

**1212956 [2012] RRTA 1031 (14 November 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1212956

**DIAC REFERENCE(S):** CLF2007/115678 CLF2012/101658

**COUNTRY OF REFERENCE:** Taiwan

**TRIBUNAL MEMBER:** Magda Wysocka

**DATE:** 14 November 2012

**PLACE OF DECISION:** Melbourne

**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 Taiwan, 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] May 2012.
3. The delegate refused to grant the visa [in] July 2012, and the applicant applied to the Tribunal for review of that decision [in] August 2012.

### RELEVANT LAW

4. 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

5. 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.
6. 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.
7. 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 *SZF DV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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.

15. 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**

16. 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').
17. '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.
18. 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**

19. 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.
20. The applicant was not represented in relation to the review.

### **The applicant's immigration history**

21. The applicant's previous immigration background is summarised in the decision record in relation to his protection visa application, which was provided by the applicant together with his application for review and in the copies of his passports that was provided with his original application. The applicant first arrived in Australia [in] November 1993 on a Subclass 670 visa. The applicant departed and arrived again in Australia [in] July 2002 as the holder of a Subclass 570 ELICOS Visa. He departed [in] July 2003 and returned to Australia [in] August, 2003. The applicant was granted a Subclass 573 Student visa [in] April 2004. He departed Australia [in] October 2004 and returned [in] March 2005. [In] February 2006 the applicant departed Australia and returned [in] March 2006.
22. [In] July 2007, the applicant lodged an application for a Subclass 820/801 Partner visa. A temporary Subclass 820 Partner visa was granted [in] April 2009. [In] September 2009, the

applicant departed Australia and arrived [in] October 2009. The applicant departed Australia again [in] December 2009 and returned [in] February 2010.

23. The applicant's permanent Subclass 801 Partner visa was refused [in] May 2010 by the Department of Immigration. The applicant lodged a review of this decision at the Migration Review Tribunal [in] May 2010. The Tribunal affirmed the department's decision [in] April 2012.

### **The primary application**

24. The applicant provided the following information in his protection visa application. He was born on [date deleted: s.431(2)] in Taipei City, Taiwan, Republic of China. He is the holder of a passport from the Republic of China issued [in] January 2012 and expiring [in] January 2022. Up until 2001 he completed his schooling in Taipei.
25. In relation to his reasons for claiming protection, the applicant states the following in his protection visa application forms:
  - a. He suffered unfair treatment in Taiwan due to his political opinion. He believes Taiwan is part of mainland China and that reunification is the best way for Taiwan's own benefit and further development.
  - b. He served in the Taiwanese army from 1996 to 1998 on Jinmen Island, when the third Taiwan Strait Crisis occurred. Because he disagreed with Lee Teng-hui's Taiwan independence policy, he was investigated by military police and removed from a gunner position to a kitchen job.
  - c. He was bullied by other soldiers from time to time until he left the army. When he returned home his family did not understand him. His brother and father thought he was mad when he spoke out about his opinion publicly. He felt very sad and stressed and sometimes wanted to kill himself.
  - d. He wanted to be truly free in Australia so he left Taiwan on a student visa.
  - e. From 1996 until 2002, he was investigated by military police in the army. He experienced verbal abuse by his own family. He was beaten by people with different political opinions. He couldn't find a good job and suffered unfair treatment in his workplace.
  - f. He fears that if he returns to Taiwan people will think he is mad or that he is not a good person because most people support Taiwanese independence. If there is no reunification with China, there will be war and he wants to stay away from war, having already experienced it in 1995-96 when he was in the Army.
  - g. He will insist on his own political opinion. He does not want to die "valuelessly" and does not want to be mistakenly treated by ignorant Taiwanese. His opinion is not acceptable to the Democratic Progressive Party or to the ruling Kuomintang.
  - h. He fears harm from people who have different political opinions than him especially members of the Democratic Progressive Party, most of whom are

violent, as well as from National Security officers who may monitor him or limit his actions. His political opinion is not acceptable to either the Democratic Progressive Party or the ruling Kuomintang. Neither party likes people who support the One China Policy.

- i. He does not believe that the authorities can and will protect him if he returns to Taiwan. The Kuomintang is a party that punishes people with different opinions.

### **The departmental interview**

26. The applicant was invited to attend a departmental interview in relation to his claims for protection [in] July 2012 but did not attend.

### **The delegate's decision**

27. [In] July 2012, a delegate of the Department of Immigration refused to grant the applicant a protection visa. The delegate found the applicant's claims to be generalised and as such, did not give rise to a real chance of Convention-related persecution. Specifically, the delegate was not satisfied that the harm feared by the applicant amounts to persecution as defined in section 91R of the *Migration Act 1958*. The delegate further found that the length of time the applicant resided in Australia before applying for refugee status was indicative of a lack of fear of persecution in Taiwan.

