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Refugee Review Tribunal of Australia

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DECISION RECORD

RRT CASE NUMBER: ←1203370 →

DIAC REFERENCE(S): CLF2011/169075

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Pamela Summers

DATE: 15 January 2013

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

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration and Citizenship for the visa on [date deleted under

s.431(2) of the *Migration Act 1958* as this information may identify the applicant] October 2011.

3. The delegate refused to grant the visa [in] February 2012, and the applicant applied to the Tribunal for review of that decision.

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] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (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.

Protection Visa claims made to the Department

20. In his application, the applicant wrote that he was a [age deleted: s.431(2)] year old man from Fujian Province. He wrote that he could speak, read and write in Mandarin and was Han Chinese. He did not give details of any religion. He gave a single residential address in [Village 1], [Town 2], [City 3] as his residence from [date deleted: s.431(2)] to August 2007 which was when he departed China. He completed 12 years of schooling, finishing at [school details deleted: s.431(2)], [City 3] in July 2007. He stated that after arriving in Australia he studied at [institution deleted: s.431(2)] for a year then at [institution deleted: s.431(2)]. He stated that his occupation before

departing China was “student” and he gave no details of any employment in China. His divorced parents and one older [brother] remained in China.

21. With his application he provided a partial photocopy of his Chinese passport issued in [2006].

22. The applicant provided a statement of his claims in Chinese with an English translation which he signed and dated 28 August 2011, stating as follows:

I come from Fujian of China. I am applying for a Protection Visa because of religious reason. I was persecuted by Chinese local government. Then I resignedly said goodbye to my family and came to Australia.

I had no belief as a child. I happened to become a Christian under God's guidance. One of my aunts believed God. My mother did not accompany me much and it was my aunt who looked after me. But soon she developed heart disease. I cried when I learnt she had heart disease. She comforted me and asked me not to cry because God must protect her. It was in May of 1999 when Dr talked to her about her situation. Doctor told her that the cost of heart surgery was very high and the surgery was very risky. She could live for one year without the surgery. But my auntie said she was willing to try it out because she believed that God would protect her. In June of 1999, she undertook the surgery. The surgery took about 6 hours. I was crying while waiting outside of the surgery room. Even doctor was surprised that surgery was successfully finished. My aunt recovered very well in those days. I sillily asked her why did her chose to accept the surgery since the rate of success was very low. She answered that she believed Jesus Christ; if she died, it was still a happy thing to enter the eternal world. She also told me that God love us; our lord Jesus die on cross to cleanse our sins. He resurrected in 3 days. Whoever believes in him must have eternal life. Then I often followed her to join in various church activities. All are God's child in church and we praise God for his Glory. We felt complete in heart.

In April 2006, [Sister A] prayed to our Lord Jesus because something happened in her home. My aunt took me and other brothers and sisters to [Sister A]'s home for prayer meeting. One day we were praying in [Sister A]'s home. Suddenly a lot of policeman broke in. They said we were illegally gathering. All were taken to police station and forced to be detained. I was also arrested. They kept on questioning me in police station. I prayed constantly. I prayed to God, our father, to strengthen my faith to follow Jesus Christ. I was detained for one week. My parents look for relationship to bail me out with a fine of 20,000 RMB and the reason that I was still a teenager, knew nothing, and was still studying at school. The police warned me not to join in such private meeting again when I was released. Otherwise they would arrest me again. I went to school after I was set free. The police also asked teachers in school to observe my behaviour. In school I was asked from time to time to admit that I was wrong. They kept on infusing atheism theory into me till I agreed to refuse God. I had enough with such a life which I lived in fear of being arrested any time.

I know that Australia is a country having religious freedom. I can only glorify God's name here. Then I asked my family to apply for a visa to Australia through relationship. After I came to Australia, I heard from my family that the police harass my family with different excuses because of me. They lived under monitor. Therefore

I sincerely hope that immigration officer can let me continue to live in Australia so that I can freely follow God. May God be with you.

23. The delegate invited the applicant to attend an interview to discuss his claims on 9 February 2012 however the applicant did not attend the interview. The delegate decided to refuse the Protection Visa application on 9 February 2012. The applicant applied to the Tribunal for review of that decision on 14 March 2012.

The Tribunal hearing on 3 September 2012

24. The applicant appeared before the Tribunal on 3 September 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

25. The applicant was represented in relation to the review by his registered migration agent who did not attend the hearing.

26. Invited to make some opening remarks about the reasons he fears harm on return to China, the applicant said that, as he wrote in his statement, in April 2006 he was at [Sister A]'s house where he was arrested by the police for no good reason. He said that the police put him in a place like a detention centre and asked him why he joined this illegal gathering. The police tried to stop him going to this local church. The applicant said that the authorities were depriving him of his right to believe in God. His family bailed him out and his family then asked him not to go to the church gatherings but he is a person who believes in God so...[implying that he continued to attend]. The authorities asked his teachers also to keep an eye on him. The Tribunal asked what the applicant feared would happen if he returned to China now. The applicant said that he didn't know but because of what happened to him in China he has this fear in his heart and if he goes back he will feel like he is being monitored.

27. Concerning the making of his application for a Protection Visa, the applicant said that he did have someone to assist him in making the application to the Department but it turned out that that person had no registration as a migration agent. The applicant said that he typed his statement of claims in Chinese and the person that assisted him translated the statement into English. The applicant said, when asked if he understood and was satisfied with the content of his statement, that this was indeed his own statement.

28. The applicant said that he arrived in Australia in August 2007. He does not have any relatives in Australia. Concerning whether he had a Student guardian as he arrived in Australia when he was [age deleted: s.431(2)] years old, the applicant said that it was arranged through a student agency. His family went through a connection to get his visa for Australia. The applicant confirmed that he was still residing in [address deleted: s.431(2)]. Concerning his marital status, the applicant said that he is single; he used to be in a de facto relationship but is not in one any longer.

29. Concerning his family in China, the applicant said that he has his parents and his elder brother there. The Tribunal asked if the applicant's parents are divorced as indicated in his Protection Visa application. The applicant said this was incorrect and that his parents are still married. He said

that his elder brother is [detail deleted: s.431(2)]. The aunt mentioned in his written statement of claims also remains in China.

30. The applicant lived in [Village 1] in [City 3]. He lived at the address given on his application form for about 10 years before coming to Australia. The Tribunal asked who lived there with him. The applicant said that both his parents and his brother have "gone out" now and don't live at that address any more; that is, his parents have gone to another province, probably to Hubei Province, but he didn't ask them exactly where they were. His aunt lived less than 100 metres from his house in his village. He said he thought that his aunt still lived in the village.

31. Concerning whether he keeps in touch with his family, the applicant said that he just keeps in touch with his parents by telephoning them sometimes. He thought the last time he had spoken to his parents was a couple of weeks before the hearing. He is able to telephone them on their mobile phone number.

32. Of his schooling the applicant said that he was at [school details deleted: s.431(2)] in [Town 2] until [date deleted: s.431(2)]. He stayed at school in the dormitory from Monday to Friday and returned home each weekend. After that, he attended [school details deleted: s.431(2)] until July 2007. He stayed at school there too during term time.

33. The Tribunal put to the applicant that on his Protection Visa application form, he did not indicate that he had a religion; that is, he left the question blank. The applicant said that the form was completed by the person who helped him, and that that person did not give him the pages to fill in himself. He said that he did indeed have a religion and that it is Christianity.

34. Concerning how he first became involved with Christianity, the applicant said that in May 1999 his aunt took him to a meeting which was a house church gathering. His aunt used to attend regularly and she sometimes took him along also. The Tribunal asked whether the applicant attended regularly. The applicant said that it was the local church but they don't hold meetings on a regular basis. Concerning which day of the week the meetings were held, the applicant said he was not sure; sometimes there was a meeting on a Saturday or Sunday but some weekends there was no meeting at all.

35. Asked to estimate how many times he had attended local church gatherings between May 1999 and April 2006 when the incident happened at [Sister A]'s house, the applicant said maybe 30 or 40 times. Most of the times that he attended were Saturdays because on Sundays he would have to go back to school. He said when asked that the meetings usually commenced at 6:30 p.m. Concerning how long they lasted, the applicant said they mostly lasted 6 hours. He then added that they sometimes went for one or two hours only. The meetings were held in homes, that is the homes of other church brothers and sisters. The meetings were not always held in his village but also in surrounding villages. He said when asked that the meetings were never held at his aunt's house because he went with her. The Tribunal asked how many people usually attended the gatherings. The applicant said he was not sure; he thought probably more than 15. He said when asked that there were other children who attended the gatherings. There was no leader at the gatherings; the brothers and sisters would just contact each other to set up arrangements for the next gathering.

36. Concerning what happened at gatherings, the applicant said that they prayed, read the Bible and sang. The Tribunal asked why the applicant liked to attend these gatherings if they were long and not very exciting. The applicant said that he went there to listen. The applicant said that the group read from the Bible and also had another book, the Holy Word for Morning Revival. He had his own copies of the books. His parents did not attend and did not approve of the gatherings because they are not Christian. His older brother is not Christian either. The Tribunal asked why the applicant's aunt did not take the applicant's older brother to the gatherings but took only the applicant. He responded that his brother is [years] older than him and did not like those gatherings very much. The Tribunal asked the applicant why he liked the gatherings. The applicant said it was because it made him feel good.

37. The Tribunal asked if there was a registered church in the applicant's village or in [Town 2]. The applicant said that he didn't think so. The Tribunal asked if there were any church buildings with crosses on them in the village or the town. The applicant said that there were but he thought these were called Catholic churches.

38. Concerning what happened when the police came to the gathering at [Sister A]'s house in April 2006, the applicant said that he went there with his aunt and then the police burst in because maybe someone reported the gathering. The police said it was an illegal gathering. This was maybe after 8 p.m. He said that it was on [a particular day in] April 2006. More than 15 people were present and some of them were children. About 10 police came and took them all to the detention centre in [Town 2]. He thought it was at the police station there but he does not know the address. It took about 7 or 8 minutes to drive there. The police asked him why he participated in the illegal gathering. He answered that it was because he believed in God. The Tribunal asked how long the applicant was detained. He answered that he was kept for 2 or 3 days. Concerning whether all the others at the gathering were also detained, the applicant said that they were.

39. The Tribunal asked whether the applicant's aunt was detained. The applicant said that she probably was. He said that all the males were kept together but the females were in a different part of the centre. The Tribunal asked when the applicant next saw his aunt after being released from the detention centre. The applicant said that he saw her after his release. His father paid money (RMB 20,000) through a friend of his to get the applicant out of detention. The applicant did not know when the others from the gathering were released.

40. The Tribunal asked if the applicant was mistreated while kept in detention. The applicant said that they stopped him from sleeping; for example, just as he was about to fall asleep they woke him up to talk to him about atheism. The Tribunal asked if this meant that the authorities entered the cell where the applicant was kept at night with other men and when he was about to sleep they woke him up. The applicant said they woke him up and said to him that he must not believe in this religion in the future because it was against the law.

41. The Tribunal asked if the applicant was asked to sign anything by the authorities. The applicant said 'yes', that he was required to write an undertaking. The Tribunal asked if the applicant or his family received any documentation from the authorities either when he was detained (to notify his

family) or when he was released. The applicant said that there was no documentation. His family were made aware that he had been detained because [Sister A]'s neighbours would have heard the noise when the police came and would have spread the word in his village. When he was released, the authorities just told him that he was not allowed to attend religious gatherings in future and that if he participated he would be arrested again and he should view this as an opportunity.

42. His parents came to collect him when he was released from detention. The Tribunal asked if he required any medical attention after his release. The applicant said he was so stunned and scared that he just went home.

43. The Tribunal asked whether the applicant's aunt was mistreated while detained. The applicant said that he didn't know; he didn't dare to ask her. The applicant said that he didn't want to talk about it.

44. Given the authorities' warnings to him, the Tribunal asked if the applicant continued to attend house church gatherings after his release from detention. The applicant said that he did continue to attend but secretly and that he was feeling very scared. The Tribunal asked if the applicant knew if the group was still meeting now. The applicant said that he did not know because he had not been in touch with his aunt. The Tribunal asked whether there were any problems for the church group during the period from April 2006 after they were released from detention to August 2007 when the applicant left to go to Australia. The applicant did not answer this question but said he was so afraid of being arrested again that he asked his family to get him out of China. The Tribunal asked again whether he heard of any problems for the church group during the year or more that he was there before leaving for Australia. The applicant said that he thought everybody else in the group was scared too and so there were not very many meetings. He was also studying at that time so he didn't go often either.

