

**060656066 [2006] RRTA 171 (31 October 2006)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060656066

**DIMA REFERENCE(S):** CLF2006/49159

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

**TRIBUNAL MEMBER:** Diane Barnetson

**DATE DECISION SIGNED:** 31 October 2006

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant is 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 Multicultural Affairs 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 Multicultural Affairs 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 as 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 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) of the Act relevantly provides that a criterion for a Protection (Class XA) 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 Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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 the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now 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.

### *Application for protection visa*

The applicant was born in early 1960s. He graduated from in the mid 1980s and worked in his profession in his home village. The applicant claims that his family was subject to persecution by the PRC government during the Civil War. His close relative, who died in late 1980s, was verbally and physically abused by the Red Guard during the Cultural Revolution. The applicant was called "relative of counter-revolutionary" as a child by classmates.

In late 1980s, the applicant, his relative A and few others joined a rally with students from the Fuzhou and other universities. Few of the participants were later arrested. One, the applicant's relative A, was put in a labour farm for many years and the other has disappeared. The applicant hid in a small village for many years to avoid arrest.

The applicant returned home in late 1990s. He subsequently joined the Chinese Democratic Party, of which his relative A, who had earlier been arrested, was a leader. In the past several years, the applicant has introduced many people to the party.

In the mid 2000s, the Chinese Democratic Party members in that area planned a rally in support of which was holding a party called a particular day being held in Hong Kong to commemorate the events of late 1980s.

The police found out about the party's plans and arrested the leaders. The applicant and his relative A were away at the time and therefore avoided arrest. They were told that their homes were searched and the police wanted them for questioning.

The applicant and his relative A decided to leave PRC. With the help of friends, they did so.

The applicant arrived in Australia on a different name and passport.

The applicant fears that, if he returns to PRC, he will be arrested because of his involvement in the Chinese Democratic Party.

### *Review application*

The applicant provided no further information or evidence with the application to the Tribunal.

### *Tribunal hearing*

The applicant appeared before the Tribunal on a particular day to give evidence and present arguments.

The applicant was represented in relation to the review by his registered migration agent.

The applicant told the Tribunal that he was born in early 1960s in village X of a city in China.

During the 1950's and 1960's, his relative B, who had attended the Military College, was a high ranking general in the National Party, which opposed the Communists. As a result of this, his relative B was jailed.

Because of his relative B's arrest and jailing, the applicant's family was considered anti-Communist and anti-Revolution. When the applicant was about several years old, his close relative was taken and publicly criticised. The close relative was beaten and was paraded through the town; was later mocked by children and stones were thrown at the close relative. The close relative developed mental problems and died in the mid 1980s.

The applicant completed few years of training in his local city. The course he completed qualified him as "medium level professional". He was able to work in low level places, but not in the larger places.

The applicant started work in his own village and worked there for few years in late 1980s.

In the late 1980s, a demonstration was organised, with students challenging the Government. The protest in Tiannamen Square was televised and the applicant watched it. He admired the protesters very much. Other demonstrations were held in other parts of China, to support the one in Tiannamen Square. One was organised in his local city, involving students and other workers. Friends of the applicant, their friends and the applicant's relative A, totalling about several people, went to demonstrate in the local city. They were part of about 10,000 demonstrators, who carried anti-government banners and smashed bottles as part of the demonstration.

Few days later, the applicant's friends and relative A were arrested. When the applicant heard of this, he fled. He stayed for a time with various relatives, but could not remain with them, as they were fearful. Eventually, he went to an isolated area in the mountains in a different province. He had a relative there who worked at in that local area. The place was very isolated, there was no phone, little public transport; the applicant believed that it was safe to remain there.

The applicant provided help to the residents, as there were only few facilities there. He eventually started his own business, which he called after the name of the village. He did not apply for a government licence but was paid by the clients, who were very poor. He remained in the village for several years.

After about several years, the applicant began to realise that nothing had happened to others who had been in his position after the demonstration in the late 1980. He had a relative in government who told him that he was no longer at risk from the government. In the late 1990s, the applicant therefore returned to his home village and went back to work. He lived in his family home with his family members. The applicant had married in mid 1980s and few children were born, in late 1980s. They did not flee with the applicant in late 1980s, but remained in the home village. The applicant visited his family secretly while living in a isolated area, only staying few nights at a time.

After returning to his home, the applicant made contact with his relative A, who had been sent to a prison after the late 1980s demonstration. The two discussed politics, their concerns about government corruption. Through his relative A, the applicant met a group of friends who were members of the Chinese Democratic Party. The applicant also joined, a process which did not involve any formality but was simply a declaration of membership. His relative A was a co-leader of the group. The party was illegal at the time. The applicant was active in promoting the party's ideas and recruited several members.

