

071558011 [2007] RRTA 181 (22 August 2007)

DECISION RECORD

RRT CASE NUMBER: 071558011

DIAC REFERENCE(S): CLF2007/82833

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Kira Raif

DATE DECISION SIGNED: 22 August 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship 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 as a holder of a temporary visa and he was subsequently granted a number of further temporary visas. The applicant applied to the Department of Immigration and Citizenship 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 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 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 Refugees Convention, or 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

According to the Protection visa application the applicant is a male born in China. The applicant holds University degrees. He stated that he was a public servant prior to coming to Australia, to undertake studies in China and abroad.

When making the application, the applicant provided the following information in response to questions 40 – 44 on the application form. The applicant stated that he came to Australia on a temporary visa. When asked what he fears may happen if he returns to China, the applicant stated that he will die because of his health and the requirement for an organ transplant. He states that in China he will not receive any assistance at all for his medical needs and he will die. This amounts to human rights violation and discrimination because only the very wealthy can access medical attention to the extent that he needs to preserve his life. He states that in China life is cheap and if he is a non-productive, non-wealthy citizen, the communist regime will take no responsibility for keeping him alive. [Information deleted: s431.] The applicant states that the Chinese government will allow him to die if he cannot pay the cost of ongoing treatment, which he cannot do. He states that China is a communist country and human rights are not all-encompassing. He states that the authorities cannot protect him because they will not provide the applicant with the necessary health care and he will die.

In an accompanying submission, the applicant's representative refers to the applicant's well-founded fear of persecution if he were forced to return to China. The representative states that the applicant was admitted to hospital suffering from a particular condition and is required to visit the hospital regularly for medical treatment, which is necessary for his survival. The applicant maintains that if he returns to China now, he would not receive the medical treatment necessary for his survival and he would die. He claims that the failure of the Chinese government to ensure adequate medical treatment for citizens in his position amounts to persecution and gives rise to a well-founded fear that he will be refused the necessary medical treatment on the basis that he is a member of a recognisable social group, namely Chinese citizens who are unable to pay the Chinese government for their medical treatment. The applicant also claims membership of another recognisable social group, namely rural Chinese from the provinces where the government has failed to provide adequate medical care and protection for its citizens.

Application for review

The delegate refused to grant the visa to the applicant, finding that there was no Convention basis for the claimed persecution. The applicant sought review of the delegate's decision.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by his registered migration agent.

Immediately prior to the hearing the applicant provided a medical certificate from the Hospital, confirming the applicant's ill health and is undergoing ongoing treatment. The report describes the medication prescribed to the applicant and states that he is unfit to travel and states that the management plan for the applicant is to continue regularly.

The applicant stated that before coming to Australia he studied and worked in a Government department for a number of years. He said that he quit this job because at that time he decided to travel abroad. He now has no job. He undertook studies in Australia and he did not work in Australia. Not long after he completed his course, he became ill and he has been under medical treatment since. He said that both of his parents and his siblings remain in China. His parents are retired and his siblings work in China. He stated his sibling's occupations. He has no health insurance as his health insurance expired when he finished studying.

The Tribunal asked the applicant what persecution he feared if he returned to China. The applicant said that he has been diagnosed with serious illness. The doctor said that due to his condition, he cannot travel to China as it may harm his health. If he returns to China, he will still require continuous treatment to maintain his life, but in reality he cannot get this kind of treatment. He stated that according to his circumstances and having regard to the definition of 'refugee', he will become marginalised in China and he cannot accept this kind of treatment. If he does not get treatment, he will die.

The Tribunal asked the applicant why he thought he would not be able to obtain the necessary treatment in China and become marginalised. The applicant said that he does not understand a 100 percent the definition of a 'social group'. His situation is that he quit his job and he is overseas. He has no link with any organisation in China. As a result of that, he has no health insurance or social security. From the financial point of view, he considers himself to be a member of a marginalised group. The Tribunal asked the applicant if he thought there were any other reasons, in addition to his financial circumstances, that may prevent him from getting treatment. He said that according to the situation in China, as he is not employed, he has no social links with anyone in China and his social status is not high, so he considers himself to be a member of a marginalised group. Combining these two factors, he will not get the required treatment. The Tribunal noted that the applicant appeared to suggest that he would not get treatment due to his financial circumstances. The Tribunal again asked the applicant if he thought there were any other reasons why he may be denied treatment. The applicant said that he comes from a part of China, where the medical conditions in that province are lagging behind. This is the summary of his situation.

