence. He says that he fears to go back to China and now applies for a protection visa.

22. Consequently, at time of application, the claim was made under clause 866.211(2) of the Regulations.
23. The Tribunal is satisfied that the applicant has claimed protection in his visa application lodged with DIAC ¹. He claims protection so that he does not have to return to China.
24. Consequently, on the basis of the visa application the Tribunal is satisfied that clause 866.211 is satisfied at the time the application was lodged on [on a certain date in] 2012. The Tribunal determines that subclause (2) is satisfied.
25. The Tribunal notes that in a statement attached to the application the applicant makes reference to his mother being granted a protection visa but his claim for protection is not couched in those terms. In such circumstances the Tribunal has not relied on subclause (3) in determining the time of application criteria.

¹ Folios 9-34 DIAC file

The Tribunal's view of the applicant's claims in his own right

26. Having considered the material on the departmental file, the departmental interview, in addition to evidence given at the hearing the Tribunal was of the view that the applicant's claim to be a person to whom Australia has protection obligations under the Refugees Convention in his own right was not a strong claim.
27. Consequently the Tribunal proposes to consider what it regards as the stronger basis for determination of this matter without elaborating further on the applicant's own claims. The Migration Act² contemplates that a protection visa may be granted by virtue of the family relationship, as opposed to an applicant making claims in their own right. The Tribunal will consider whether the applicant is a member of the same family unit of a person to whom Australia has protection obligations under the Refugees Convention and who has been granted a protection visa.
28. It involves consideration of two main issues; namely
 - whether the applicant is a member of the same family unit as
 - a person to whom Australia has protection obligations under the Refugees Convention and who has been granted a protection visa.

The Tribunal will deal with these issues in turn.

Is the applicant a member of the same family unit as his mother?

29. The Tribunal recounts below the provisions of the law relevant to the consideration of whether the applicant is a person who is a member of the same family unit as his mother who has claimed, and been granted, a protection visa.
30. 'Member of the same family unit' is defined in section 5(1) of the Act as follows:

'member of the same family unit: one person is a member of the same family unit as another if either is a member of the family unit of the other or each is a member of the family unit of a third person'.

'Member of the family unit' is also defined as follows:

'member of the family unit of a person has the meaning given by the regulations made for the purposes of this definition'.
31. Regulation 1.12 defines 'member of the family unit' as follows:

1.12 (1) For the definition of member of the family unit in subsection 5(1) of the Act, and subject to subregulations (2), (2A), (6) and (7), a person is a member of the family unit of another person (in this subregulation called the family head) if the person is:

 - (a) a spouse or de facto partner of the family head; or

² Section 36(2)(b) and cl.866.221(3)

(b) a dependent child of the family head or of a spouse or de facto partner of the family head;
or

(c) a dependent child of a dependent child of the family head or of a spouse or de facto partner of the family head; or

.....

(e) a relative of the family head or of a spouse or de facto partner of the family head who:

(i) does not have a spouse or de facto partner; and

(ii) is usually resident in the family head's household; and

(iii) is dependent on the family head.

Subregulations (2), (2A), (6) and (7) are not relevant.

32. 'Dependent child' of the family head is further defined in Regulation 1.03 as follows:

'dependent child',

of a person, means the child or step-child of the person (other than a child who is engaged to be married or has a spouse or de facto partner), being a child who:

(a) has not turned 18; or

(b) has turned 18 and:

(i) is dependent on that person; or

(ii) is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.

33. 'Dependent' is defined in Regulation 1.05A as follows:

1.05A (1) Subject to subregulation (2), a person (the first person) is dependent on another person if:

(a) at the time when it is necessary to establish whether the first person is dependent on the other person:

(i) the first person is, and has been for a substantial period immediately before that time, wholly or substantially reliant on the other person for financial support to meet the first person's basic needs for food, clothing and shelter; and

(ii) the first person's reliance on the other person is greater than any reliance by the first person on any other person, or source of support, for financial support to meet the first person's basic needs for food, clothing and shelter; or

(b) the first person is wholly or substantially reliant on the other person for financial support because the first person is incapacitated for work due to the total or partial loss of the first person's bodily or mental functions.

(2) A person (the first person) is dependent on another person for the purposes of an application for:

(d) a Protection (Class XA) visa;

.....

if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support.

34. The Tribunal finds that the applicant's date of birth is [date deleted: s.431(2)]³. The Tribunal finds that he arrived in Australia on [date deleted: s.431(2)].⁴ He arrived on a subclass 571 visa. At that time he was [age deleted: s.431(2)] years old. He has lived with his mother, [Ms A], since coming to Australia aside from a period of [circumstances deleted: s.431(2)]. Since [month deleted: s.431(2)] 2012 he has lived with his mother in [suburb deleted: s.431(2)] NSW. His mother was granted a protection visa on [date deleted: s.431(2)]⁵ The Tribunal is satisfied of the relationship of mother and son between the applicant and his mother on the basis of a birth certificate translation⁶ which appears on the departmental file. The Tribunal is satisfied⁷ that [name deleted: s.431(2)] is the applicant's father and the Tribunal notes that he was granted a Class BC-100 visa on [date deleted: s.431(2)]. On the basis of this information the Tribunal finds that the applicant's father is the spouse of the applicant's mother.