45. The Tribunal put to the applicant that he asked his family to get him out to go for study in Australia after being detained in April 2006, and yet it was not until the end of July 2007 that he obtained his visa for Australia. The applicant said that he handed in his papers a long time before that but the agency did not lodge it for him until then.

46. The Tribunal asked whether the applicant had said earlier in the hearing that his church in China was "the local church". The applicant said this was so. The Tribunal asked whether the Chinese authorities called that church by any other name. The applicant said he didn't know. The Tribunal asked if there was anything different about his church from other kinds of family church. The applicant said he did not know.

47. The applicant said when asked that he was baptised in China in 2005. This took place in the house of a church brother or sister in some other village. His whole body was lying down in water. Concerning the meaning of baptism, the applicant said that it was to wash off one's sins and to start a new life. The Tribunal asked if Jesus was baptised. The applicant said that he was but he could not say when asked by whom he had been baptised. By way of explanation of this gap in his knowledge, the applicant said that he just learnt Christianity from books. Asked what books he learnt from, the applicant said that 'they' gave him the books, and he did not know, but it could have just been the Bible.

48. The applicant confirmed that he did have his own Bible in China and that he had brought it with him to Australia. He said it was at home. The Tribunal asked what words it had on the cover. The applicant said it just said, "Bible" The Tribunal asked if there was anything different about the Bible used in his church compared with the Bible used in other places. The applicant said he didn't know because he only went to this church. The Tribunal asked whether the Bible is divided into books or chapters. The applicant said that it is and he was able to name the books of Matthew, Mark, Luke and John. He said that he did not know of any other book or chapter names. The Tribunal asked if he had heard of the Old and New Testaments. The applicant said that he had but he did not know if his Bible had both of these in it, but thought perhaps it was only the New Testament.

49. Referring to the applicant's statement of claims, the Tribunal asked in what way the applicant's family had been harassed since his departure. The applicant said that his parents told him 'they' sent someone to ask if there was any news of the applicant. The Tribunal asked what his parents told the police about him. The applicant said they just told the authorities some lies because they didn't want to tell his whereabouts. The applicant thought that if his parents said that he was overseas studying, the authorities would just ask when he would be getting back to China.

50. The Tribunal asked the applicant what his beliefs were as a Christian. The applicant said he believes in the washing away of sins because we are slaves to sin and he believes in starting a new life. The Tribunal asked what the applicant believed about Jesus Christ. The applicant said that Jesus Christ was crucified because he wanted to wash away people's sins. The Tribunal asked what the applicant knew about the life on earth of Jesus Christ. The applicant said he could not say anything about the life of Jesus Christ because he was only just reading books. The Tribunal put to the applicant that if they were religious books, they must have talked about the life of Jesus. The applicant said that when they were communicating with each other, they read off the books. The Tribunal asked if the applicant remembered anything that he read. The applicant said he did not because his memory had never been good.

51. The Tribunal asked if the applicant knew who were the main figures in the history of the local church. The applicant replied that they were Watchman Nee and Witness Lee. Asked what their role was, the applicant said that Witness Lee wrote the Holy Word for Morning Revival but he hadn't read anything of Watchman Nee. The Tribunal asked if the Holy Word for Morning Revival was just one book with that title. The applicant said it was just one book. Asked if he has a copy of it here in Australia, the applicant said that he does; he bought it at church at a primary school next to [Suburb 4] shopping centre where he goes for meetings on Sundays. He said he did not know what street it was in, but it is next to the shopping centre because he usually parks under the shopping centre and walks there. The Tribunal asked if it is in a park and the applicant agreed that it was. The Tribunal asked if the building might be a community centre rather than a primary school. The applicant said that the others told him it was a primary school.

52. He first started going to that church about two years after his arrival in Australia. His friend took him there. The Tribunal asked if he started around August 2009. The applicant said he started roughly in 2009. Concerning

whether he has been attending regularly since then, the applicant said that sometimes he has to work on a Sunday and can't go. The Tribunal asked why the applicant did not find a church in the first two years he was in Australia. The applicant said he did not know where a church was until he heard from a friend.

53. The applicant said when asked that he last attended about three weeks ago. The Sunday services start at 10am and usually finish at 12 or 12.30pm. At the meetings, some people pray then they sing hymns and read the Holy Word for Morning Revival. Asked whether anyone is in charge there to direct the worship, the applicant said it is [Brother B]. Concerning whether [Brother B] has a particular title, the applicant said they just call him [Brother B]. The applicant did not know his last name. He is Chinese. Of whether it is a Mandarin speaking congregation, the applicant said that there are some Westerners who sing in English and there are some Chinese who do it in Chinese. Asked if the praying is in Chinese, the applicant said that it is. The Tribunal asked if the reading from the Holy Word for Morning Revival is just one person standing up to read to everyone else. The applicant said this was so. Sometimes it is a Westerner who reads in English and someone translates for them.

54. The Tribunal asked the applicant to describe what happens when they pray. The applicant said they bow their heads and everyone speaks saying their own prayers. The Tribunal asked if they just pray by themselves or if they pray with a partner or a group. The applicant said that he has his eyes closed. He did open his eyes to see what everyone else was doing. He said everyone was saying their own prayers but he did not listen in. The Tribunal asked the applicant if he could give an example of something he might pray about and what kind of words he would use. The applicant said he said words like, "do not let me encounter what happened in China again" and "God give me blessing".

55. The Tribunal asked if the applicant knew the prayer that Jesus Christ taught his followers to say. The applicant said he did not know it; sometimes he arrived at 10:30am so perhaps they had already finished.

56. The Tribunal asked if the applicant knew anything about the Lord's Table or Holy Communion. The applicant said he did not know.

57. The Tribunal asked if he had heard of the term, "God's Economy" The applicant said he did not know it. He only read the Holy Word for Morning Revival. The Tribunal asked if he remembered anything he read in that book the last time he went to the church three weeks before. The applicant said that they just stand up, one after another, and say, "turn to this particular page" and then they turn to that page and read. The Tribunal asked if there are quotations from the Bible in the Holy Word for Morning Revival book. The applicant said he did not know. The Tribunal asked if the applicant could himself remember any Bible verse or anything from the Bible. The applicant said he did not know; his memory was never good...he just read the book.

58. The Tribunal put to the applicant that he had said that Jesus Christ was crucified to wash away our sins. The Tribunal asked if the applicant knew who had crucified Jesus. The applicant said he did not know.

59. The Tribunal asked if the applicant knew the term "Pray Reading" (*dao du*). The applicant said he did not know it.

60. The Tribunal asked if the applicant would consider worshipping in a registered church if he returned to China. The Tribunal added that there are registered churches in China which are not Catholic churches. The applicant said he would not because the Bible used in the local church is different from that of other churches. The Tribunal asked in what way the Bible was different. The applicant said that 'that's what they all say'. The Tribunal asked if the applicant would prefer to attend a church with the Bible he is used to. The applicant said, 'yes'.

61. The Tribunal asked why the applicant waited more than four years after his arrival in Australia before making his Protection Visa application. The applicant said that he heard from others that refugee protection was available in Australia. The Tribunal asked if the applicant did not know about refugee protection until October 2011. The applicant said that he knew about it and wanted to lodge his application in August 2011 but it was the migration agent who delayed lodging the application until October 2011. The Tribunal said that it could see that the applicant signed his statement at the end of August 2011. The Tribunal put to the applicant that even if it was August 2011, it was still four years after he arrived in Australia. The Tribunal said that he had been mixing with other people from the Chinese community in Australia including attending church since 2009. The Tribunal said that it was hard to accept that he would not have heard about refugee protection until 2011. The Tribunal said it thought that if he were genuinely in fear of persecution on return to China he would have taken the first available opportunity to seek Australia's protection after arriving here to avoid having to return to China. The applicant said that people did talk to him about Protection Visas but didn't tell him about migration agents and he didn't have any money at that time to do these things.

62. The Tribunal asked if the applicant was in immigration detention at any point. The applicant said he was in detention in March 2009 for around two weeks. He went to Melbourne to work and was found working in excess of his entitlements. The Tribunal asked if the immigration officers asked him at the time he was being put in detention whether he had reasons for fearing returning to China. The applicant said that he was asked that but he doesn't remember what he said; he was just conscious that his parents spent a lot of money getting him to Australia. He was afraid that if it happened again in China he would feel like he was under police surveillance. He did not tell the immigration officers that; he was a student at that time and working.

63. The Tribunal asked the applicant why he did not attend the interview to which the delegate invited him in relation to his protection visa application. The applicant claimed that the previous migration agency did not tell him. The current agency then told him about that interview but he had a fever that day.

64. The Tribunal said it had some concerns about the applicant's evidence; the Tribunal had concerns about whether the applicant was telling the truth in claiming to be a Christian and about whether he was telling the truth in relation to being a member of the Local Church in particular. The Tribunal said it would outline its reasons and provide an opportunity for the applicant to comment.

65. The Tribunal put to the applicant that if he had been thirty or forty times to the family church gatherings in China and if he had been attending the Local Church here in Australia since 2009, it would have expected that the

applicant to know more about Christianity than he had been able to tell the Tribunal at the hearing. The Tribunal put to the applicant that he had been able to say very little about Christian beliefs or about the life of Jesus Christ. The applicant commented that it was all from reading (that is, what he knows is only from what he has read). The Tribunal put to the applicant that for someone to consider themselves a believer and seek baptism in the faith, it would have expected that the person would understand and know what they believed in, and be able to explain to another person what it means to be a Christian and what being a Christian meant in their own life. The applicant did not comment.

66. The Tribunal put to the applicant that he did not seem to be familiar with the main beliefs and practices of the Local Church. He had been able to name the founders of the Local Church and to say that the Bible is different from that used in other denominations, but was not able to say what was different about the Bible or to comment on the meaning of the Lord's table/Holy Communion or God's economy or pray reading and didn't know what other name the Chinese authorities might give to the Local Church. The Tribunal said that these things suggested that if he was involved with a church in China it was not the Local Church. The applicant said that the Local Church are *huhan pai* (the Shouters). The applicant said that when the Tribunal asked about other names, he thought the Tribunal meant that whether the church had different names in different places. He said he did not hear the Tribunal correctly when it asked whether the Chinese authorities had a different name for his church. The Tribunal said, leaving that issue aside, that the applicant still did not appear familiar with beliefs and practices of the Local Church including the practice of pray reading which the Tribunal had been told all Local Church believers would be familiar with.

67. The Tribunal put to the applicant that, even though he claimed to be baptised, he appeared to know so little about Christian doctrine that it seemed that if he wished to pursue an interest in Christianity he could do so in a registered church on return to China. The applicant said that Government churches like Catholic churches and some Buddhist temples don't believe in Jesus. The Tribunal put to the applicant that there are many registered churches in China, both Protestant and Catholic, where Chinese Christians worship Jesus. The applicant indicated he was surprised to hear that they believe in Jesus.

68. The Tribunal put to the applicant that he had not provided any evidence of his attendance at the Local Church in Australia whereas other applicants had brought to the Tribunal witnesses or documentary evidence from the church about their regular attendance and sometimes brought their Bible and other holy books to show the Tribunal. The applicant said he did not know this was required. The Tribunal said it was not 'required' a such but the fact that the applicant did not volunteer any evidence of his attendance in combination with his low level of knowledge of the Christian faith contributed to the Tribunal's doubts about the credibility of his claims in relation to his religion. The applicant said he was only reading. Even the Holy Word for Morning Revival was just for reading. Asked to explain, the applicant said that he just reads out what is written then he lets the whole group feel it. The Tribunal asked whether the applicant had learnt anything himself without reading it from the book. The applicant said he had not.

69. The Tribunal put to the applicant that it had doubts about the applicant's claims that the police raided a church gathering he was present at in April 2006; it had doubts as to whether that event actually occurred. The Tribunal put to the applicant that he had said this happened on [a particular day in] April 2006 and that it was a Saturday night. The applicant said this was true. The Tribunal put to him that [the particular day in] April in 2006 was a Friday. The applicant said it was when he finished school and was going home and his aunt asked him if he would like to go to the meeting.