The Tribunal noted its concerns. The Tribunal noted that the applicant claimed that he would face persecution by way of denial of medical treatment, due to his membership of a particular social group. The applicant said that as a Chinese citizen, he will be denied treatment and that is a kind of persecution. The Tribunal referred to the applicant's claims and, in particular, to his identification of particular social groups. The Tribunal referred to the country information concerning the availability of medical treatment and noted that the common characteristic of the particular social group may not distinguish the group from the society at large. The Tribunal sought the applicant's comment. The applicant said that maybe his understanding of the definition of a 'social group' is a bit different.

The applicant's advisor provided comments with respect to Tribunal's concerns. She said that her client collapsed quite suddenly and he had recourse to the Chinese officials from the embassy. The Hospital staff believed that as the applicant was a Chinese citizen, the embassy could provide assistance to him, but they had not provided any kind of assistance. The medical staff were disturbed that they did not want to get involved. The applicant had a temporary visa, but could not continue with that due to his health. The applicant was intending to depart for China but could not travel. He had no funds for the treatment or accommodation. As the Chinese government refused to be involved in any way, this can be considered as the failure of state protection. The fact that the applicant will be left to die amounts to persecution. The applicant is an educated Chinese who will not be granted protection if he returns to China. He cannot afford medical treatment even in Australia and the Chinese government will allow him to perish. The social group is an educated Chinese who is suffering a severe physical medical condition who will be denied access to the life support that he needs in China and that is the failure of the state protection and the denigration of human rights. The Tribunal again noted its concern that the characteristics of the particular social group may not distinguish the group from the society at large. The advisor agreed.

The advisor stated that as an educated person, the applicant understands what may happen to him and the denial of the treatment is in itself persecutory. There has been no assistance from the embassy and the treatment by the Chinese officials at the moment is in itself persecutory and while the Australian government is assisting the applicant, the Chinese government is doing nothing.

The representative suggested that the way the particular social group may be defined is, for example, the Chinese overseas suffering serious health problems. Whether the rest of the society have no access to medical treatment is immaterial as this is defined by the applicant's personal circumstances. The applicant is part of the group of Chinese who require assistance and is being denied assistance. The applicant will die without such assistance.

Evidence from other sources

Access to medical treatment in China

The availability and quality of medical treatment in China varies from region to region. Eastern China and cities have better access to quality medical treatment than Central and Western China and rural areas. Medical treatment is mostly funded by the patient with rural residents paying more than city residents. Transplants and related treatment are available for those who can pay for it.

According to the CDRF and the UNDP, rural residents are "less likely to get access to medical services" with most health resources located in Chinese cities:

According to the third national health care survey in 2003, the proportion of people in urban areas who could reach the nearest medical institution in ten minutes was 82 percent. In the countryside, it was only 67 percent; moreover, 7 percent needed more than 30 minutes.

...There are also disparities between the regions, and again, the western region fares the worst. Some poor and mountainous areas have no clinics, so farmers must go to hospitals in townships or county towns. The disparity between regions is evident in the proportion of the

population that lives more than five kilometres from the nearest hospital. One survey in 2002 found this proportion to be only 8 percent in the eastern region, but 13 percent in the central region and 22 percent in the western region.¹

According to the Office of the World Health Organisation (WHO) Representative in China and the Social Development Department of China State Council Development Research Centre, specialised care is not available outside Chinese cities:

Geographical obstacles are more subtle in China. The fact that about 10% of rural residents have to travel more than 30 minutes to receive basic medical care, compared to only 1% of their urban counterparts, is acceptable by international standards. A bigger problem is access to specialized services. Outside the cities, specialized care (such as emergency obstetric care and trauma service) is not available, and adequate facilities and trained medical professionals are scarce.²

According to the UN Health Partners Group in China, in 2002 government health spending was 0.8% of GDP compared to 0.9% in 1978 or 3.9% of total spending in 2002 compared to 6.1% in 1978. The share of medical costs paid by insurance schemes dropped from 47% in 1980 to 27% in 2002. As a result private spending on health increased from 36% in 1980 to 68% in 2002. The UN Health Partners Group in China also report that health spending mainly benefits urban residents.³