Dependency of the applicant

35. As the applicant is over 18 years of age he can only be regarded as a dependent child of the family head, or of a spouse of the family head, if he is dependent on that person, or is incapacitated for work due to loss of bodily or mental functions (of which there is no suggestion in this case). The question of whether a person is dependent on another person is specifically dealt with in regulation 1.05A. The categorisation of dependency in an application for a protection visa is different from other visa types. The person will be regarded as being dependent on another person 'if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support' The Tribunal notes the difference in the definition for the purpose of a protection visa as compared with other visa classes. There is no requirement for the dependency to be for any particular period of time.
36. The applicant and his mother gave evidence almost reticently and the Tribunal determined that there were complex emotions of guilt on the part of them both for different reasons which are elaborated on hereunder. However based on oral evidence of both the applicant and his mother, in addition to documentary evidence submitted at both hearings and contained in the departmental file, the Tribunal concludes as follows:
- The applicant and his mother arrived in Australia in [date deleted: s.431(2)]. He arrived on a subclass 571 student visa and she came on a Guardian visa.
 - The applicant resides with his mother and has done so since his arrival in Australia in [year deleted: s.431(2)] aside from a period of [circumstances deleted: s.431(2)]. They

³ based on the copy of the passport at folio 5 of the DIAC file

⁴ Based on movement details on Tribunal file at folio 23.

⁵ The Tribunal had this confirmed from Departmental records to which the registry has access.

⁶ Folio 1 of DIAC file

⁷ On the basis of the birth certificate translation-see footnote 6

live together in a house occupied by another family. He was [age deleted: s.431(2)] years old when he arrived and is now [age deleted: s.431(2)] years old. He is an only child.

- The applicant was studying after he came to Australia but after a while they could no longer afford for him to continue. When he was studying he had some paid work in a restaurant but said that it was about 10 hours a week. The Tribunal finds that such work was limited. He looked for work but could not find any.
- The applicant is not working and has not done any paid work since [year deleted: s.431(2)] when he was [circumstances deleted: s.431(2)]. He referred to himself undertaking house “decoration” work with a friend. He referred to himself as an apprentice but the Tribunal understood that he was not paid a wage but was given some support by way of food and accommodation and payments towards his mobile phone. He said that his mother did not give him any money [during this time] but she said that occasionally she did.
- The applicant applied for permission to work in an application for a bridging visa in [2012]. That form contains statements that his mother supported the applicant.
- Since obtaining the bridging visa he has not obtained work despite looking for it.
- The applicant's mother has worked for a period until approximately [date deleted: s.431(2)] when she became unwell. At the time of the second hearing she was still unable to work due to her ill-health.
- [During this time] he has been looking after his mother, trying to learn English and studying the bible. He has not been looking for work as he has been caring for his mother.
- At hearing evidence was given that the applicant's father has [arrived] in Australia. The Tribunal has ascertained that he arrived on [date deleted: s.431(2)] on a subclass 100 visa. He [resides] with the applicant and his mother. They initially rented one-room of the house but they now rent two rooms with the applicant's mother and father sharing a room and the applicant having a separate room.
- The applicant’s mother meets expenses for the applicant’s accommodation, food, transportation and mobile phone. She has met those expenses from her own wages and savings, and later in 2012, from money given to her by her spouse who is now working in Australia.
- From [a certain date in] 2012 the applicant’s mother has transferred [money] each week to the applicant’s [bank] account so that he could buy clothes food etc. [D]ocumentation supported the evidence in that regard.
- The regular payments faltered as from [the date] when the applicant’s mother became unable to work. A[n amount of] credit was paid on [a certain date in] 2013 and regular [payments] per week from [Ms A] to the applicant appear on the list of transactions for his [bank] account from [that date]. The applicant and his mother lived off her savings for the period she did not work before her husband arrived in Australia and commenced working.