In the mid 2000s, the applicant learnt of a memorial which was to be held in Hong Kong to commemorate the events in Tiananmen Square. The applicant and his friends were active in arranging for local activities in support of this memorial. All the members of the Chinese Democratic Party were to be involved, including the applicant's friends in the local city. Contact was made with the University, high and middle schools. The applicant's responsibility was to contact the people whom he had introduced to the party and to bring as many of them as possible.

When the applicant was contacting the democratic organization to make arrangements for the activity there, the local PSB in the city arrested few friends of the applicant. After few hours, they went to the applicant's home and that of his relative A and searched them. The applicant's family member was told to tell the applicant to report to the police as soon as he arrived home. His family member asked what crime the applicant had committed and was told that he "assembled people and disturbed order" and was a leader. The family member was told that if he confessed, they could reduce his punishment.

The applicant's family member called him on his mobile phone and told him what had happened. The applicant did not dare return and also left where he was then staying. He moved around to a few places, staying with relatives and friends. He then arranged his escape from China.

The applicant's relative A was told that a person in the Democratic Party could help them get the documents to escape from China, but that it would cost a lot of money. The applicant decided to escape, as he already had a record from the late 1980s and he was now being accused of being a leader, which would have very serious consequences for him if he were arrested.

The applicant's family was able to raise a large amount of money for his escape. He was guaranteed to go to Australia. He gave his Chinese passport to the person arranging his escape, and it was returned the next day. He was given the mobile number of someone in a different city. The applicant went there with another man who was escaping from China, also from the Democratic Party. He was taken to the airport. He was held up by authorities for about half an hour, and said, as he had been instructed, that he was travelling to a different country; he had a visa for that country in his passport. He was also queried about leaving from that city rather than his local city; he told them that he was in that city on business and so left from there. A body search was done and his baggage was also searched. The official questioning him made a phone call and then let him through.

The applicant then flew to a different location, where he was met by a stranger who took his Chinese passport and few colour photos and came back few hours later with a Japanese passport. They then boarded the plane and flew to Australia.

The applicant was not asked any questions in that country as he was being lead through the departure process by another person.

The applicant told the Tribunal that the problem he faces is very serious. He cannot hide anywhere in China and if arrested the consequences would be hard to imagine. Others have disappeared or been put in prison. As he is considered as a leader, his situation is even worse.

The applicant has spoken to his family since being in Australia. The family member has told him that strangers had appeared near their home. The family member also has told people that the applicant is now in Australia and there has been no interest lately. The applicant's relative A fled to a different country, where he remains.

The hearing was adjourned for few weeks to give the applicant the opportunity to provide documents and possibly statements from witnesses supporting his application.

#### *Information following hearing*

The applicant provided further documentary evidence to support his claims. He provided a copy of his PRC passport and confirming his date and place of birth. The visa for a different country in the passport with issued date.

A notarial certification of the applicant's birth was submitted, confirming his date and place of birth.

A certificate, showing his studies a College in his local city in China.

A statement was provided by the applicant's relative A, who is now living in a different country. This statement corroborated the applicant's claims of his family history; his hiding for several years until late 1990s and his involvement in the Chinese Democratic Party as a leader; and his departure from China.

A statement was provided by the person, who lives in Australia. He arrived in Australia with the applicant, using the same method: a false identity and travel via the same country. He also corroborated the applicant's claim of involvement in, and leadership of, the Chinese Democratic Party. He also described the means of escape from China.

#### *Country information*

The China Democracy Party (CDP) sometimes referred to as the Chinese Democracy Party, China Democratic Party and Chinese Democratic Party was formed on 25 June 1998 when Wang Youcai attempted to register the party in Hangzhou, Zhejiang. The CDP was a loosely organised group of veteran dissidents and pro democracy activists. The Government cracked down heavily on the CDP during 1998 and 1999 until the CDP was effectively silenced. In 2005, the CDP remains a banned organisation and the Chinese Government continues to surveil, detain and imprison current and former CDP members.

A Human Rights Watch report dated September 2000 provides extensive information on the CDP. The report "documents the emergence and suppression of the CDP." The following extract is a brief summary of the report. For more detailed information on the founding of the party and the Chinese Government's response to the CDP please refer directly to the report:

The China Democracy Party (CDP), a loosely linked group of political activists, operating nationwide, emerged in mid-1998. It was significant because it was the first

time since the establishment of the People's Republic of China in 1949 that an attempt was made to obtain the formal legal registration of an opposition political party. Over the next eighteen months, however, it was systematically crushed. Known members of the CDP were summarily arrested and detained, and though most were held for relatively brief periods, at least thirty-four of them were sentenced to prison terms of up to thirteen years on charges of attempted subversion. At least four others fled into exile abroad. Others, who remain in China but are not in prison, live under close police surveillance and have ceased to be openly active.

The CDP called for multiparty democracy in China and respect for human rights.