According to the Office of the WHO Representative in China and the Social Development Department of China State Council Development Research Centre, of the many obstacles the poor face in accessing health services “the financial barriers are perhaps the most acute.” In 2004, private spending accounted for over 55% of total health spending. In rural areas, private spending on health was as high as 90%.⁴

In 2003, the average annual income for China’s rural population was 2,622 *yuan* (US\$328). According to the Ministry of Health, the average medical expenses were 2,236 *yuan* (US\$280) in 2004. According to a report by the Chinese Scientist Discussion Forum in Beijing, “Chinese citizen’s medical expenditures have increased from an average of 11 *yuan* (approximately US\$1.35) in 1978 to 442 *yuan* (approximately \$54.50) in 2002.” The report notes that 87% of farmers pay their own medical expenses with some farmers saying that a single visit to the hospital can equal one year’s income. The *Blue Book* dated December 2005 by the Chinese Academy of Social Sciences reports that one quarter of the population forgoes medical treatment because they cannot afford it. In December 2005, the Ministry of Labor

¹ China Development Research Foundation & United Nations Development Programme 2005, *China Human Development Report 2005*, 15 October, p.58

² Office of the World Health Organisation Representative in China & Social Development Department of China State Council Development Research Centre 2006, *China: Health, Poverty and Economic Development*, June, p.18 http://www.wpro.who.int/NR/rdonlyres/A1F18401-BE93-44EF-9F76-55DDA2C6E12D/0/hped_en.pdf – Accessed 27 July 2007

³ United Nations Health Partners Group in China 2005, *A Health Situation Assessment of the People’s Republic of China*, July, pp.39-41

⁴ Office of the World Health Organisation Representative in China & Social Development Department of China State Council Development Research Centre 2006, *China: Health, Poverty and Economic Development*, June, p.17 http://www.wpro.who.int/NR/rdonlyres/A1F18401-BE93-44EF-9F76-55DDA2C6E12D/0/hped_en.pdf – Accessed 27 July 2007

and Social Security in Hebei examined the health of rural workers. They found that 40% of rural workers continued to work when sick.⁵

According to the Office of the WHO Representative in China and the Social Development Department of China State Council Development Research Centre, the poor face “major social, financial and cultural obstacles” in accessing health services in China.⁶

According to Shanyan Lin, President of the Chinese Society of Nephrology, hemodialysis⁷ and peritoneal dialysis⁸ are widely used in China:

...In the relatively economically developed areas of China, especially in the major cities, the incidence of ESRD is programs is currently estimated to be 102 cases per million of the population. Fifty-five percent of these patients are currently receiving hemodialysis or treatment with continuous ambulatory peritoneal dialysis (CAPD). In small centers where there are fewer special facilities, peritoneal dialysis is more commonly employed. In larger cities, because of the relatively high cost of imported fluid for CAPD, which means that the costs are roughly equivalent, hemodialysis is now and is likely to remain the predominant mode of treatment. At the present time about 80% of patients are treated by maintenance hemodialysis and 20% by CAPD. There is universal use of twin bag systems for CAPD in the major centers.

The financial support for dialysis comes mainly from Government sources. Government employees, those who work for Government owned enterprises and those who can obtain enrolment in the Government Health Insurance Program are able to gain reimbursement for the costs of their treatment. In the large cities, in Shanghai for instance, more than two thirds of the patients with ESRD are available to afford the cost of dialysis by obtaining financial support from a variety of sources. Due to the increasing number of ESRD cases and hence the increasing expense, the upper limit of financial support for the cost of dialysis has been capped by the Government in most areas of the country. The average cost for hemodialysis in Shanghai is \$US7500 per patient per year and US\$9600 for peritoneal dialysis. These rates are clearly much cheaper than those available in more developed nations. Nonetheless, this is still a heavy burden on the public health and social security systems.