70. The Tribunal put to the applicant that he told the Tribunal earlier that he was detained at the police station or detention centre for 2 or 3 days but in his written statement he claimed that he was detained for a week. The applicant was surprised to hear this and checked his personal copy of the statement he wrote in Chinese. He checked the statement and ascertained that it did say he was detained for a week. The Tribunal said it seemed that there was quite a difference between saying he was held for two days and saying he was held for seven days. Invited to comment, the applicant said that because he was in detention, the time seemed very long.

71. The Tribunal put to the applicant that in his written statement there was no mention of the Local Church and asked if the applicant agreed. The applicant said he wrote that he went to [Sister A]'s house and it was Local Church, however he was not able to point out any such reference apart from where he wrote that he was attending a prayer meeting. The Tribunal put to him that this could have been any house church gathering then, and not just a Local Church. The Tribunal put to the applicant that country information available to it indicates that there are very many house church groups operating in Fujian Province and that they no longer operate in strict secrecy because the Fujian authorities are relatively liberal and tolerate those groups to a great extent. The applicant said his group secretly informed each other about meetings. The Tribunal explained that it had doubts about whether the group was a Local Church group rather than a Protestant house church. The applicant said that if it was just a Protestant house church they wouldn't have been arrested. The Tribunal said its understanding was that there are occasional crackdowns on house church groups but the Local Church is a banned sect in China. The applicant said that they held their meetings secretly and didn't do it openly.

72. The Tribunal put to the applicant that there is a section of the Migration Act which says that it must disregard conduct engaged in by the applicant in Australia (such as attending church here) unless it is satisfied that this conduct was engaged in otherwise than for the purpose of strengthening the applicant's claims to a Protection Visa. The Tribunal put to the applicant that he had not attended church for the first two years he was in Australia and so it raised some doubts about the applicant's motivation for starting to attend church as he claimed in 2009. The applicant said he came here in 2007 for study and also for evading the surveillance by Chinese authorities. He was still living in the shadows at that time. The Tribunal asked why the applicant felt the situation was different in 2009. The applicant responded that it was because a friend took him to the church.

73. The Tribunal put to the applicant that after he was detained in China and released again, he said at hearing that he continued to attend the house church gatherings but more secretly and not so often, but in his written

statement he wrote that under pressure from teachers at school he eventually 'agreed to refuse God' The applicant said that was in school only but every Saturday he went home and they wouldn't follow him to his home. The Local Church was not held at his own home so they wouldn't know about it.

74. The Tribunal asked when the applicant's parents and possibly his brother went to Hubei Province. The applicant said it was a few years ago, and even before that, they lived in another province. The Tribunal asked if this meant they had not lived at his home in [Town 2] for quite some time. The applicant said this was so. The Tribunal asked if the applicant's parents were living in Fujian Province at the time he left China to come to Australia. The applicant said that they were not, but they came back to see him off. They do go back to Fujian every year for Chinese New Year but when he was studying at school they were not at home. The Tribunal asked when the police harassed his family then as referred to in his written statement of claims. The applicant said it was after he had that incident (in 2006). The Tribunal asked if the applicant thought his parents had been harassed since the applicant has been in Australia given that they are not living in Fujian Province. The applicant said that they did come back to Fujian Province for Chinese New Year. The Tribunal asked if the applicant meant that while his parents were in Fujian for Chinese New Year, the police harassed them by asking where the applicant was. The applicant said that it was not the police but some other people in charge of something. The Tribunal asked if the applicant was claiming that someone asked his parents about him at Chinese New Year. The applicant said, 'yes' Asked for any other detail about this person or people, the applicant said it was the leaders in the village. He said that there are other people who know he has gone overseas but he does not know if they have told 'those guys' The Tribunal asked why the village committee would be trying to find out where he is. The applicant said he did not know but perhaps they wanted to know whether he had come back and was continuing with the meetings.

75. Of whether his aunt is still attending the meetings, the applicant said that he did not know because he had not been in touch with his aunt. He said that he thought she is a believer and would have continued attending.

76. The Tribunal invited the applicant to say anything more that he wished about any other harm he feared which had not already been discussed. The applicant said he did not think there was any other harm he needed to mention. Asked if he wished to tell the Tribunal anything more before the hearing concluded, the applicant said he did not.

Information from other sources

Regarding the Local Church

77. Concerning the Local Church, pejoratively known as the "Shouter Sect" (*huhan pai*):

An offshoot of the biblically-based Little Flock, the Local Church looks to Witness Lee – Li Changshou – for inspiration. Li, based first in Taiwan and then California, "made no secret of his virulent anti-Communism" and his close political ties with the Kuomintang.[1]

...The authorities pejoratively labelled the group the “Shouter Sect” (*huan pai*) because of adherents’ practice of repeatedly and raucously “calling on God” (*Zhuaaaaa!!*). Resilient in the face of the repression of the 1980s and early 1990s, the Local Church has continued to expand its operations and attract new converts, swelling to an estimated 800,000 adherents.

...The Local Church presence in China dates to the late 1970s, when missionaries arrived from the United States and Taiwan, initially targeting Little Flock strongholds in the southern coastal areas such as Wenzhou, Zhenjiang, Fujian and Guangdong Provinces. By 1983, RAB [Religious Affairs Bureau] authorities were so alarmed by the extent of Local Church activity that a nationwide alert was issued denouncing the group as a heretical cult and directing local officials to repress their activities. Crackdowns were unleashed for the purpose of “exterminating the Shouters” in strongholds such as Baofeng, Ye and particularly Lushan in Henan Province. The campaign was internationalised when two Local Church missionaries from Taiwan were accused of conducting espionage for the Kuomintang (KMT) and executed on charges of spying. [2]

78. The 2009 US Department of State report on religious freedom in China states:

Beginning in the 1980s, the Government banned groups that it determined to be “cults”... The Government also considers several Protestant Christian groups to be cults, including the “Shouters” (founded in the United States in 1962)...[3]

79. The Chinese authorities banned the Local Church in 1984, labelling it the “Shouter Sect” (*huan pai*) and designating it an “evil cult”. [4] An elder of the Local Church in Melbourne advised the RRT in 2006 that:

According to our understanding, local churches in China are generally considered as “shouters” by the Chinese government particularly [sic] in Fujian province. ”.[5]

80. The Local Church uses the unique *Holy Bible Recovery Version*, heavily annotated by Li Changshou.[6] [7] Those in the Local Church are encouraged to read the Bible regularly: “We read the Word, we study the Word, and we take the Word by prayer as spiritual food”.[8]

81. The Local Church uses the term “God’s economy” to refer to “God’s divine arrangement to dispense Himself into us for the producing and building up of the church”[9]. According to Local Church belief:

God’s economy is His plan to carry out His eternal purpose in order to satisfy His heart’s desire... The goal of God’s economy is to have many believers who are fully transformed by Christ (2 Corinthians 3:18) and conformed to His glorious image (Romans 8:29)... Ultimately, God’s economy will consummate in the New Jerusalem, which will exist throughout eternity as the complete expression of the Triune God in humanity.[10]

82. The term “pray-reading” is used by the Local Church to describe the practice of “simply praying the words of the Bible” An elder of the church in Melbourne has advised the Tribunal that a person who has regularly attended

the local church in China or Australia would be familiar with both the term and the practice of Pray Reading.[11]

83. Li Changshou provided the following guidance on Pray Reading:

There is no need for you to compose any sentences or create a prayer. Just pray-read the Word. Pray the words of the Bible exactly as they read. Eventually, you will see that the whole Bible is a prayer book! You can open to any page of the Bible and start to pray with any portion of the Word... The world has only the words of human beings, but the Bible has the Word of God! Every word in this Book is the Word of God. Although you may not understand a certain passage, still you are nourished while pray-reading it, because there is really something of God in His Word; the Word of God is His very breath. There is no need to explain or expound the Word; simply pray with the Word. Forget about reading, researching, understanding, and learning the Word. You must pray-read the Word. Then eventually you will really understand it. [12]

84. The beliefs of the Local Church (as set out on the Sydney and Melbourne websites) are:

- o The Bible is the complete divine revelation inspired word by word by God through the Holy Spirit (2 Pet. 1:21, 2 Tim. 3:16)
- o God is uniquely one, yet triune — the Father, the Son, and the Spirit (1 Tim. 2:5a, Matt. 28:19)
- o The Son of God, even God Himself, was incarnated to be a man by the name of Jesus Christ (John 1:1, John 1:14)
- o Christ died on the cross for our sins, shedding His blood for our redemption (1 Pet. 2:24, Eph. 1:7a)
- o Christ resurrected from among the dead on the third day (1 Cor. 15:4)
- o Christ ascended to the right hand of God to be Lord of all (Acts 1:9, Acts 2:33, Acts 2:36)
- o Whenever any person repents to God and believes in the Lord Jesus Christ, he is regenerated (born again) and becomes a living member of the one Body of Christ (Acts 20:21, John 3:3, Eph. 1:22-23, Rom. 12:5)
- o Christ is coming again to receive His believers to Himself (1 Thes. 2:19) [13]

85. Regarding Local Church meetings and the weekly celebration of the Lord's table (Holy Communion):

We pray, praise, sing, give testimonies, and minister the Word. Every Sunday we have the Lord's table at which all the Lord's children are welcome to partake with us of the bread and wine. The church meetings are open, and all believers are free to participate. [14]

86. [Information deleted: s.431(2)].

87. Regarding the publication, Holy Word for Morning Revival, the Local Church's Living Stream Ministry has advised the Tribunal as follows:

The Holy Word for Morning Revival is a derivative work, which includes Scripture verses from the Recovery Version Holy Bible and selected readings from various ministry publications of Living Stream Ministry (LSM)...

In general, the basic structure of a particular volume, or series of volumes, of The Holy Word for Morning Revival follows a recent conference or training sponsored by LSM...

There are several volumes, or sets of volumes, of The Holy Word for Morning Revival that are topical in nature. These would include the two-volume set with the subtitle "Topic for New Believers." These are not updated but are available for ongoing use by the churches as the need may dictate.

Currently, we produce nine new volumes of The Holy Word for Morning Revival each year. These nine volumes provide a total of fifty-eight weeks of material. [15]

Regarding the treatment of Christians in general and Local Church members in particular in Fujian Province

88. Tony Lambert, author of *China's Christian Millions*, notes that the south-eastern coastal province of Fujian, with a population of some 35 million, was one of the first to be evangelised from the nineteenth century and has "a thriving and rapidly-growing Christian community" In 2004, it was estimated that the city of Fuqing had 350,000 Christians meeting in 520 churches, and that 26 per cent of the city's population was Christian. In general, he noted, the official religious policy had been applied relatively liberally in Fujian, although there had been occasional crackdowns on house churches.[16]

89. Lambert's characterisation of Fujian as a relatively liberal province in relation to religious policy was supported by a Canadian government fact-finding mission to the province in 2000[17] and the executive secretary of the Hong Kong Christian Council in 2005.[18] A 2009 report on the Protestant Church in Fujian Province in a Global Chinese Ministries newsletter confirms that there are large numbers of independent house churches in Fujian. The report also indicates that '[i]n general, local government in Fujian seems fairly tolerant of unregistered believers as it is rare that one reads of cases of persecution of house-church Christians in this province' It should be noted that one of the sources for this report is the TSPM/CCC.[19]

90. Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.

91. Members of unregistered Protestant groups that the government arbitrarily deems 'evil cults' are the most vulnerable to detention and harassment. The government has banned at least 18 Protestant groups including the Local Church.[20] The Congressional Executive Commission on China annual report for 2009 refers to reports from two localities in Fujian province having indicated that "the Local Church has been singled out as one of the targets that public security forces must 'strike hard' against." [21] However, an elder of the Local Church in Melbourne in 2009 relayed reports that fewer arrests of Local Church members in Fuqing and in Fujian province,

more broadly, were taking place, and there was “now more dialogue between members of the local church and the authorities”.[22]

FINDINGS AND REASONS

92. The applicant submitted to the Department as evidence of his identity an uncertified partial photocopy of his Chinese passport which was valid from 2006 to 2011. The applicant advised the Tribunal that this passport has been lost, and provided the Tribunal with another photocopy of the partial copy previously provided to the Department with his Protection Visa application. The applicant claims to be a citizen of the People’s Republic of China and there is no evidence before the Tribunal that the applicant has the nationality of any other country. The Tribunal accepts for the purposes of the review that the applicant is a citizen of the People’s Republic of China and has assessed the applicant’s claims against China as his country of nationality.

