

**060858423 [2007] RRTA 26 (26 February 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 060858423

**DIMA REFERENCE(S):** CLF2006/6323 CLF2006/66323

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

**TRIBUNAL MEMBER:** Catherine Carney

**DATE DECISION SIGNED:** 26 February 2007

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being 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 her review rights by letter dated and posted on the same day.

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 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 (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 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, 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:

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) 222 CLR 1 and *Applicant S v MIMA* (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 also took evidence from an elder from the church in another city. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

The Tribunal finds that the applicant is a witness of credit. The applicant gave consistent evidence and displayed a detailed knowledge of the "Shouters" underground church.

The Applicant's evidence is summarised as follows:-

The Applicant was born in Fujian Province. She is single and her parents live in PRC. The applicant became involved with Mr. S in recent years. Her evidence was that she became romantically involved with Mr. S, who was a Leader in one of the secret "Shouters" groups. The applicant's evidence was that she was introduced to the "Shouters" by Mr. S. and baptised in the Church. The police started to make enquiries about Mr. S. and his activities. The applicant travelled around from place to place with Mr. S. to hide from authorities and continue their activities with "shouters" groups. Some time later, the police came to a village and arrested Mr. S. and other members of a local "shouters" group. The applicant's evidence was that she hid in a local shop and was able to avoid detention. She was helped by leaders of the "Shouters" to hide and eventually leave China. She left China on a false passport and arrived in Australia soon after.

The applicant's evidence is that she had to escape China using a false passport as she is in danger from the authorities. The applicant's evidence is that she has had her identity card sent to her in Australia by a family member. Her original passport is in China.

The applicant provided to the Tribunal the following documents:

A copy of her Identification Card of the National of the People's Republic of China

Photos showing her and other members of the Christian Local Church at meetings in Australia

A letter from Elders in the Church in another city

The Tribunal took evidence from Mr L. over the phone. Mr. L. identified himself as a Leader of the Church in another city. Mr L's evidence was that the applicant had been attending gatherings and church services at his church. His evidence was that he believed the applicant was a committed member of the Church and a believer.

The applicant gave evidence that she attended services in cities in Australia. The applicant displayed a detailed knowledge of the structure and beliefs of the “shouters”.

The Tribunal asked how the Christian Church was different in Australia from China. The applicant replied that in China the church is organised at a local level and members meet at sisters and brothers houses. In Australia people go to Church on Sunday and take communion and think their sins are forgiven but they are not. In China she attended as much as possible but particularly on Saturday. The applicant’s evidence was that in China and Australia she is a true believer in Jesus Christ and they show love and respect for God by shouting his name out loud in prayer meetings. The applicant gave evidence that when she was fleeing China she was very scared and in her mind loudly used the vocal practice of calling on God for help. The applicant’s evidence was that this practice gave her peace and helped her. The applicant’s evidence was that she has changed her personality and is now at peace, before she was a part of “shouters” she was selfish and difficult but is now able to live peacefully. The applicant briefly gave the Tribunal an example of how the vocalising is done at the gatherings.

The applicant gave evidence that at the prayer meetings the members would praise god, read the Bible and call on God. The applicant gave evidence that the members pray and give each other strength in times of need. The Tribunal asked who was the founder of the “Shouters”? The applicant stated that Li Changshou was a founder. The interpreter queried if this was a Taiwanese spelling. The Tribunal asked if there was any connection to Taiwan. The applicant replied that yes there was as Li Changshou had gone to Taiwan to continue to spread the message.

The Tribunal asked if the Church the applicant attended was registered. The applicant replied no it was not recognised by the Chinese government.

The Tribunal asked the applicant why the authorities would want to persecute her. The applicant replied because she was in a relationship with Mr. S. and therefore they suspect her of being a key member of the “Shouters”. The Tribunal asked whether she was a key member of the “Shouters” group and she replied that she was just an ordinary member not a key member. The applicant replied that the authorities think she is a key member and would continue to preach. The Tribunal asked if she would continue to practice the rituals of the “shouters” if she returned to China. The applicant replied that yes she would, she would continue to preach and does so in Australia. The Tribunal asked how she does this in Australia. The applicant replied that she tells people she meets at work and other places of her personal struggles and understanding of Jesus. The applicant said she would continue with prayer meetings with other brothers and sisters where they read the Bible and use their knowledge of the Bible to better themselves. The applicant said that the Bible she uses is a Bible of the New Testament. The “Shouters” is based on a detailed knowledge of the Bible. The Tribunal asked the applicant to explain why the “Shouters” is important to her and why she could not attend another church in China. The applicant said that she communicates by prayer, she prays that god will pity her and forgive her sins and help her solve her difficulties. To leave the “Shouters” would be like losing an organ from her body. All the members are connected and to lose any members or contact with members would be to lose your body.