The principal reason for non-acceptance onto dialysis programs is the inability to afford treatment for those who do not have access to insurance programs. It is now quite rare to find areas in China where dialysis is not available for lack of trained staff and facilities.⁹

⁵ Xiewang 2006, ‘China’s Unfair Distribution of Health Care Resources’, *The Epoch Times*, 7 February <http://en.epochtimes.com/news/6-2-7/37811.html> – Accessed 27 July 2007

⁶ Office of the World Health Organisation Representative in China & Social Development Department of China State Council Development Research Centre 2006, *China: Health, Poverty and Economic Development*, June, p.16 http://www.wpro.who.int/NR/rdonlyres/A1F18401-BE93-44EF-9F76-55DDA2C6E12D/0/hped_en.pdf – Accessed 27 July 2007

⁷ “During hemodialysis, a machine acting as an artificial kidney cleans your blood” (<http://www.kidney.org.au/LinkClick.aspx?fileticket=dUT8LoLhk6E=&tabid=78&mid=882>)

⁸ “Peritoneal dialysis allows the blood to be cleaned inside your body” (<http://www.kidney.org.au/LinkClick.aspx?fileticket=RE%2bCT%2f8%2fu0s%3d&tabid=78&mid=882>)

⁹ Lin, Shanyan 2003, ‘Nephrology in China: A great mission and momentous challenge’, *Kidney International*, Vol. 63, Issue S83, February, pp.S108-S109

According to Chen Jianghua, Professor of the Nephrology Centre at the First Affiliated Hospital of Zhejiang University, hemodialysis costs between 70,000 *yuan* (\$US8,750) and 100,000 *yuan* (\$US12,500).¹⁰

According to Lin, “about 5000 patients receive renal transplantation every year”. Lin notes that “an inability to pay for the procedure is still a barrier to transplantation.” Lin continues:

While most of the recipients of renal transplants are young, an inability to pay for the procedure is still a barrier to transplantation. For those with access to medical insurance, reimbursement of \$100,000 Yuan (US\$12,000) is available for the first year of treatment following transplantation. Cyclosporine, which is locally produced, together with mycophenolate mofetil and prednisolone constitute the most widely used immunosuppressive regime, but tacrolimus and sirolimus also are available for use, and the cost of these agents can be reimbursed also. Monoclonal antibiotics are available, but the cost of their use is not reimbursed.

Renal transplantation units are not Government run, and a number of private clinics are being established to provide the necessary services. The principle source of organs is from brain dead cadavers. Signed consent is required from the closest relative and in the case of renal donation following execution, from the donor and the closest relative.¹¹

According to Chen Jianghua, Professor of the Nephrology Centre at the First Affiliated Hospital of Zhejiang University, “a patient may only spend 40,000 *yuan* (5,000 US dollars) on a kidney transplant and other services when being hospitalised”.¹² A kidney transplant costs between 40,000 and 60,000 *yuan* (\$US4,800 and \$US7,200) in China. This is affordable for foreigners from developed countries but a “heavy burden” for most Chinese people.¹³

Treatment of failed asylum seekers in China

In March 2007 DFAT responded to questions concerning possible treatment by the Chinese authorities of failed Chinese asylum seekers who were named in the media and who might be imputed to be a Falun Gong practitioner, underground Christian or political dissident in the following terms:

...Our impression is that these days Chinese authorities view seeking to remain in Australia through a protection application as more commonplace behaviour rather than a sign of political disloyalty. Authorities could, however, treat the person more severely if he or she was quoted publicly as criticising China’s regime or senior leadership in the media.¹⁴

¹⁰ ‘Lack of donated kidneys afflicts Chinese patients’ 2006, *People’s Daily*, source: *Xinhua*, 15 December http://english.people.com.cn/200612/15/eng20061215_332687.html – Accessed 30 July 2007

¹¹ Lin, Shanyan 2003, ‘Nephrology in China: A great mission and momentous challenge’, *Kidney International*, Vol. 63, Issue S83, February, p.S110

¹² ‘Lack of donated kidneys afflicts Chinese patients’ 2006, *People’s Daily*, source: *Xinhua*, 15 December http://english.people.com.cn/200612/15/eng20061215_332687.html – Accessed 30 July 2007

¹³ ‘New rule to regulate organ transplants’ 2006, *People’s Daily*, source: *China Daily*, 5 May http://english.people.com.cn/200605/05/eng20060505_263202.html – Accessed 30 July 2007

¹⁴ DIAC Country Information Service 2007, *Country Information Report No. CHN8990 – CIS Request CHN8980: China: Publication of client details*, (sourced from DFAT advice of 20 March 2007), 22 March.

FINDINGS AND REASONS

The applicant travelled to Australia on a valid Chinese passport and claims to be a national of China. The Tribunal accepts that the applicant is a national of China and has assessed his claims against China as his country of nationality.

The applicant claims that he requires medical treatment which he will not receive in China due to his membership of a particular social group, variously defined, and that this amounts to a denial of human rights and persecution as defined in the Convention. The applicant claims that he is unable to pay for such treatment and for that reason the government will allow him to die.