### **The Tribunal proceedings**

28. [In] October 2012, the Tribunal wrote the applicant advising him that it had considered all the material before it relation to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] November 2012. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on his case without further notice.
29. [In] October 2012 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] November 2012 [In] November 2012 the applicant advised the Tribunal that he did not wish to give oral evidence and consented to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable him to appear before it. This matter has therefore been determined on the evidence available to the Tribunal.

### **Country Information**

30. The most recent *Freedom in the World* report on Taiwan from Freedom House<sup>1</sup> states the following:

Taiwan became home to the Chinese nationalist Kuomintang (KMT) government-in-exile in 1949 and is still formally known as the Republic of China (ROC). Although the island is independent in all but name, the People's Republic of China (PRC)

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<sup>1</sup> Available at <http://www.freedomhouse.org/report/freedom-world/2012/taiwan>.

considers it a renegade province and has threatened to take military action if de jure independence is declared.

Taiwan's transition to democracy began in 1987, when the KMT ended 38 years of martial law. In 1988, Lee Teng-hui became the first Taiwanese-born president, breaking the mainland émigrés' stranglehold on politics. The media were liberalized and opposition political parties legalized in 1989. Lee oversaw Taiwan's first full multiparty legislative elections in 1991–92 and won the first direct presidential election in 1996.

Chen Shui-bian's victory in the 2000 presidential race, as a candidate of the pro independence Democratic Progressive Party (DPP), ended 55 years of KMT rule. Chen narrowly won reelection in 2004, but the KMT-led opposition retained its majority in the legislature.

Thanks in part to a new seat-allocation system adopted in 2005, the KMT secured an overwhelming majority in the January 2008 legislative elections, taking 81 of 113 seats. The DPP took 27, and the remainder went to independents and smaller parties. Taipei mayor Ma Ying-jeou of the KMT won that year's presidential election, which marked the island's second peaceful, democratic transfer of power. Both elections were deemed generally free and fair.

[...]

On the issue of relations with China, the Ma administration has pursued closer cross-strait ties while continuing to reject unification, independence, and the use of force. Since 2008, bilateral talks have led to agreements on matters including transportation, tourism, food safety, financial cooperation, and intellectual-property protection. In June 2010, both sides signed the Economic Cooperation Framework Agreement (ECFA), which was expected to bring about greater economic integration by reducing trade barriers. In 2011, the government launched a program allowing Chinese tourists to visit as individuals rather than strictly in tour groups, and local universities began accepting Chinese students. Though many Taiwanese supported improving economic ties with China, critics argued that the administration was conceding elements of Taiwan's sovereignty, and moving too quickly with minimal transparency. The country remained under threat from China's military strength, with over 1,000 missiles aimed at the island. In 2011 the United States agreed to upgrade its older U.S.-built F-16 fighter planes instead of selling newer models—a decision that came as a disappointment for many in Taiwan.

#### Political Rights and Civil Liberties:

Taiwan is an electoral democracy. The 1946 constitution created a unique government structure comprising five distinct branches (yuan). The president, who is directly elected for up to two four-year terms, wields executive power, appoints the prime minister, and can dissolve the legislature. The Executive Yuan, or cabinet, consists of ministers appointed by the president on the recommendation of the prime minister. The prime minister is responsible to the national legislature (Legislative Yuan), which consists of 113 members serving four-year terms. The three other branches of government are the judiciary (Judicial Yuan), a watchdog body (Control Yuan), and a branch responsible for civil-service examinations (Examination Yuan).

The two main parties, the proindependence DPP and the Chinese nationalist KMT, dominate the political landscape. In general opposition parties are able to function freely, as evident from the vibrant campaign ahead of the January 2012 elections.

[...]

Taiwanese media reflect a diversity of views and report aggressively on government policies and corruption allegations. The state has relatively little influence over the media, though partisan influence is strong. In response to public concerns over “embedded marketing,” in which government entities pay for promotional items that are presented as news, the legislature amended the Budget Law in January 2011 to prohibit the use of public funds for such purposes; the law did not explicitly address “embedded marketing” paid for by PRC entities. Occasional cases of Chinese state-run news appearing in Taiwanese papers continued to surface during the year. In April, *China Post*, an English-language newspaper in Taiwan, was found to have inserted articles originally published by the PRC’s state-run *China Daily* without citing their source. An amended Children and Youth Welfare and Rights Protection Act passed in November banned excessively detailed newspaper coverage of rape, suicide, or drug abuse, as well as the publication of photographs depicting violent or erotic subject matter.