93. The Tribunal has summarised the applicant’s claims as follows. The applicant claims to have been introduced to Christianity by his aunt in May 1999. His parents and older brother are not Christian and do not approve, but were living in another province for many years. He attended house church gatherings, which he said were Local Church gatherings, with his aunt at various church brothers’ and sisters’ homes in his village and surrounding villages. Around 15 or more people usually attended. Gatherings were held on Saturday evenings from 6.30pm or on Sundays, but some weekends there were no gatherings. The gatherings mostly lasted 6 hours but sometimes were as short as 1 hour. The applicant claims to be a Christian and that he was baptised by immersion in 2005.

94. The applicant claims that on [a particular day in] April 2006, a gathering at which he was present was interrupted by about 10 police who detained all those present at a police station or detention centre about 8 minutes’ drive away. The applicant was deprived of sleep while detained and asked why he participated in the illegal gathering. He was released from detention after a period of days (either 2 to 3 or 7 days) when his father used a connection and paid RMB 20,000 for his release. He signed an undertaking that he would not attend the house church meetings in future. The authorities threatened to arrest him again if he attended further house church gatherings.

95. After release, his teachers at school kept an eye on him and taught him atheism theory until he agreed to ‘refuse God’ At home on weekends, he continued to attend house church gatherings but less frequently and more secretly. He asked his family to organise for him to leave the country to study in Australia. His visa was granted in July 2007 and he arrived in Australia in August 2007 for study. By the time he left China, he estimated he had attended 30 or 40 house church gatherings since May 1999. He does not know if the house church in China still meets because he has not been in touch with his aunt but he thinks she would have continued to attend as she is a believer. Since he has been in Australia, his family told him that the village committee harassed them when they returned to Fujian Province for Chinese New Year by asking them the applicant’s whereabouts. The applicant claims to have attended Local Church worship some Sunday mornings at a building in a park in [Suburb 4] since being introduced to the church by a friend sometime in 2009. The applicant fears that if he returns to China, something

like the April 2006 incident will happen again; he will not be able to worship freely and will feel as if he is living under surveillance. He does not wish to attend a registered church in China because they are possibly Catholic, might not believe in Jesus and may use a different Bible.

96. The Tribunal put to the applicant at hearing that it had trouble in accepting his claims to be a Christian. The applicant claims to have been introduced to Christianity by his aunt and to have attended approximately 30 or 40 house church meetings in China in the more than 8 years between May 1999 and August 2007. The applicant claims also to have attended Christian worship in Australia since 2009. Asked what occurred at worship gatherings in both China and Australia, the applicant said that participants prayed, sang and read both from the Bible and the Holy Word for Morning Revival. However, despite these activities during his claimed involvement with Christian worship over an extended period, the applicant could demonstrate to the Tribunal only a very superficial understanding of Christianity.

97. In his written claims he stated that his aunt told him that Jesus died on the cross to cleanse our sins and was resurrected three days later and that whoever believes in him would have eternal life. At hearing however, when asked about his beliefs as a Christian, the applicant was only able to say he believes in the washing away of sin and in starting a new life. Asked the significance of baptism, he gave the same answer (that it is for the washing away of sin and starting a new life). He could not say anything when asked about the life of Jesus Christ. He knew that Christ had been baptised but did not know by whom. Similarly, he knew that Christ had been crucified but did not know by whom.

98. The applicant could not when asked remember anything he could recount from the religious books he had read (the Bible and the Holy Word for Morning Revival). He said that he owned his own copies of these books but was nonetheless unclear whether his Bible contained both old and new testaments and did not know whether the Holy Word for Morning Revival contained quotations from the Bible. Of the books of the Bible, he could name only the four gospels. He could not remember any Bible verse and did not know about the prayer Jesus taught his disciples. He was not able to say anything about Holy Communion.

99. When the Tribunal put to the applicant at hearing that it would have expected him to have a better knowledge of Christianity given the number of years he claimed to have been involved, he said that he did not have a good memory and was only reading aloud leaving others to react to the experience. The Tribunal does not accept these reasons for the applicant's lack of understanding of basic Christian beliefs. Regarding his memory, the applicant has not presented any evidence of any medical condition affecting it and the Tribunal found he was readily able to answer other questions such as when and for how long he had been placed in Immigration detention in Australia. Regarding his response that he just worships by reading, the Tribunal took this to mean that the applicant did not expect to read in order to understand but only for the experience of reading aloud as part of worship. Information before the Tribunal such as that quoted above indicates that the Local Church has a set of beliefs which it seems reasonable to expect followers would share, and that of the many Holy Word for Morning Revival booklets available there are two expressly covering topics for new believers. The information quoted

above concerning the Local Church indicates that followers “study the Word” The Tribunal acknowledges that the description of pray reading quoted above indicates that followers need not immediately understand everything they are reading but would come to understand it over time. The Tribunal considers that with over ten years of claimed Christian worship, the applicant would have come to understand and be able to discuss more than he can about the Bible itself, the life of Christ and the meaning of Christianity. The Tribunal finds that the applicant’s inability to do so reflects adversely on the credibility of his claims.

100. The details the applicant could give about the church gatherings he attended in China appeared to the Tribunal to be vague He said at first he was not sure which days of the week gatherings were held. He then said that gatherings could be on Saturdays or Sundays but were not always held. He said that he mostly attended on a Saturday evening because on Sundays he had to travel back to school. When it was put to him that [the particular day in] April 2006 when he claimed to have been arrested while attending a gathering was a Friday, he seemed to indicate that this was a Friday night gathering he attended after he travelled to his village from his school, even though he had not previously mentioned that there were gatherings on Fridays. He said that gatherings usually commenced at 6.30pm and that they usually lasted for six hours, then added that sometimes they were only one or two hours long. The Tribunal found his evidence concerning the gatherings to be imprecise, considering that he claimed to have attended 30 or 40 such gatherings.

101. The applicant claimed at hearing that the church he attended in China was a Local Church though this claim was not made in his written statement. The Tribunal accordingly questioned the applicant about his knowledge of beliefs and practices particular to the Local Church as the Tribunal understands them from the independent information quoted above. The applicant was able to name Watchman Nee and Witness Lee as the founders of the church but could not say anything when asked about Pray Reading (a term and practice which a person who has regularly attended the local church in China or Australia would be familiar with, according to an elder of the church in Melbourne, as quoted above). He could not say anything when asked about the concept of God’s Economy, a belief of the Local Church as outlined in the information quoted above. He knew that the Bible used in the Local Church was different from the version used in other churches but could not say in what way this was true. He did not name the Local Church Bible as the Recovery Version, and did not mention the annotations by Witness Lee throughout its text. His response that he had only used the Local Church bible and so had no point of comparison might have satisfied the Tribunal had it not been for the fact that the applicant could say very little at all about the Bible and its content.

102. Regarding the claimed incident in 2006 in which the police broke into a religious gathering and arrested the attendees including the applicant and his aunt, the applicant gave inconsistent evidence about the period of time he claims to have been detained (7 days in his written claims but only 2 or 3 days in his account at hearing). The applicant gave a reason for this inconsistency when it was put to him, saying that it seemed to be a long time because he was in detention. The Tribunal does not find this reason satisfactory given that the period of detention is more than twice as long in one account than it is in the

other. The Tribunal considers that if this period of detention occurred, it would have been a traumatic event in the applicant's life and he could reasonably have been expected to remember how long it lasted.

103. The applicant claimed that because of this event in April 2006, and because of monitoring by his school teachers of his behaviour and a constant fear of arrest, he asked his family to get him a visa for study in Australia. As put to him at hearing, the Australian visa was not issued until July 2007, more than a year after the applicant claims to have been arrested, which is another factor which the Tribunal considers reflects adversely on the credibility of the applicant's claims. The applicant claimed that he completed forms much earlier but the agent used by his family for the visa application did not lodge them until close to when his visa was issued in late July 2007. The applicant did not make this claim previously and presented no evidence in support of it beyond his assertion at the hearing. The Tribunal does not find this a satisfactory explanation for the delay in arranging the applicant's departure from China if he was in genuine fear of persecution there.

104. The applicant claimed in his written statement that after his arrival in Australia, he heard from his family that the police harassed them because of him. When asked for more detail about this at hearing, the applicant gave inconsistent evidence, explaining that it was not the police but the village leaders who asked his parents about the applicant's whereabouts when his parents returned to Fujian Province for Chinese New Year. They did not apparently tell his parents the reason for their enquiry. The Tribunal finds that applicant's oral evidence does not support his written claim that his family were harassed by police on his account. The Tribunal does not accept the applicant's written claim of police harassment and finds that an enquiry by village leaders about the applicant's whereabouts does not amount to serious harm.

105. The Tribunal finds that the applicant waited more than four years after arriving in Australia before making his application for a Protection Visa. As put to him at hearing, the Tribunal considers that the applicant would have taken the first available opportunity to seek Australia's protection had he been genuinely in fear of persecution on return to China. The Tribunal does not consider satisfactory and rejects the applicant's explanation that he was not at first aware of the availability of refugee protection in Australia given that this information is freely available from many sources including the Department's website, and given that he was mixing with other members of the Chinese community in which the availability of Protection Visas would be widely known. The applicant later said that he was aware of the possibility of applying for protection in Australia but could not do so until he had enough money to do so and could find a migration agent. The Tribunal does not find this explanation satisfactory given that a Protection Visa application can be lodged without immigration assistance on payment of a small lodgement fee. The applicant also acknowledged that he was asked by Departmental officers when detained by them in March 2009 whether he had any reason to fear returning to China and so would have had a further opportunity at that time to make a Protection Visa application had he been genuinely in fear of persecution. The Tribunal does not accept as credible the applicant's explanation that he did not tell the Immigration officers about his fear of harm

in China when asked because the issue for him at that time was that he was a student found working in breach of his visa work limitations.

106. The applicant claims that since some time in 2009 he has attended the Local Church gatherings at a primary school in the park in [Suburb 4] and that there is a [Brother B] in charge of worship there. The Tribunal accepts, from advice quoted above from the Local Church, that there is a regular Sunday meeting place in a community centre in [Suburb 4] and that [Brother B] is one of the elders there. The applicant has provided no corroborative evidence of that attendance but the Tribunal is willing to accept that the applicant has had some contact with the group at that location. However, as the Tribunal found that the applicant was not a Christian in China, and given the applicant's very limited knowledge of Local Church beliefs and practices, the Tribunal cannot be satisfied that the applicant's involvement in religious activities after his arrival in Australia signifies his genuine commitment to the doctrines of the Local Church or his devotion to the Christian faith generally. The Tribunal cannot be satisfied that the applicant's engagement in religious activities in Australia was otherwise than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention. The Tribunal finds that s 91R(3) applies with respect to the applicant's conduct in Australia and the Tribunal will disregard such conduct in determining whether the applicant has a well-founded fear of being persecuted.

107. Having considered all of the applicant's evidence and the information available to it from other sources, the Tribunal finds that the applicant's knowledge of Christianity in general and of the beliefs and practices of the Local Church in particular are superficial given the personal experience he claims. The Tribunal finds that the applicant's description of church gatherings in China is vague and imprecise. The Tribunal finds that the applicant gave inconsistent evidence about his claimed detention in China. The Tribunal finds that the applicant was unable to give evidence supporting his claim that his parents were harassed in China following the applicant's departure. The Tribunal finds that the applicant delayed for more than a year in leaving China despite claiming to be in fear of arrest. The Tribunal finds that the applicant delayed more than four years in applying for a Protection Visa after arriving in Australia. For all of these reasons, the Tribunal finds that the applicant is not a witness of truth concerning his claims. The Tribunal does not accept that the applicant was a Christian in China or a member of the Local Church there. The Tribunal finds that the applicant was not detained in 2006 for attending a religious gathering or threatened with future arrest by authorities should he attend religious gatherings. The Tribunal does not accept that the applicant's parents were harassed by authorities since his departure from China.

108. The Tribunal finds that the applicant was not a Christian in China and was not involved with a Local Church group there from 1999. The Tribunal does not accept that the applicant suffered any harm in China on the grounds of religion.

109. The Tribunal finds that the applicant will not engage in the practice of Christianity in a protestant house church or Local Church group if he were to return to China. The Tribunal does not accept that the applicant will be perceived as a house church member or Local Church practitioner if he returns to China and does not accept that the applicant will be arrested, detained,

tortured or subject to any persecution because of his religion on return now or in the reasonably foreseeable future.