The Tribunal accepts, on the basis of the applicant's own evidence and the report from the Hospital, the evidence relating to the applicant's medical condition. The Tribunal accepts that the applicant requires specialized ongoing medical treatment and an organ transplant. The Tribunal also accepts that the denial of medical treatment, particularly in circumstances where such denial may lead to death, may amount to serious harm and persecution. The question for the Tribunal to determine is whether there is a relevant social group of which the applicant is a member. If so, the next question for the Tribunal is whether the persecution that the applicant fears is for reasons of membership of the group.

The definition of "particular social group" is wide and flexible. In the 1992 Federal Court case *Morato v MILGRA*, Justice Lockhart stated:

The interpretation of the expression "particular social group" calls for no narrow definition, since it is an expression designed to accommodate a wide variety of groups of various descriptions in many countries of the world which, human behaviour being as it is, will necessarily change from time to time. The expression is a flexible one intended to apply whenever persecution is found directed at a group or section of a society that is not necessarily persecuted for racial, religious, national or political reasons.

...

In my opinion for a person to be a member of a "particular social group" within the meaning of the Convention and Protocol what is required is that he or she belongs to or is identified with a recognizable or cognizable group within a society that shares some interest or experience in common. I do not think it wise, necessary or desirable to further define the expression. ((1992) 39 FCR 401 at 416.)

The meaning of the expression "for reasons of ... membership of a particular social group" was considered by the High Court in *Applicant S*, where the following summary of the principles for the determination of whether a group falls within a particular social group:

First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, [*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225] per Dawson J at 242, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". (*Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ.)

In the same case, Justice McHugh emphasised the necessity of the group being "cognisable within the society":

A number of factors points to the necessity of the group being cognisable within the society. Given the context in which the term “a particular social group” appears in Art 1A(2) of the Convention, the members of the group, claimed to be a particular social group, must be recognised by some persons - at the very least by the persecutor or persecutors - as sharing some kind of connection or falling under some general classification. That follows from the fact that a refugee is a person who has a “well-founded fear of being persecuted for reasons of ... membership of a particular social group”. A person cannot have a well-founded fear of persecution within the meaning of Art 1A(2) of the Convention unless a real chance exists that some person or persons will persecute the asylum-seeker for being a member of a particular class of persons that is cognisable - at least objectively - as a particular social group. The phrase “persecuted for reasons of ... membership” implies, therefore, that the persecutor recognises certain individuals as having something in common that makes them different from other members of the society. It also necessarily implies that the persecutor selects the asylum-seeker for persecution because that person is one of those individuals. (*Applicant S v MIMA* (2004) 217 CLR 387 at [64] per McHugh J)

Although widely drawn, the concept of persecution is not to be used in defining “particular social group.” Justice McHugh stated in the *Applicant A* case:

The concept of persecution can have no place in defining the term “a particular social group”. ... Allowing persecutory conduct of itself to define a particular social group would, in substance, permit the “particular social group” ground to take on the character of a safety-net. It would impermissibly weaken, if it did not destroy, the cumulative requirements of “fear of persecution”, “for reasons of” and “membership of a particular social group” in the definition of “refugee.” (*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 242 per McHugh J.)

However, Justice McHugh considered that the actions of the persecutors may serve to identify or cause the creation of a particular social group in society:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.”(*Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 264 per McHugh J.)

The question of whether or not a particular social group shares a unifying characteristic that makes them “cognisable in society” must be considered separately from whether or not its members share persecution in common. The issue is whether there is something other than persecution which makes the group cognisable as a particular social group. Further, it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reason of the membership of the particular social group

The Tribunal will now consider the applicant’s position in the present case. Whether the group to which an applicant claims to belong is a “particular social group” for the purposes of the Convention is a question of fact for the Tribunal to determine.

There are several particular social groups identified by the applicant. The applicant refers to the particular social group comprising the Chinese citizens who are unable to pay the Chinese government for their medical treatment, a particular social group comprising rural Chinese

from the provinces where the government has failed to provide adequate medical care and protection for its citizens, a particular social group comprising of well-educated Chinese unable to access medical treatment, a particular social group comprising people from lower social groups with no societal links or unemployed who cannot access medical treatment and a particular social group comprising overseas Chinese with health problems who will be unable to access treatment. With respect to the latter, the Tribunal is of the view that the group must be described in relation to the country where the persecution is feared and, if the applicant were to return to China, he will no longer be a member of a group of overseas Chinese.