31. In January 2012, Ma Ying-jeou of the KMT won a presidential second term.<sup>2</sup>
32. The most recent US Department of State Country Report on Human Rights Practices in Taiwan for 2011<sup>3</sup> mirrors the above report and states that there states there were no reports of politically motivated disappearances or of political prisoners or detainees. The report also states that the Taiwanese constitution prohibits arbitrary arrest and detention, and that the authorities generally observed these prohibitions. The report also notes that there was no restriction on internet freedom, academic freedom or cultural events. In relation to the role of the police and security apparatus, the above report stated that civilian authorities maintained effective control over the National Police Administration and that the authorities have effective mechanisms to investigate and punish abuse and corruption. The report further notes that there were no reports of impunity involving security forces.
33. The US Department of State reports from 2010 and 2009 also stated that there were no reports of politically motivated disappearances or of political prisoners or detainees and that authorities generally observed the prohibitions of arbitrary arrest and detention. The reports also consistently noted that the Taiwanese authorities generally respected freedom of speech and of the press.
34. An article in the Taipei Times of 11 August 2012 entitled ‘Taiwanese independence more popular, survey says’ and available at <http://www.taipeitimes.com/News/taiwan/archives/2012/08/11/2003540007> indicates that support for Taiwan’s unification with China is not uncommon, with over 18% of those polled supporting the idea of unification and over 66% opposed.

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<sup>2</sup> BBC News “Taiwan’s President Ma Ying-jeou wins second term (14 January 2012) available at <http://www.bbc.co.uk/news/world-asia-16557209>.

<sup>3</sup> Available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>



35. No country information could be located indicating that the Democratic Progressive Party engages in violence against its opponents.

## **FINDINGS AND REASONS**

36. The applicant has declined to attend a hearing before the Tribunal to give evidence and present arguments relating to the issues arising in his case. Accordingly, following s.425(2)(b) of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.
37. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
38. The Tribunal accepts on the basis of the copies of the passports that the applicant provided with his protection visa application that he is a citizen of Taiwan. It has assessed his claims against Taiwan as his country of nationality for the purposes of the Convention and his receiving country for the purposes of s.36(2)(aa).
39. The applicant claims that he suffered unfair treatment in Taiwan due to his political opinion that Taiwan is part of mainland China and that reunification is for Taiwan's own benefit and further development. The applicant claims that he served in the Taiwanese army on Jinmen Island during the Third Taiwan Strait Crisis. Because he disagreed with Lee Teng-hui's Taiwan independence policy, he was investigated by military police and removed from a gunner position to a kitchen job. He was also bullied by other soldiers from time to time until he left the army and was investigated by military police from 1996-2002. The applicant claims he experienced verbal abuse from his family who did not understand him, which caused the applicant stress and at times he wanted to kill himself. The applicant claims he was beaten by people with different political opinions, could not find a good job and suffered unfair treatment in his workplace. He fears harm from people with opposing political views, particularly members of the Democratic Progressive Party, as well as from the authorities. He does not believe that the authorities will protect him due to his political opinion.
40. The applicant has provided vague evidence that is lacking in detail in relation to his political beliefs and past experiences of harm. The Tribunal has not had the opportunity to question the applicant in order to obtain further details about his particular circumstances including the exact nature of his political beliefs and his past experiences. Based on the information before it, the Tribunal is not satisfied that the applicant holds a political opinion in support of Taiwan's reunification with China or has suffered unfair treatment as a result. Based on the information the applicant provided in his protection visa application, the Tribunal accepts that the applicant underwent military service from 1996 to 1998. Given that the Tribunal is not satisfied that the applicant holds a pro-reunification political opinion, it follows that it is not satisfied that the applicant was ever investigated by the military police, bullied by fellow soldiers or removed from his position as a gunner. The Tribunal is also not satisfied that the

applicant experienced verbal abuse by his family which caused him to feel stressed and led to suicidal thoughts.

41. Due to the lack of any detail provided by the applicant, the Tribunal is not satisfied that the applicant was beaten by people with different political opinions. For the same reasons, the Tribunal is not satisfied that the applicant could not find a good job or that he suffered unfair treatment in his workplace and that, if this had occurred, it would have been for reasons of his political opinion.
42. Based on the information before it, the Tribunal is not satisfied that the applicant has a well founded fear of persecution. As noted above, for the purposes of s91R(2) of the Migration Act persecution involves 'serious harm' such as 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 an applicant's capacity to subsist. Based on the information before it, the Tribunal is not satisfied that the applicant has in the past experienced such harm that would amount to persecution or that there is a real chance that he would do so in the future.
43. The applicant has stated that he does not believe that the authorities can and will protect him if he returns to Taiwan due to his political opinion. Based on the information before it, the Tribunal is not satisfied that the Taiwanese authorities would be unable or unwilling to provide effective protection to the applicant for any reason against any harm.
44. For the reasons above, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason if he returns to Taiwan now or in the reasonably foreseeable future.
45. **Complementary protection**
46. The Tribunal has also considered whether the applicant meets the complementary protection criteria under s.36(2)(aa). As set out above, the Tribunal is not satisfied that the events the applicant has claimed actually took place based on the information that is before it. Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Taiwan, there is a real risk that the applicant will suffer significant harm.

## **CONCLUSIONS**

47. 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).
48. 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).
49. 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**

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