110. The Tribunal has considered all of the applicant's claims, both individually and cumulatively, in assessing his claims to a Protection Visa. The Tribunal does not accept that the applicant has been harmed in the past, or that in the reasonably foreseeable future, if he were to return to China, there is a real chance that he will be harmed for reasons of his religion, actual or imputed, or any other Convention reason. The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution for a Convention reason.

111. The Tribunal has not accepted the applicant's claims that he will suffer harm on return to China. The Tribunal does not accept therefore that the applicant will suffer significant harm on return to China. The Tribunal has not accepted that the applicant was a Christian or adherent of the Local Church in China and has found that the applicant would not attend Christian including Local Church worship on return to China. As indicated above, the Tribunal accepts that the applicant has attended the Local Church in Sydney on one or a small number of occasions, but does not accept on the evidence before it that there is a real risk the applicant will suffer significant harm as a result of that attendance on return to China.

112. The Tribunal finds that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that the applicant will suffer significant harm.

CONCLUSIONS

113. 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).

114. 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).

115. 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 s36(2) for a protection visa.

DECISION

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

[1] Tony Lambert, *China's Christian Millions*, (2nd Edition), Monarch Books, 2006, p.136

[2] Jason Kindopp, "The Local Church: a transnational Protestant sect," *The Politics of Protestantism in Contemporary China: State Control, Civil Society and Social Movement in a Single Party-state*, Faculty of Columbian College of Arts and

Sciences, George Washington University, 2004, CISLIB#15663

[3] US Department of State 2009, *International Religious Freedom Report 2008 – China*, 26 October

[4] Kindopp, J. 2004, *The Politics of Protestantism in Contemporary China: State Control, Civil Society, and Social Movement in a Single Party State*, 16 May, p.430

[5] Yee, P. 2006, 'RE: Request for information from the Refugee Review Tribunal', 18 October.

[6] *Holy Bible Recovery Version* 2003, Living Stream Ministry, Anaheim (MRT-RRT Library); see also *The New Testament Recovery Version Online* at <http://online.recoveryversion.org/index1.asp>

[7] Kindopp refers to the *Holy Bible Recovery Version* as a "highly subjective interpretation of scripture"; see Kindopp, J. 2004, *The Politics of Protestantism in Contemporary China: State Control, Civil Society, and Social Movement in a Single Party State*, 16 May, p.441

[8] 'Beliefs & Practices – Concerning the Church Life', The Local Churches website <http://localchurches.org/beliefs/church-life1.html> – Accessed 13 February 2012

[9] 'FAQs' (undated), The Local Churches website, source: *The Beliefs and Practices of the Local Churches* (1978) <http://www.localchurches.org/beliefs/faq.html> – Accessed 8 July 2009

[10] 'Summary' (undated), God's Economy website <http://www.godseconomy.org/summary/index.html> – Accessed 7 July 2009

[11] Elder of the Church in Melbourne 2010, Email 'RE: RRT Information Request CHN35196', 18 January

[12] '9. Pray-reading' (undated), The Meetings and Spiritual Exercise of the Local Church website <http://www.local-church-meetings.org/pray-reading-local-church.htm> – Accessed 8 July 2009

[13] www.churchinmelbourne.org/beliefs/index.html accessed 14 February 2011.

[14] 'FAQs' (undated), The Local Churches website, source: *The Beliefs and Practices of the Local Churches* (1978) <http://www.localchurches.org/beliefs/faq.html> – Accessed 8 July 2009

[15] Living Stream Ministry 2010, Email 'FW: Request for Information from the Refugee Review Tribunal, Australia', 12 January

[16] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1

[17] Immigration and Refugee Board of Canada 2000, CHN34099.E 'China: Report of a fact finding mission to Fuzhou by political counsellor, Canadian Embassy, Beijing', 23 March.

[18] In comments to the Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2005, CHN100387.E – *China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong (2001-2005)*, 1 September.

[19] Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April http://www.omf.org/omf/us/resources__1/newsletters/global_chinese_ministries/gcm_newsletter_2009/global_chinese_ministries_apr_09/the_protestant_church_in_fujian_province – Accessed 2 November 2009. The information is said to be taken from information has been taken from November 2008 *Tianfeng* and *History of Christian Missions in China* by K.S. Latourette. *Tianfeng* is a Protestant magazine published by

the TSPM/CCC and can therefore not be taken to be unbiased in relation to house churches.

[20] Congressional Executive Commission on China 2010, Annual Report 2010, October, pp.110-1

<http://www.cecc.gov/pages/annualRpt/annualRpt10/CECCannRpt2010.pdf>.

[21] Congressional Executive Commission on China 2009, *Annual Report 2009*, 10 October, pp. 138-139

[22] Yee, P. 2009, Email to RRT Research & Information: 'Re: Request for information from the Refugee Review Tribunal, Sydney', 9 February.

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←**1212633** → **[2013] RRTA 152 (27 February 2013)**

Last Updated: 15 April 2013

←**1212633** → [\[2013\] RRTA 152 \(27 February 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←**1212633** →

DIAC REFERENCE(S): CLF2012/4418

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Sue Raymond

DATE: 27 February 2013

PLACE OF DECISION: Adelaide

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 China (PRC), 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] January 2012.

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

4. The Tribunal has before it the Department's file, CLF2012/4418, relating to the applicant.

5. The applicant appeared before the Tribunal [in] January and [in] February 2013 to give evidence and present arguments. The Tribunal hearing on each occasion was conducted with the assistance of an interpreter in the Fujing and English languages. The application was originally scheduled for hearing [in] November 2012 but was rescheduled to [a date in] January 2013 to ensure an appropriate interpreter was available. The first hearing was conducted via video link and the second hearing was held as a face to face hearing in Sydney.

6. The applicant was represented in relation to the review by her registered migration agent. The representative did not attend the hearing on either occasion.

RELEVANT LAW

7. 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) of the Act. 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

8. 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.

9. 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.

10. 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.

11. There are four key elements to the Convention definition and in the context of the current application are as follows:

12. First, the applicant must be outside her country.

13. Second, the 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

CONSIDERATION

Application Form

19. According to the information provided in her application form the applicant is a Chinese National born in Fujian Province, China in [month and year deleted: s.431(2)]. She claims to be Catholic. She indicates that she married [in] 1992. The applicant claims to have come to Australia [in] March 2007. She departed China legally using a Chinese passport in her own name. She entered Australia on a TU Student [visa] issued on [date deleted: s.431(2)] which expired [in] December 2008. She stated that she was a [occupation deleted: s.431(2)] in Fuqing City from 1985 to March 2007.

20. In a statement attached to her application [the applicant] indicated that her son came to Australia to study [in] 2006 and she came on a [visa] [in] March 2007. The statement was stated to be written by the migration agent based on information she provided as she is illiterate. She said that the statement was read to her and she signed it. She gave evidence that the statement is accurate.

21. She recounted her marriage to [Mr A] and that she had a daughter born in [year deleted: s.431(2)] and a son in [year deleted: s.431(2)]. In this statement the applicant described an incident where her husband fell down a ditch but he ultimately recovered. The applicant believed that God gave him a second life and that it was a miracle. Her husband became Catholic after he was saved. After the applicant married her husband, his family believed in God and the applicant believed in God too. He talked to her about the goodness of God and Jesus. His health became better and later he opened a [factory]. He had that business for a few years and business was good. Her husband told her that all that goodness was from God.

22. She indicated that there were many villagers who believed in God and they had underground house church gatherings. Her family lived in the countryside. They were not willing to go to the public Catholic Church in the city as they believed that the public church was controlled by the Chinese government. She believed that they did not put God first. The underground house church was persecuted by the government and the police so they held gatherings in secret. Sometimes she went to the house church gatherings with her husband. She states that she is illiterate and only listened to their speech and sang psalms with them.

23. In her statement she indicated that after a few years attending the gatherings she gradually understood their belief and got some knowledge about "Catholics". She believed that they will have eternal life if they believe in God. She also learned to read Rosary beads of "15 duan." In August 1997 she was baptised in an underground church member's home and she became Catholic. After she was baptised she felt she had peace and joy in her heart and had God to look after her. She had no fear. She was very happy. She knew that Catholics should follow "three things Believe, Hope and Love. It is the condition to get eternal life. I also believed there is a devil in this world. I believe in Heaven and Hell".

24. Her statement recounts four different incidents where the police came and detained the applicant's husband and one incident where she was detained. The following are the salient parts of that statement.

25. The first was in May 2002 when she states that her husband was caught by the police while he was attending a house church gathering.

“He was detained by police for 7 days and nights. He was violently beaten by the police. He was fined RMB 3000. At that time, my mother-in-law was sick. My father-in-law went to visit my husband; he was amazed at the bruises on my husband. Since then, my father in law became very sick. He died in [date]. My husband had a Catholic funeral for my father-in-law. Many people came. Some were Catholics. The Local police came too. They claimed that my husband was against the Government in public. They also claimed that my husband spread superstitions at the funeral. The police arrested my husband and detained him for three days. He was released after he paid a fine RMB 5000. My mother in law saw the bruises on my husband's body; she told us many times not to hate the police as they were ignorant. If the police knew about God and how powerful and good he was they would not persecute Catholics or Christians. After [time period], my mother-in-law closed her eyes and went to heaven. ...

As my husband... spread gospel to others and he became one of the heads in the underground church. On [date]/12/05, we held house church gatherings at home. There were other Brothers and Sisters too. The police came. They held us against the wall. They searched our home and took us to local police station. They interrogated us separately. Three or four police asked me questions. They were very frightening I had a fear in my heart. I prayed to God for help. They detained me for a day and fined me RMB 5000.

My husband [Mr A] was detained for a month. The police charged him for being the organiser of the illegal underground church, holding cult meetings and being a danger to the government. He was fined RMB 10,000. [Mr A] told me later that in Detention Centre, police tortured him and asked him to study books about the communism. The police wanted him to give up the Catholic belief. But [Mr A] held belief firmly. After he was released, the police threatened him, if he was found to be in illegal gathering, he would be sent to prison.

There is no religious freedom in China. [Mr A] told me the police often came to my home and his factory to harass him. The police would monitor him. He did not want us to live in fear My husband [Mr A] decided to send my son and I overseas. In [month] 2006, we spent money and gained a visa for my son's[sic] to Australia. My son came to Australia in [month] 2006. The next year, I got visa to Australia in [month] 2007.

.....

On [date]01/2008, I called my husband in China. I couldn't find him. My daughter told me that he was in prison. He was sentenced for 3 years in prison, because he was attending illegal house church gathering in March 2008 and caught by the police. Our factory was forfeited by the local government because my husband was using factory money to support illegal underground church. Now my daughter lived with her grandparents.

When I heard what had happened to my husband I was so sad, I was speechless. I lost everything. I worried about my husband [Mr A]. Our factory was lost, so I lost an income to support my son and me. What could I do? I prayed to God again and again. I prayed to Mary again and again. God gave me power. I must live for my husband and my two children. I wanted to go back to save my husband and look after my daughter, but I am frightened to go back as I might be put in prison too.

I did not go back to China. I miss my husband in prison. I lived in fear too. All I could do is pray and worship God at church. I asked God: God, please save me and my family.

In January 2011, my husband was released. He asked me to stay in Australia. He might be put in prison again. He did not want to live in fear. Now he is in other province to spread the Gospel.”

Supporting Documents

26. On the departmental file there is an uncertified copy of a Baptism Certificate which states that the applicant was baptised [in] August 1997 at [location deleted: s.431(2)] of [details deleted: s.431(2)].
27. The departmental file also contains documents supplied at the departmental interview which took place [in] June 2012;
 - o namely a letter from [Priest B] of the [institute deleted: s.431(2)] (folio 62). The letter claims that the applicant has been attending [Church 1], NSW since her arrival in Australia in March 2007. [Priest B] notes that the date of the applicant’s first attendance at the Church was given to him by the applicant.
 - o Photocopies of photographs produced to the Department stated to be of her husband being arrested, her wedding ceremony, their factory being demolished, and her religious study group.

Delegate’s decision

28. The delegate interviewed the applicant. In his written decision he did not accept that the applicant was of Catholic faith but in any event did not accept that Catholics in Fujian province are subject to persecutory treatment by the Chinese authorities. He also was not satisfied that the applicant genuinely feared persecution in China for her “alleged Catholic beliefs”.

Is the applicant outside her country of nationality?