- The applicant is not provided with financial support by anyone other than his mother.
37. The applicant gave evidence that he believed he was dependent on his mother for financial support. He expressed regret at being supported by her.
 38. The applicant's mother gave evidence that the applicant couldn't find work and then she became sick and he looks after her. She said she has not been well since [month deleted: s.431(2)]. The Tribunal asked whether he did look for work before she became sick and he said he did but he was not successful.
 39. The Tribunal asked the applicant if his mother was well would he rely on her and he said that he would probably look for work if she was well. The Tribunal asked the applicant's mother whether he was reliant on her for financial support and her answer was that she thought "temporarily yes". In the context of the other evidence the Tribunal interprets this to be a situation which is hoped not to be permanent but nor is it fleeting.
 40. He is not working at the present time and has not looked for work recently. He expressed the view that his parents' English is not good, he would like to study English and if he was able to study "they don't have to bring their troubles to others" His mother indicated her preparedness to support him in that study. The Tribunal detects frustration and some guilt on the part of the applicant in relation to his situation of dependency and his lack of skills. The Tribunal also detected guilt on the part of the applicant's mother that the applicant had not been able to continue to study when he came to Australia as she could not afford it. She said "I owe him a lot".
 41. On the basis of the above evidence, the Tribunal is satisfied that the applicant is wholly, or substantially, reliant on his mother for financial support. The Tribunal is satisfied that this is the case from a least the date of the visa application and up until and including the date of decision.
 42. The Tribunal notes that the applicant's father has been working recently and has essentially been the wage earner for the family. However the applicant's mother gave evidence that her husband gives her part of his wages for living costs and from that amount she has paid the applicant [amounts] per week from [a certain date in] 2013. Consequently the Tribunal is satisfied that the dependency is on the applicant's mother. Even if the dependency is on the father, as opposed to the mother, the definition of 'dependent child' includes the 'spouse of the family head'.
 43. The Tribunal is satisfied that the applicant's dependency is not contrived and at the present time there is a dependency for financial support by the applicant on his mother. He is wholly, or substantially, reliant on his mother for financial support. The Tribunal notes that the case law in relation to the definition of dependency is to the effect that the proper construction of 'dependent' does not carry any implication of the notion of necessity or the lack of choice and therefore there is no need to prove more than reliance in fact.⁸
 44. The Tribunal is further satisfied that the dependency is for financial support and whilst there is some physical support provided, for example if the applicant is ill, he in fact is

⁸ *Huynh v MIMIA* (2006) 152 FCR 576

providing physical support in terms of cleaning duties and doing his own washing for himself. In terms of psychological support there is much discussion about religion and his parents provide guidance in that regard but the Tribunal's finding is based on the financial support of the applicant.

The applicant's mother

45. An additional requirement is that the person on whom the applicant is dependent needs to be someone to whom Australia has protection obligations under the Refugees Convention and that person has been granted a protection visa.
46. The Tribunal has had regard to the reasons for decision of the Tribunal (differently constituted) which related to the review of an application of [Ms A].⁹ The Tribunal is mindful that it is not rehearing a protection application from [Ms A], and it would be inappropriate for it to do so.
47. On the basis of information contained in the decision record of [Ms A] the Tribunal finds that she claimed that her religious activities attracted the adverse interest of the PRC authorities in [year deleted: s.431(2)] when she was detained and mistreated by the police. She further claimed that in [date deleted: s.431(2)] her husband was detained for the same reasons and he was sent to prison for three months. The applicant in that case claimed that she and her husband have attracted the adverse interest of the PRC authorities because of their religious activities.
48. The differently constituted Tribunal found that the mother of this applicant had been implicated in religious activities in China relating to an underground Christian church which attracted the adverse interest of the PRC authorities. The Tribunal accepted her claim that the authorities may arrest or otherwise mistreat her in the reasonably foreseeable future because of her involvement in illegal religious activities. The Tribunal further accepted the claim that she may be prevented by the authorities from participating in religious activities of her choice if she returns to China in the reasonably foreseeable future. The Tribunal found that such treatment amounts to persecution for Convention purposes and was satisfied that there is a real chance that the [mother of the] applicant would be subjected to persecution by the PRC authorities for reasons of religion¹⁰.
49. At the hearing [Ms A] gave evidence that she had been granted a protection visa. The Tribunal has checked that this visa was granted and determines that it was granted on [date deleted: s.431(2)].
50. There is no evidence before the Tribunal to suggest that the applicant's mother's circumstances have altered in so far as her protection claims are concerned, nor that there is any material change in China since the protection visa application has been determined in so far as underground churches are concerned.
51. Having considered the Tribunal's findings and reasoning in the applicants mother's case, the Tribunal is satisfied that his mother continues to be a 'noncitizen in Australia to whom the Minister is satisfied Australia has protection obligations under the

⁹ [case details deleted: s.431(2)]

¹⁰ Paragraph 62 of reasons in the RRT case number [case number deleted: s.431(2)]

Refugees Convention'. The Tribunal is satisfied that the applicant's mother holds a protection visa.

CONCLUSIONS

52. The applicant's mother has been granted a protection visa and her husband now has a permanent spouse visa. If the applicant is dependent on his mother, as the Tribunal has determined he is, it is appropriate that a determination be made by this Tribunal that the he satisfies the requirements of the Migration Act.
53. Consequently the Tribunal is satisfied that subclause 866.221(3) is made out and that the applicant satisfies the requirements of section 36(2)(b) of the Act. Given the different basis of the decision the Tribunal will make reference to both the Act and Regulations in its decision.

DECISION

54. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(b) of the Migration Act and subclause 866.221(3) of Schedule 2 of the Regulations.