The Tribunal asked if the “Shouters” had any formal structure like the Vatican in Rome. The applicant replied that the structure of the “Shouters” is organised locally and that the groups are all local. Local men like Mr. S. who are well regarded can become the leader of a Local Church. They become a Leader because the local members recognise him.

The Tribunal asked what would happen if you return to China. The applicant replied she would be detained by the authorities. The applicant stated she could not stop practising with the “Shouters” as she would go back to being a bad person. If she did not have the support of her beliefs she would lose all heart.

#### INDEPENDENT COUNTRY INFORMATION

(Huhan pai) is considered a “cult” by the Chinese authorities and it is banned in China. The organisation of the church is based on a New Testament pattern of worship and ministry, proposing a "one locale, one church" formula.

Authorities first banned the Local Church in the early 1980s, pejoratively labeling the group the "Shouter Sect" (huhan pai) and have launched sporadic crackdowns against the group throughout the reform era. The church has proved resilient in the face of official repression, however, continuing to attract new converts and expand its operations, swelling to an estimated 800,000 adherents in China today...

The church does not refer to itself as the “Shouter Sect” (*huhan pai*). This pejorative label was given to it by the Chinese authorities during their crackdown on the group, which was first banned in the early 1980s (Kindopp, Jason 2004, ‘The Local Church: a Transnational Protestant sect’, in *The Politics of Protestantism in Contemporary China: State Control, Civil Society, and Social Movement in a Single Party State*, 16 May 2004 p 429.)

The 2006 US Department of State report states:

The Government has banned all groups that it has determined to be “cults,” including the “Shouters” (founded in the United States in 1962), Eastern Lightning, the Society of Disciples (Mentu Hui), the Full Scope Church, the Spirit Sect, the New Testament Church, the Guan Yin (also known as Guanyin Famin, or the Way of the Goddess of Mercy), the Three Grades of Servants (also known as San Ba Pu Ren), the Association of Disciples, the Lord God Sect, the Established King Church, the Unification Church, the Family of Love, the South China Church, the Falun Gong, and the Zhong Gong movements. (Zhong Gong is a qigong exercise discipline with some mystical tenets.)

After the revised criminal law came into effect in 1997, offences related to membership in unapproved cults and religious groups were classified as crimes of disturbing the social order. A ban on cults, including the “Shouters” spiritual movement, was enacted in 1999. Under Article 300 of the criminal law, “cult” members who “disrupt public order” or distribute publications may be sentenced to three to seven years in prison, while “cult” leaders and recruiters may be sentenced to seven years or more in prison. Under the new Public Security Administrative Punishment Law, which took effect March 1, 2006, adherents could face five to fifteen days of administrative detention and fines of up to \$125 (1,000 RMB) for using superstitious cults or qigong activities to disrupt public order or harm public health. (US Department of State 2006, *International Religious Freedom Report 2006: China (includes Tibet, Hong Kong, and Macau)*,

A 2005 research response by the Canadian Immigration and Research Directorate states of illegal groups:

In 1995, a circular issued by the State Council and the Communist Party Central Committee labelled a number of Protestant groups “evil cults” and declared them illegal organizations (Chan and Carlson 2005, 14-15). These groups included the Shouters, Full-Scope Church, New Testament Church, Eastern Lightning, and Spirit Church (ibid., 15). According to Chan and Carlson, since the 1999 introduction of a resolution banning cults, “the government has focused on enforcement on all groups labeled as ‘evil cult’ organizations” (ibid.). Human rights groups claim that following the 1999 anti-cult resolution, authorities cracked down on more than a dozen evangelical Christian groups (AFP 9 Oct. 2002; see also *SCMP* 9 Jan. 2002). (*U.S. News & World Report* 30 Apr. 2001). (Immigration and Refugee Board of Canada 2006, *CHN100387.E – China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong (2001-2005)*).

A March 2006 report by Human Rights Watch comments that “one year after China’s Regulations on Religious Affairs came into force, Chinese citizens’ ability to exercise their right to freedom of religion remains as subject to arbitrary restrictions as ever”. The report goes on:

Chinese officials claim the new regulations safeguard religious freedom through the rule of law, but the intentional vagueness of the regulations allows for continued repression of disfavoured individuals or groups. There’s nothing accidental about the vagueness – it gives officials the room they need to legitimize closing mosques, raiding religious meetings, “re educating” religious leaders, and censoring publications. The regulations took effect on March 1, 2005. At the time they came into force, the Chinese government asserted that the national regulations, the first comprehensive set of regulations on religion in China, constituted “a significant step forward in the protection of Chinese citizens’ religious freedoms”. However, local officials continue to repress religious activities that they determine to be outside the scope of the state-controlled religious system. Their decisions are often made arbitrarily and in a manner inconsistent with the right to freedom of belief or religion. Chinese officials continue to detain and arrest religious believers, close religious sites, and impose restrictions on movements, contacts, visits, and correspondence of religious personnel (Human Rights Watch 2006, *China: A year after new regulations, religious rights still restricted*).