...Three of the group's founders, Wang Youcai, Wang Donghai and Lin Hui, seized the opportunity presented by U.S. President Bill Clinton's state visit to China in June 1998 to announce the formation of the CDP's first local preparatory committee in Hangzhou, Zhejiang province. Then, taking advantage of the relatively relaxed political atmosphere at the time, CDP activists sought to register preparatory committees in other provinces.

...At first, local authorities to whom CDP members applied to register their preparatory committees appear to have been uncertain how to react. But when the CDP announced that it planned to create a national structure, the central government, led by National People's Congress chairman Li Peng and President Jiang Zemin, denounced the fledgling party, and CDP leaders were arrested and imprisoned. The first wave of arrests took place in November and December 1998, but neither it nor a subsequent series of arrests in May 1999 deterred the remaining CDP members from continuing their efforts to build the party, issue public statements, or hold discussion groups. It was only in late 1999 that the CDP was effectively silenced.

CDP members stressed during their efforts to obtain legal recognition that they were seeking to do so in accordance with existing laws. In the absence of regulations specifically governing the registration of political parties, they sought to register with the relevant provincial branches of the Civil Affairs Ministry in view of its responsibility for the registration of "social groups." They also invoked the Chinese constitution and official regulations on social groups issued in October 1989 and pointed to China's stated commitment to the rights enshrined in the International Covenant on Civil and Political Rights. Finally, when all else had failed, they tried to go directly to the State Council, China's equivalent of an executive cabinet, to register. The end result, however, was that the embryonic party was declared an "illegal organization."

The main regulation used to try and sentence CDP leaders was Article 105 of the 1997 Penal Code, which penalizes "those involved in organizing, scheming or acting to subvert the political power of the state and overthrow the socialist system" (Human Rights Watch 2000, *China Nipped in the Bud: The Suppression of the China Democracy Party*, September, Vol. 12, No. 5).



## **FINDINGS AND REASONS**

The applicant arrived in Australia using a false passport in a different name. This has been confirmed by the forensic document examination report from the Department of Immigration and Multicultural Affairs.

Based on this evidence, and the evidence provided by the applicant, including his passport and birth certification, the Tribunal is satisfied that he is a national of PRC and that he is outside that country.

The Tribunal further finds that the applicant's family, particularly his relative B and close family member, were seen as counter revolutionaries in the fifties and sixties, due the relative B's role in the National Party.

The Tribunal finds that the applicant obtained qualifications in his local city, as evidenced by the certificate provided from the College at which he studied.

Based on the evidence of the applicant and his relative A, the Tribunal accepts that the applicant was forced to flee his home in late 1980s, due to his involvement in the Chinese Democratic Party and the support it gave to the protests in Tiannamen Square. The Tribunal also finds that the applicant lived in a remote village for several years in order to escape apprehension by the Chinese authorities.

The Tribunal accepts, based on the evidence of the applicant, his relative A and his associate, that the applicant was a leader in the Chinese Democratic Party after his return to his home village in the late 1990s. It also finds that the applicant was active in arranging the support for the Hong Kong commemoration in mid 2000s and that the Chinese authorities were pursuing him as a result.

Independent country information available indicates that members of the Chinese Democratic Party who have come to the attention of the Chinese authorities can face serious harm amounting to persecution.

The Tribunal finds that, should he return to PRC in the foreseeable future, there is a very real chance that he will suffer incarceration and other punishment because of his involvement in the Chinese Democratic Party. The Tribunal considers that the harm he faces amounts to persecution involving "serious harm" as required by paragraph 91R(1) (b) of the Act in that it involves at least significant physical ill-treatment and imprisonment. The Tribunal considers the harm to be Convention-related, namely, political opinion (as evidenced by his membership of the Chinese Democratic Party). The Tribunal is satisfied that the imputed political opinions are the essential and significant reasons for the persecution which he fears, as required by paragraph 91R (1) (a) of the Act. The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c) of the Act, in that it is deliberate or intentional and involves selective harassment for a Convention reason.

Having found that the applicant faces a real chance of persecution for a Convention reason if he returned to China, the Tribunal must also consider whether it would be reasonable for him to relocate to some other part of China where he would be safe from the persecution he fears. Based on his evidence of his long-standing involvement in, and commitment to, the Chinese Democratic Party, the Tribunal is satisfied that the applicant would continue to be active in it

should he return to China. In that case, and looking at the evidence as a whole, the Tribunal finds that there is no part of China to which the applicant could reasonably be expected to relocate and where he would be free of the persecution he fears.

In summary, the Tribunal finds that the applicant has a well-founded fear of being persecuted for Convention reasons if he were to return to China now or in the reasonably foreseeable future.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 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 is a person to whom Australia has protection obligations under the Refugees Convention.

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. PRAKSA</p>
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