29. On the basis of a copy of a Chinese passport[1] issued to the applicant on [date deleted: s.431(2)] and in the absence of any evidence to the contrary, the Tribunal accepts that the applicant is a national of the People's Republic of China. The Tribunal finds that the applicant is outside her country of nationality. She gave evidence that she does not hold any other passport and, in the absence of any other evidence, the Tribunal finds that the applicant does not have a legally enforceable right to enter and reside in any country other than her country of nationality. The Tribunal finds that the country of

reference for the assessment of the applicant's claims to be a refugee is the People's Republic of China (PRC).

30. The People's Republic of China is also the receiving country for the purpose of the complementary protection provisions of the Migration Act.

31. The Tribunal finds that the applicant came to Australia [in] March 2007 entering Australia legally on a passport in her name. The Tribunal finds that she came to Australia on an Australian [visa] which was granted [in] 2007 and allowed her to remain in Australia until [a date in] December 2008. This visa subclass is known as a [visa details deleted: s.431(2)] and she came to Australia because her son was studying here. She has not returned to China since coming to Australia and the Tribunal finds that the applicant lodged an application for a Protection visa [in] January 2012.

Does the applicant fear persecution?

Is the applicant a Catholic?

32. The Tribunal is satisfied that the applicant is of the Catholic faith and practised that faith when she was in China prior to coming to Australia [in] March 2007. In forming a view as to whether the applicant was of Catholic faith the Tribunal was mindful that the applicant is illiterate in the ability to read and write in either Mandarin or English; that she has no formal education and is from a rural farming community. Consequently the nature of the questions asked of her by the Tribunal was consistent with her background and mindful that she was not born into a Catholic family. The Tribunal's satisfaction about the applicant's Catholic faith was demonstrated by her understanding the sign of the cross, the pictures of Mary and Jesus and the cross which she described as hanging on the walls of her home in China and one of Mary in her home in Australia, her description of her use of the holy water and her description of the rituals at the funerals of her parents-in-law.[2] The Tribunal formed the view that she valued and used the rosary beads which she had with her at the hearing. The Tribunal determines that her demonstrated understanding of her faith is consistent with someone who is illiterate and from a rural community in China. In reaching its conclusion the Tribunal also had regard to her regular attendance at church in Australia which is discussed further below.

33. The Tribunal is satisfied, based on the applicant's oral evidence, that she attends a Catholic Church in [suburb deleted: s.431(2)], New South Wales, and attends service regularly on Sunday morning. That service includes part of the service being conducted in Mandarin. The applicant gave evidence that she has attended at that church since shortly after she came to Australia. She found out about the church by asking her son. The Tribunal notes that there is a letter on the Tribunal file from [Priest B]. The letter supports the applicant's statement that she is attending church and notes that she has been regularly attending the time Mass celebrated every Sunday in [Church 1]. Although the letter indicates that the date of first attendance at the church, March 2007, was given to [Priest B] by the applicant the Tribunal is satisfied that she attended church from shortly after her arrival in Australia. The Tribunal notes subsection 91R(3) of the Act which indicates that in determining whether a person has a well-founded fear of being persecuted any conduct engaged by

the person in Australia should be disregarded unless the person “*satisfies the Minister [or in this case the Tribunal standing in the Minister’s shoes] that the person engaged in the conduct otherwise than for the purpose of strengthening the person’s claim to be a refugee...*”

34. The Tribunal accepts that the applicant is of Catholic faith and has been so since at least August 1997 when she was baptised. The Tribunal is satisfied based on her evidence that she did not intend to make a [Protection] application when she came to Australia and yet attended church regularly from the time of her arrival in Australia. The Tribunal is satisfied that her attendance at Church in Australia is consistent with her following her Catholic faith and was not undertaken to strengthen her claim for protection in Australia. The Tribunal is satisfied that her attendance at church in Australia was otherwise than for the purpose of strengthening her claim to be a refugee. Consequently her conduct in attending church in Australia is not to be disregarded by the Tribunal.

35. However the Tribunal is not satisfied that the applicant holds a well-founded fear of persecution if she returns to China. There are several reasons for the Tribunal holding this view which will be outlined hereunder.

Delay in applying for protection visa and

Delay between visa application in China and departure from China

36. The applicant arrived in Australia [in] March 2007, and did not apply for a protection visa for approximately 5 years, until [a date in] January 2012. The reasons she gave for this delay were not convincing. She says that she did not know what was going on, and she did not know what to do. The Tribunal accepts that she is illiterate but this does not explain the delay satisfactorily when she has lived here for a period of nearly five years before making the application.

37. The Tribunal understood the applicant to be saying that she conveyed to the Catholic community who could see her suffering as she had not seen her husband and daughter and she was told about the Protection visa then. She said that when she saw police here she was scared.

38. The Tribunal asked the applicant whether when she first came to Australia she wanted to stay in Australia because of fear [to return to China] and her response was to the effect that the first purpose was to look after her son and also because Australia is a “freedom country” and she has freedom to go to church, to pray and to worship. The Tribunal canvassed whether the fear of going back to China was there when she first came to Australia and her response was to the effect that she is very happy when she came here and felt God embracing her. The Tribunal concluded that she came to Australia to look after her son which is consistent with her passport being applied for at the same time he came to Australia in 2006. At the second hearing the Tribunal specifically put the delay between her passport being [issued] and coming to Australia [in March 2007]. She confirmed that when she left China she was not concerned about herself but only her son and husband. The Tribunal concludes that the applicant did not have any fear of persecution for herself when she left China.

The applicant's fear of returning to China

39. Nevertheless the Tribunal has considered whether there are multiple reasons for her not wanting to return to China and whether any fear has arisen since her departure from China. The applicant gave evidence that she wanted to return to China last year but was advised against it by her husband. She indicated that last year she had planned to go home as she worried about her husband and daughter. She spoke to her husband and in recounting his response she said that he said "don't come home", and conveyed words to the effect that he is running everywhere, he has 'no money' and that if she comes back "you will be more suffering than you are in Australia". Later in response to a question from the Tribunal about what is stopping her going back to China she said that she told her husband that she wants to go home and that he responded, "I even run out of money to feed myself how can I look after you when [you] come home."

40. Her answer to this question was telling in that she referred first to the economic difficulties that would be suffered if she returned. It was only after the Tribunal asked explicitly whether she was in fear to return or whether not going back because husband had said that there was no money. In her response to this question the applicant said that every time she sees police she has "fear in my heart" She explained that her fear comes from being caught by police in 2005. In response to a specific question about whether she thinks anything will happen to her if she returns to China she indicated that her husband had told her that the police will catch her as well 'so don't come home' and in answer as to why the police would want to catch her she said because her husband is the leader of the church and she is his wife. The Tribunal asked specifically whether she fears returning because the police might catch her or because her husband can't feed her. She responded "both".

Incidents which are alleged to have occurred in China

41. The Tribunal considered the evidence the applicant gave about the four occasions on which she said the police came to detain her husband. There were inconsistencies with this evidence such that the Tribunal is not satisfied that it can rely on the accounts as accurate-for example in oral evidence the applicant indicated that on the first occasion, in May 2002 that her husband was not harmed by the police but in the written statement it records that he "was violently beaten by the police" and further that her father-in-law went to see him and "was amazed at the bruises on her husband" She indicated that she was not at the house when he was detained the first time in 2002 and that she did not know where he was but he returned home after one week. In her oral evidence she said that she asked her husband did the police do anything and he said not that time happened and he was only asked, words to the effect "don't believe in this this religion anymore" When the inconsistency was raised with the applicant at the hearing she did not explain it and when it was put to her as a specific inconsistency later in the hearing in the context of whether this is an accurate account and whether the Tribunal can believe her, she indicated that her memory is not that clear.

42. On the occasion in December 2005 she indicated that her mother-in-law had told them not to hate the police. The Tribunal asked whether her

parents-in-law had passed away by then and the applicant acknowledged that her husband's parents had passed away in [year deleted: s.431(2)].

43. Even allowing for some confusion about dates of the incidents and what incident was being asked about the Tribunal regards as significant the inconsistency about the first incident.

44. On the only occasion the applicant was taken to the police station in 2005 the applicant gave evidence that she was not mistreated but her husband was treated roughly and she was sent home after a day. She also had to pay a fine of RMB 5000.

45. She gave no evidence to suggest that she had been mistreated at all by the police but was taken to the police station for one day and had to pay a fine. There is no evidence to suggest that she holds any leadership role in the church and she did not assert that to be the case. At the second hearing she confirmed that she did not have a leadership role in the church.

46. In relation to the occasion in 2008 when she states that her husband was detained she was in Australia. She indicated that his arrest followed an incident when the [factory] owned by her husband was smashed/demolished by the police. Her husband told her that this occurred because [the police] said words to the effect –“you don't follow what we say and keep preaching-that is why we break the business”.

47. There are copy photographs on the DIAC file[3] of some broken buildings and the applicant said that these photos were taken by her husband after the buildings were damaged and before he was detained in 2008. At the second hearing the Tribunal put the copy photographs to her and indicated that the overgrown grass in the photographs did not indicate that the photographs were taken close to the time the building was demolished. It looked as though it was taken sometime afterwards. She asserted that they were taken soon after the incident and said in explanation about the overgrown grass said that perhaps her husband had not had a chance to mow the grass.

48. The Tribunal at the second hearing also put to the applicant a copy photograph[4] which she had indicated was a photo taken secretly of her husband being arrested in 2008 outside her home in China. The Tribunal indicated the difficulty it had in accepting that the photograph was taken secretly at the time of arrest. She indicated that it was taken by her brother's son who was 'accidentally' home that day and also said that police were so fierce that they had to take a photograph. The Tribunal does not accept that the photograph depicts the arrest of the applicant's husband and regards it as contrived.

49. Given the inconsistencies in the evidence and the Tribunal not accepting the photographs as evidence of what is depicted, the Tribunal is not satisfied that each of the incidents as described by the applicant occurred. The Tribunal is not therefore satisfied that the applicant's husband has been detained or mistreated as described and does not accept that he had a profile as head of the underground church as claimed.

Country Information about Catholics in China

50. The Tribunal has analysed country information relating to Catholics in Fujian province in the People's Republic of China and draws the following conclusions from the source material:

- There are two Catholic churches in China: the official (registered) church and the unofficial (unregistered or underground) churches.[5]
 - The official Catholic church enjoys legal protection of its practices whereas the unregistered churches do not.[6] The Government does not permit proselytising in unregistered places of worship or in public.[7]
 - Chinese authorities have shown increased tolerance in recent years for unofficial activity which does not challenge the authority of the state but levels of tolerance vary depending on the location.[8] Underground Catholic churches which are small and discreet are less likely to be targeted. [9]
 - The policy of the right 'to meet at home for worship, including prayer and Bible study without registering with the government' is applied unevenly within PRC. ["Since 2005 the State Administration for Religious Affairs (SARA) has publicly acknowledged that family and friends have the right to meet at home for worship, including prayer and Bible study without registering with the government. This statement has been posted on SARA's website at various times. Respect for this policy at the provincial, county, and local levels was uneven, and there were several reported cases of local officials disrupting religious meetings in private homes."][10]
 - The Tribunal notes that the 2011 US Department of State International Religious Freedom Report for 2011 noted that the government's respect for and protection of the right to religious freedom had deteriorated over the year.
 - Fujian is generally regarded as one of the provinces that is said to have applied regulations on religion more liberally than others.[11] Police and officials have sometimes arrested underground Catholic priests and although not recently, police and officials have arrested parishioners and demolished churches.[12]
 - There are few recent reports of problems for Catholics in Fujian. The most recent is in March 2010[13] and reports the arrest of an underground Catholic priest. This involved an activity of being involved in organising a camp for university students. Another priest involved in the camp is reported to have been arrested and released after 15 days imprisonment.
 - Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.
51. When the Tribunal put the relevant country information about Fujian to the applicant and suggested that the latest report related to priests being detained she disagreed that it is only priests who are targeted. The Tribunal accepts that parishioners may have been detained in the past but nevertheless the Tribunal concludes there is no recent country information report, of which it is aware, which indicates detention or adverse attention from the PRC authorities of someone, such as the applicant, who is a member of an underground church in Fujian but who does not hold a leadership position in the church

SUMMARY

52. In the final analysis the Tribunal does not accept that the applicant fears persecution in China. The Tribunal understands that the relevant question for it to ask is whether the applicant has a present fear of a risk of harm in the future. The Tribunal also appreciates that a past lack of fear does not necessarily preclude a well-founded present fear of future harm. The Tribunal is not satisfied that the applicant “owing to well-founded fear of being persecuted for reasons of ...religion..., and is unable or, owing to such fear, is unwilling to avail ‘herself’ of the protection of that country [namely, the People’s Republic of China]. Rather the Tribunal concludes that the applicant has wanted to return to China but her husband has indicated that he cannot support her there and asked her not to come.