The 2006 report on China by the US Commission on International Religious Freedom contains the results of a visit to China by the Commission in early 2006. The Commission sums up its assessment of China thus:

In China, where the Commission made its first official visit last year, the government continues to be responsible for pervasive and severe violations of religious freedom and related human rights. Every religious community in China is subject to serious restrictions, state control, and repression. The most severe religious freedom abuses are directed against Tibetan Buddhists, Uighur Muslims, Roman Catholics, house church and unregistered Protestants, and spiritual groups such as the Falun Gong—abuses involving imprisonment, torture, and other forms of ill treatment. Though the Chinese government issued a new Ordinance on Religion in March 2005, its provisions, in fact, restrict rather than protect religious freedom, offering Party leaders more extensive control over all religious groups and

their activities. Prominent religious leaders and others continue to be confined, imprisoned, tortured, “disappeared,” and subjected to other forms of ill treatment on account of their religion or belief. What is more, the Chinese government, in its treatment of refugees from North Korea, continues to disregard its international obligations to protect those who face persecution on their return. For more information on all of these concerns, see the chapter on the Commission’s visit to China in this report (US Commission on International Religious Freedom 2006, *Annual report on the United States Commission on International Religious Freedom* (Excerpt on China pp 107-117), May) <http://www.uscirf.gov/countries/publications/currentreport/2006annualRpt.pdf#page=1> – Accessed 18 October 2006.

## **FINDINGS AND REASONS**

The applicant entered Australia on a false passport. The applicant has since supplied the Tribunal with a copy of her Identification Card and a Statutory Declaration which is contained on the Department file and goes to the circumstances of her fleeing China on a false passport. The applicant also provided oral evidence on the circumstances of her leaving China.

The Tribunal accepts the evidence of the applicant and finds that the applicant is a national of PRC and will assess her claims accordingly.

The Tribunal finds that the applicant does not have a right to enter and remain in a third country and will assess her claims accordingly.

The Tribunal accepts the evidence provided at the hearing in the form of oral and documentary evidence. The Tribunal finds that the applicant gave clear and detailed evidence.

The Tribunal accepts that the applicant is a member of the underground church group known as “Shouters”. The Tribunal accepts the oral evidence given by the Elder of the Church from another city that the applicant is a believer in Jesus and a committed member of the Church. The Tribunal accepts the evidence that the applicant had attended meetings in cities in Australia.

The Tribunal is satisfied that the applicant is a committed member of her church and engaged in conduct within Australia otherwise than for the purpose of strengthening her claims to be a refugee.

The Tribunal accepts the applicant’s evidence that she has continued to proselytize to her co-workers and acquaintances in Australia.

The Tribunal accepts the evidence of the applicant that she would continue to proselytize and participate in the “Shouters” if she were to return to China. The Tribunal finds that the applicant would continue to read the “Shouters” Bible and participate in prayer groups and



meetings. The applicant gave a detailed knowledge of and indicated a strong commitment to her faith.

The Tribunal accepts the documentary evidence provided by the applicant, the independent country information and oral evidence at the hearing that the applicant would come to the attention of the PRC authorities, if she were to return to PRC, as a result of being an associate of Mr. S. The Tribunal further finds that the applicant's attachment to her spiritual guidance and activities is such that she would continue to be a part of the "Shouters" should she, return to PRC.

The Tribunal finds that the applicant's beliefs are the essential and significant reason for the persecution. The Tribunal has had regard to independent country information and finds that the applicant would face serious harm which would involve systematic and discriminatory conduct if she were returned to PRC. The Tribunal accepts the applicants evidence of her relationship with leaders and elders in the "Shouters" and that there is a real chance that due to her beliefs and relationship with members of the "Shouters" that there is a real chance she will be persecuted upon her return to PRC.

The Tribunal has had regard to independent country information and finds that the applicant would not be able to re-locate to another area in PRC as the persecution is not localized or confined to any one area.

Therefore I am satisfied on the evidence before me that the applicant has a well-founded fear of persecution for reason of her religion.

Accordingly, I am satisfied that the applicant is a refugee.

## **CONCLUSIONS**

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. 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 satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 *Migration Act* 1958.

Sealing Officers ID: PRRTIR