The Tribunal acknowledges that there may be other ways in which particular social groups may be identified having regard to the applicant's circumstances. The defining characteristic in all the social groups suggested by the applicant relates to the applicant's need for medical treatment and the unavailability of such treatment in China.

The three-point test announced by the High Court in *Applicant S* poses three issues for determination by the Tribunal:

- is the group identifiable by a characteristic or attribute common to all members of the group.
- are the characteristic or attribute common to all members of the group the shared fear of persecution.
- does the possession of that characteristic or attribute distinguish the group from society at large.

The applicant submits that the characteristic or attribute common to all members of the group is the need for medical treatment and the unavailability of such treatment in China, whether due to financial circumstances of the members of the group, the social status, employment, societal links or the government's failure to provide the appropriate level of medical care.

The independent country information, cited above, suggests that the availability of medical treatment for rural residents of China is limited, that the average treatment may cost the annual income of a rural resident and that up to a quarter of the rural population forego medical treatment due to expense. Similar information emerged with respect to the availability of specialised treatment in China, both in rural areas and larger cities. While the treatment is available, it is the cost of the treatment that precludes people from being able to access it.

While this information supports the applicant's claim that he may be unable to access the requisite medical treatment, it also indicates that the possession of the common characteristic (such as the need for medical treatment and the lack of funds) does not distinguish the group from the society at large. However the particular social group is defined, the Tribunal finds that the common characteristic or attribute shared by the members of the group do not distinguish the group from the society at large. The Tribunal finds that any of the groups identified by the applicant – or otherwise identifiable on the basis of the applicant's characteristics – do not meet one of the fundamental elements of the test put forward in *Applicant S*. The Tribunal finds that the applicant is not a member of a particular social group or that he will face persecution due to such membership. No other Convention reason has been suggested by the applicant and is apparent from his circumstances.

The Tribunal has also considered whether there is a well-founded fear of persecution for a Convention reason. This involves an inquiry as to whether the applicant faces a real chance of serious harm for the essential and significant reason of belonging to any of the particular social groups (for example, the Chinese citizens who are unable to pay the Chinese government for their medical treatment or rural Chinese from the provinces where the government has failed to provide adequate medical care and protection for its citizens) Although it is possible that the lack of access to affordable health and welfare service may result in “serious harm,” the Tribunal considers that this is not because of “systematic and discriminatory” conduct (or inaction) by the Chinese authorities.

The independent information referred to above indicated that there are services available to the Chinese nationals, residing both in cities and in rural China, and that the availability of such services is not contrary to the international standards. The Tribunal does not accept that the evidence establishes that the applicant, as member of any of any identifiable particular social groups will be denied services, assistance or benefits for reasons of his membership of the particular social group, or that they will be denied in the future for such a reason.

The Tribunal does not accept that the essential and significant reason for inaction against the applicant would be that he is a member of a particular social group of Chinese citizens who are unable to pay the Chinese government for their medical treatment or rural Chinese from the provinces where the government has failed to provide adequate medical care and protection for its citizens The Tribunal therefore does not accept that any harm which might result if the applicant were to return to China would be for the essential and significant reason of the applicant’s membership of a particular social group or for any other Convention reason.

The applicant stated that the Chinese embassy was aware of his plight. While it is not apparent from the evidence that the Chinese government is aware of the applicant’s application for asylum in Australia, the Tribunal has considered whether such knowledge, if it existed, could lead to the applicant suffering serious harm for a Convention reason. However, the information cited above indicates that the Chinese authorities do not treat attempts to seek asylum overseas as a sign of disloyalty and there is nothing to suggest that the applicant may be perceived as being an active campaigner against the Chinese government. The Tribunal finds that there is no real chance that the applicant will suffer serious harm as a result of his application for the protection visa in Australia, should such application become known to the Chinese authorities.

The applicant claimed that they spoke to staff at the Chinese embassy who refused to assist him and that this in itself amounts to the failure of state protection and a denial of human rights. The applicant also submitted that the lack of adequate medical care in China constitutes a denial of human rights. The Tribunal is of the view that the denial of human rights per se, if such was established, does not give rise to protection obligations under the Convention. The Tribunal has considered above the applicant’s claims in terms of the Convention definition.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

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