53. The Tribunal is mindful that it is assessing the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future. It is also mindful that a fear could have arisen since she left China and not been in existence at the time she departed from China in 2007[14]. The Tribunal has taken into account the applicant’s illiteracy and lack of education in assessing her responses but also notes that in answering about her reasons for not wanting to return to China her responses did not suggest to the Tribunal a fear of persecution. Whilst the Tribunal notes that she says that she fears the police she has not alleged mis-treatment by the police in China. The Tribunal formed the view that she does not fear persecution and her fear in this regard was only raised after initially making reference to the economic circumstances.

54. The Tribunal has already accepted that the applicant is of Catholic faith and in China worships in an underground church. However the Tribunal does not accept that the events of arrest and detention described in the applicant’s statement occurred as described. There was one significant material inconsistency in her oral evidence in relation to the first incident of arrest of her husband. In addition in describing an arrest which took place in 2005 she made reference to a conversation with her parents-in-law who she later conceded had passed away in [year deleted: s.431(2)].

55. It concludes that the significant delay in making the visa application against a backdrop of her coming to Australia to look after her son; coupled with her initial response about why she did not wish to return to China to support its conclusion in that regard.

56. The Tribunal finds that the applicant does not face a real chance of persecution, now or in the reasonably foreseeable future. The Tribunal finds that her fears are not well-founded.

Complementary protection criterion

57. 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').

58. '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.

59. The Tribunal is not aware of information which would suggest that the applicant's attendance at [Church 1] in Australia would place her at real risk of significant harm if she returns to China. In this regard the Tribunal notes that there is information from Department of Foreign Affairs and Trade about asylum seekers returned to China. The Tribunal notes that it would be likely that Chinese authorities would interview failed asylum seekers and 'might keep them under surveillance and detain them for a short period.'^[15] The Tribunal is not satisfied that if this were to occur that it amounts to "significant harm" within definition in sections 36(2A) of the Act and the other definitions defined in section 5(1) of the Act which are outlined above. Returnees with a higher profile in Australia may be treated more severely by the authorities^[16]. There is no information suggesting that the applicant's activities in Australia, or as a practising Catholic attending an underground church in China, are such that she faces a risk of significant harm on return to China.

CONCLUSIONS

60. 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).

61. 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).

62. 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. The applicant confirmed that her son does not hold a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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

[1] Folios 3 and 4 of DIAC file

[2] The Tribunal was mindful of comments of Dr Richard Madsen, in the book "China's Catholics", where he cautions against applying knowledge of the Catholic Church in the West directly to Chinese Catholicism.

[3] At folios 57 and 58

- [4] Folio 61 DIAC file
- [5] Madsen.R 2003, "Catholic Revival during the Reform Era",The China Quarterly,vol.174.pages 472-474.
- [6] US Department of State 2011,"'Legal/Policy Framework', International Religious Freedom Report 2010 (July-December), 13 September
- [7] US Department of State 2012, International Religious Freedom Report 2011 China,30 July, Executive Summary
- [8] See footnote 6
- [9] Human Rights Watch 2006,"China:AYear after New Regulations, Religious Rights still restricted", 1 March
- [10] US Department of State International Religious Freedom report, November 2010, Status of Religious Freedom, Legal/Policy Framework and similar comments were expressed in the Report for 2011
- [11] Lambert,Tony 2006 China's Christian Millions, Monarch books, Oxford, page 241
- [12] "Another underground priest arrested in Fujian" 2010, Asia News, 24 March
- [13] "Another underground priest arrested in Fujian" 2010, Asia News, 24 March
- [14] Known as a refuge 'sur place'.
- [15] [reference deleted: s.43192)]
- [16] CX 174138 --March 2007



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←**1214443** → **[2013] RRTA 124 (15 February 2013)**

Last Updated: 5 April 2013

←**1214443** → [\[2013\] RRTA 124 \(15 February 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←**1214443** →

DIAC REFERENCE(S): CLF2012/106876

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Ruth Cheetham

DATE: 15 February 2013

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

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of China, 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] August 2012, and the applicant applied to the Tribunal for review of that decision.

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. There are four key elements to the Convention definition but central to the Tribunal's decision in this matter is that an applicant must genuinely fear persecution. The mere fact that a person claims fear of persecution for a particular reason does not establish 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 herself or himself, in as much detail as is necessary to enable the examiner to establish the relevant facts. The Tribunal is not required to make the applicant's case for her or him. Neither 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] FCA 470; (1992) 38 FCR 191, *Prasad v MIEA* [1985] FCA 47; (1985) 6 FCR 155 at 169-70).

8. It is legitimate for the Tribunal to take into account any delay in the lodging of a protection visa application by an applicant in assessing the genuineness, or at least the depth, of an applicant's claimed fear of persecution: *Selvadurai v Minister for Immigration and Ethnic Affairs* [1994] FCA 1105; (1994) 34 ALD 347, per Heerey J.

Complementary protection criterion

9. 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').

CLAIMS AND EVIDENCE

10. 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.

Protection visa application and delegate's decision

Personal details and visa history

11. The following summary of information is extracted from the applicant's protection visa application and the written statement and copy of the biodata pages of her passport which accompanied it.

12. The applicant was born in [date deleted: s.431(2)] in Liaoning Province, China. She is of Han ethnicity. Her marital status is "separated" as of February 2006. She lived at the same address in Liaoning Province from her birth until 2009, then at another address until her departure from China for Australia. She gives no detail of any family members, whether in China or elsewhere.

13. The applicant states that she completed 12 years of education in China but does not give any detail of any university, trade or other qualifications obtained. The applicant describes her occupation before coming to Australia as "marketing manager" and she worked in this capacity from April 2009 to April 2012.

14. The applicant travelled to Australia on a Chinese passport issued [in] 2012 which is valid for 10 years. In her protection visa application the applicant states that she has not travelled out of China prior to her current journey to Australia. She states that she left China legally and that she had no difficulty obtaining her travel documents.

15. The applicant entered Australia [in] May 2012 on a temporary [business] visa which was granted [in] April 2012 and which was expressed to cease [in] June 2012.

16. The applicant lodged her protection visa application [in] May 2012.

Protection claims

17. The applicant provided a written statement of protection claims which accompanied her protection visa application.
18. The applicant was invited to attend an interview with the delegate to discuss her protection claims but did not attend on the scheduled day and did not contact the Department to arrange an alternative interview time.
19. In her written statement, the applicant claims (last paragraph quoted because the meaning is unclear):
 - a. She is a Falun Gong practitioner and has been learning Falun Gong for 10 years, although she also states that she started to practise Falun Gong in 1998;
 - b. In July 2001 she was reported to the police by someone. She was detained and mistreated on one place, for 23 days, then taken to a jail and detained there for a year and a half, physically mistreated and forced to perform unpaid labour;
 - c. She was harassed after her release by the police checking to see if she was practising Falun Gong and she had to move house frequently, sometimes up to two or three times a months, and had “no fixed abode”;
 - d. Her marriage and family broke apart under the pressure;
 - e. She fled China with a friend who is also a Falun Gong practitioner.

Delegate’s decision

20. The delegate concluded that on the basis of the limited information provided by the applicant, and without an opportunity to discuss her claims at an interview, the delegate could not be satisfied that the applicant was a Falun Gong practitioner in China, nor that she had ever been detained for that reason. The delegate did not accept that the applicant had a genuine fear of persecution in China and found that there was no real chance that she would face persecution for a Convention reason if she returned to China.

Application to Tribunal for review

21. [In] September 2012 the applicant lodged an application with the Tribunal for review of the delegate’s decision. No further material or evidence was provided with the review application.
22. The applicant appeared before the Tribunal [in] February 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Tribunal hearing

23. The applicant produced her passport at the hearing, which bore an attestation that it had been issued [in 2012] to replace a previous passport. The Tribunal asked what had happened to her previous passport and the applicant stated that she lost it, in China. The Tribunal asked when her first passport had been issued and whether she had travelled on that previous passport and the applicant said it was issued in, she thought, 2008 and around two years later

she had travelled to Hong Kong. Then she stated that she went to Hong Kong in 2001, then said that it was two years after 2008 and then stated that she does not remember when she went to Hong Kong.

24. The Tribunal asked what had been the purpose of her trip to Hong Kong and the applicant said she went there to hide from the police after she was released from prison. The Tribunal asked when she had been released from prison. The applicant said it was in 2010 or 2011. When the Tribunal asked again, the applicant said she was in prison from 1998 to 2001, then she said she was caught in 2001 and put in prison for 1 ½ years, and that she started practising Falun Gong in 1998. She said she was imprisoned in July 2001. The Tribunal then repeated the question of when she had been released from prison. The applicant said she forgot when, then said that she was in prison for 1 ½ years. The Tribunal asked whether she was saying that she forgot when she was released for prison and the applicant said yes. The Tribunal put to her that this was a very significant event in her life and it would not be unreasonable to expect that she would be able to remember at least the month and year in which she had been released. The applicant replied that she really does not remember, that she only remembers that she was released when her family paid money.

25. The Tribunal asked whether she got her first passport in 2008, to which the applicant said yes. Asked if she remembered what month she got it, the applicant said no. Asked if she used that passport to travel to Hong Kong, the applicant said yes. The Tribunal asked if she travelled to Hong Kong two years after that passport was issued and she said yes. The Tribunal asked whether that meant she went to Hong Kong in 2010 and the applicant said yes. The Tribunal asked whether her evidence was that she went to Hong Kong to hide from the police after she was released from imprisonment and the applicant responded that she was there for 3-4 days because it was the anniversary of the events [of] June. The Tribunal repeated the question, and the applicant said yes. The Tribunal asked how it was that she went to Hong Kong to hide from police after being released from imprisonment if she was imprisoned for 1 ½ years in July 2001 and she went to Hong Kong in 2010. The applicant said that there were rumours that they would begin to start putting people in prison and after she was released from prison she had been practising Falun Gong.

26. The Tribunal asked where, in her protection visa application or written statement, she had said that she went to Hong Kong and that she went there to avoid being imprisoned. The applicant said that she did not mention it. Asked why not, the applicant responded that she just did not mention it.

27. The Tribunal asked who had helped her to write her statement, and she said it was a friend of a woman she came to Australia with ("Z"). She said she told Z her history and he wrote her statement, and he helped her fill in the protection visa application form as well. Asked whether both were accurate or whether she wanted to add to or correct anything in either, the applicant said that they were accurate and she did not need to make any changes.

28. The Tribunal noted that she had not attended the interview with the delegate. The applicant said that she never received that invitation.

29. The Tribunal asked the applicant some questions about her claim to have been arrested in July 2001. Asked where she had been taken by the police, the applicant at first failed to understand the question, stating that she

had been at home when the police came, then said that she was taken to the No.1 prison in her area and kept there for about a month, during which time she was physically mistreated, then she was taken somewhere else, she does not know where and was there for one year. Asked whether she was there for one year, the applicant said that her family paid money and she was released and she was there altogether for 1 ½ years. When the Tribunal asked if she meant that place for 1 ½ years, or both places in total for 1 ½ years, the applicant said both places for a total of 1 ½ years.

30. The Tribunal asked the date on which she was arrested. The applicant said she does not remember.

31. The Tribunal asked if she remembered the date on which she was released. The applicant said she does not remember anything at all, that there was lots of torture and they paid money and she does not even know how she was released.

32. The Tribunal asked how much was paid. The applicant said her mother paid 30,000 yuan and someone else paid 20,000 yuan. Asked who that other person was, she said it was her ex-husband.

33. The Tribunal asked whether she could provide any corroboration, documentary or otherwise, for her claim to have been arrested, detained for 1 ½ years, and 50,000 yuan paid for her release. The applicant said she could not. She said that there were no documents, that the police just came to her home and put her in prison.

34. The Tribunal asked the applicant about her claim that the police harassed her after her release, and asked what they had done. The applicant said that came to her home, that she moved 2-3 times to avoid disturbing her neighbours, and that when the police came they would steal her jewellery and watches and anything they could see.

35. The Tribunal asked the applicant the period of time when this harassment had occurred. The applicant said it was after she was released from prison, because she had been practising Falun Gong and maybe a neighbour reported her to the police and that her husband had to go to work somewhere outside their city because of the harassment. The Tribunal repeated the question, asking when the harassment started and when it had finished, if at all. The applicant said it was after she was released. The Tribunal repeated the question again, and explained that the purpose of the question was to know what dates the harassment started and finished. The applicant responded that it was after her release, that she really did not remember. Asked what year it had started, the applicant said she did not remember. Asked what year it had ceased, if at all, she said it started a few months after she was released. The Tribunal asked what year she had been released and the applicant said she was in prison for 1 ½ years since 2010, then corrected this to 2001. The Tribunal asked when the harassment had ceased, and the applicant said about 6 months after she was released.

36. The Tribunal then asked whether her evidence was that the police harassment started a few months after her release and ceased 6 months after her release. The applicant said that it started 6 months after her release. Asked when it stopped, the applicant responded that the police came to her house only once then she started to move around and they could not find her. Asked why they couldn't find her, the applicant said she was moving house every other month. Asked where she moved to, the applicant said she moved around

different places within her home town, and for the last 10 years she has been moving all the time. The Tribunal asked why her protection visa application gives only one address from her birth until 2009, and the applicant said she did not fill in the other addresses, that she was here for a couple for months and there for a couple of months. The Tribunal asked why she gave a different address, again only one address, for the period May 2009 to April 2012. The applicant said that could be the address of her husband. When the Tribunal pointed out that she said in her protection visa application that she was separated, the applicant said they had been separated for 7 years. The Tribunal asked why she would give her former husband's address in her protection visa application and she said she does not know.

37. The Tribunal asked the applicant why she had not included having been in Hong Kong and she said she just did not mention it. The Tribunal noted that she did not provide this despite there being three opportunities to do so, as part of her protection claims in her written statement, in the part of the protection visa application form asking about other travel, and in the part of the form asking for addresses. The applicant said she did not mention it.

38. The Tribunal put to the applicant that it had some concerns about whether she was being honest and that that her failure to mention the new claim about having to go to Hong Kong to avoid being imprisoned might suggest that she did not have any fear about returning to her hometown after Hong Kong. The applicant said that she did not think to mention it. She said she got a scar while she was in prison.

39. The Tribunal asked the applicant how she secured employment as a marketing manager in a technology firm, a senior position, if she was a known Falun Gong practitioner who was in hiding from the police and had been moving every other month from about 2001. The applicant said she got the job through a recommendation of friends, then that it was on the recommendation of travel agents because they wanted to get her a business visa so they asked her to work at that company. The Tribunal asked whether she had actually been employed as the marketing manager for that company between April 2009 and April 2012 as she said in her protection visa application, and she said that the friend she travelled to Australia with also worked there and that she had actually worked there for that time. The Tribunal asked how she could have done that if she was moving every other month to hide from the police. The applicant said she was working within the city so she was still able to work. The Tribunal asked why the police were unable to find her if she was working for three years at the same company. The applicant said they did not find her, or maybe they could find her but they did not put her in prison, and that she was practising Falun Gong secretly then.

40. The Tribunal asked how the applicant was able to obtain two passports, the first one in 2008 and the one she travelled to Australia on which was issued in 2012, while she was running and hiding from the police from 2001 to 2012. The applicant said she gave someone money and her photograph and they got it made, the one issued in 2012. The Tribunal asked where in her protection visa application or statement she had mentioned this, and the applicant said that she does not remember writing this. The Tribunal asked how she got her first passport. The applicant said she went to the passport office and found someone and gave that person a little bit of money.

41. The Tribunal put to the applicant the independent information that being able to obtain a passport in one's own name, and to depart on a genuine passport, was an indication that the Chinese authorities had no adverse interest. The Tribunal noted that she had been able to obtain two passports and to pass through airport security on two occasions, to Hong Kong and to Australia. The applicant said that the first time she got someone inside the passport office and the second time she paid money. The Tribunal asked how she passed through security both times and she said she was on a business visa so they just said that they were going to an exhibition, and that she travelled with her friend.

42. The Tribunal put to the applicant that there was independent information which indicated that the Chinese authorities confiscate identity documents from known Falun Gong practitioners in order to prevent them being able to obtain passports, but that this did not happen to her. The applicant said she did not know about this, that they just let her go, they did not check on her.

43. The Tribunal informed the applicant that there were a number of aspects of her evidence and claims which might throw doubt on whether she was telling the truth or whether she had fabricated her protection claims. The Tribunal indicated that it had not come to any conclusions but would put these matters to her for response:

- a. That she had no corroboration for any of her claims, that she was Falun Gong in China, that she was arrested, that she was detained, that money was paid for her release, that the police harassed and searched for her, that she had to pay money for both her passports;
- b. That her capacity to obtain two passports and to pass through airport security on two occasions was, on the independent information, indicative of no adverse interest in her by the Chinese authorities;
- c. That not having had her identification documents confiscated at the time of her arrest was inconsistent with the independent information;
- d. That she had held a passport since 2008 but did not attempt to leave China to seek protection until her travel to Australia in 2012;
- e. That her departure from China was characterised by a series of delays which, in combination, were more suggestive of a planned and orderly departure than a fleeing from persecution, being that she had her second passport [from early] 2012 and her Australia visa April 2012 but did not depart China for almost another month, and that when she arrived in Australia she did not lodge her protection visa application [until] May 2012 which was only 7 days before her visa was to expire;
- f. That she had raised significant new claims about how she obtained her two passports at a late stage, contrary to her responses to questions on those matters in her protection visa application, and only after the Tribunal put contrary independent information to her;
- g. That she raised a new and significant claim, about having to go to Hong Kong to avoid being imprisoned, at such a late stage and could not explain why she made no mention of it in her written statement or as part of her travel history in her protection visa application;
- h. That she had stated in her protection visa application that she had no trouble obtaining her travel documents and departed China legally, which she contradicted in her evidence at the hearing; and

i. That she had indicated in her protection visa application form that she had only ever lived at two addresses, which she contradicted in her protection claims.

44. The Tribunal asked the applicant whether there was anything she wished to say in response to any of these matters. The applicant said that everything she has said is true, and that she does not want to go back to China.

Independent country information

Exit procedures

45. In relation to departure checks in China, advice from DFAT indicates that the Post understands China's national-level border entry and exit system electronic database "to be efficient. But Post is unclear about how this entry-exit database interfaces with individual provinces' crime databases and counties' maintenance of *dang'ans*" or personal dossiers. The Post "is aware that law enforcement agencies at the local and provincial levels have put in place electronic databases to enable them to track suspects and their crimes", but also comments that "China's various database systems can be disjointed," and the "Post considers that the integration of electronic databases holding personal information to be at an embryonic stage."^[1]

46. China is reported to have developed a national computer network for policing named the Golden Shield Project. A counsellor at the Chinese Embassy in Ottawa informed the Immigration and Refugee Board of Canada in June 2009 that the Golden Shield Project had eight databases, including criminal record information, criminal fugitive information and information on passports and entry and exit. Police departments at provincial, city and county levels and most police stations and other grass-roots units under the county level could connect to the system. Some small police stations and grass-roots units in remote areas were not connected. The Chinese police were in charge of entry and exit administration and the police units in charge of examination at all ports of entry including international airports could connect to the system. A researcher who was previously a professor of Chinese and East Asian Politics at Western Michigan University also advised the Immigration and Refugee Board of Canada in May 2009 that China's Public Security Departments had nationwide computer information sharing networks. There had been complaints, however, about provincial police departments being unwilling to share information with each other. The researcher also noted that China's policing system was very decentralised.^[2]

47. DFAT advice indicates that "[a]lthough Post is aware of foreign reports of the Golden Shield database, Post is unable [sic] confirm the existence or implementation of the Golden Shield database or equivalent(s)."^[3]

48. Earlier information on departure checks in China include advice from the Chinese embassy in Canada to the Immigration and Refugee Board of Canada in July 2008 that inspection officers at Chinese airports verify a person's identity through a computer-based information system.^[4] In August 2006, DFAT advised that the Chinese authorities checked all outgoing passengers against an alert list, but DFAT did not know how comprehensive the list was.^[5] In November 2006, DFAT confirmed "that Chinese citizens

subject to arrest warrants would be on the alert lists” and that it was likely that people being investigated but for whom a formal arrest warrant was yet to be issued would also be on the lists. The alert lists were connected to Chinese identity cards as well as to passports and operated at railway stations as well as airports and border crossings.[6]

49. The Ministry of Public Security have advised DFAT that only those considered Falun Gong leaders are refused passports and hence would be prevented from leaving China legally.

50. DFAT believe however that the Chinese government does act to prevent identified Falun Gong followers from leaving China, on the evidence that in many cases those who have been identified by the government as Falun Gong followers have their Chinese identity cards confiscated and hence are unable to obtain a passport and leave the country legally. Those not identified by the government as Falun Gong followers can obtain passports and leave the country legally. DFAT has emphasised that corruption is endemic in the Chinese bureaucracy, in particular at lower levels such as provincial Public Security Bureaus where passports are issued. DFAT has concluded that in many cases it would be possible to obtain a passport illegally by paying a bribe.[7]

FINDINGS AND REASONS

Country of reference - finding

51. The Tribunal finds that the applicant is a citizen of the China.

52. This finding is based on: The biodata page of the applicant’s passport which bears her name and likeness; the details of residence, education and employment given in her protection visa application; and the applicant’s language and claimed ethnicity. All these factors are consistent with Chinese nationality, and the applicant has not claimed any other nationality.

Protection claims – findings

53. The Tribunal finds that the applicant is not a truthful witness and that she has fabricated her claims to Australia's protection. The Tribunal does not accept the applicant’s claim to have been a Falun Gong practitioner in China or to have experienced or been at risk of any other form of harm for that reason. The Tribunal is satisfied that the applicant has fabricated her protection claims.

54. None of the applicant’s claims have been corroborated by documentary or testimonial evidence. The applicant did not provide any documentary corroboration of her Falun Gong practise, or of her arrest, her period of detention or her release. She has not provided any support for her claim that a large sum of money was paid for her release, or to have had to pay for both her passports to be issued.

55. The applicant’s evidence about her period of detention was vague and had the appearance of having been memorised rather than being a lived experience. The applicant became confused when the question of the duration of her detention was approached in any manner other than to state the

duration. The only consistency in the applicant's evidence as regards her claim to have been detained was that it lasted for 1 ½ years.

56. It is implausible to the Tribunal that the applicant would have been able to run and hide from the police from 2001 until May 2012 when, on the applicant's own evidence, she obtained a passport in her own name in 2008, she travelled on that passport to Hong Kong in 2010, she returned to her hometown from Hong Kong, she worked at the same enterprise in her own city for three years, when she moved to evade the police she did so within her own city, and she obtained a replacement passport and an exit permit in 2012.

57. The applicant also does not explain how she was able to achieve a high status position as a "marketing manager" despite a history of being a known Falun Gong practitioner since 1998 and having been detained for 1 ½ years for this reason.

58. The applicant was able, in 2008 and 2012, to obtain passports, to travel to Hong Kong in 2010 and pass through airport security despite claiming to be running from the police, and to have departed China in 2012 for Australia without difficulty on a passport in her own name. This suggests, consistent with the independent information, that the applicant was not of any interest to the Chinese authorities by reason of her practise of Falun Gong or her claimed period of detention.

59. The applicant's delay in departing China suggests that she was not genuinely in fear of harm in China. Her passport was issued [in early] 2012, but she did not depart China [until] May 2012. Her Australia visa was granted [in] April 2012 and she left China almost a month later, [in] May 2012. The circumstances of her passport and visa, and her departure from China, are all indicative of a planned and orderly departure rather than fleeing from a fear of persecution.

60. The applicant's protection visa application was lodged only seven days before her [business] visa was to expire which suggests that her motivation for applying for a protection visa was to extend her stay in Australia rather than from any genuine fear of persecution if returned to China.

61. The Tribunal is of the view that such delays are not consistent with a genuine fear of persecution.

62. These matters were all put to the applicant at the hearing. The applicant's responses, which are set out in the recitation of her evidence at the hearing, did not resolve the Tribunal's reservations about the applicant's truthfulness. All of the applicant's claims are uncorroborated, others are inconsistent over time or with information available from independent sources, some are inherently illogical, and significant claims were raised only after the delegate rejected her claims as not credible.

63. Given all the above matters, the Tribunal is not satisfied that the applicant's claims are true. The Tribunal does not accept that the applicant was a Falun Gong practitioner in China, nor that she was detained for this reason.

64. The Tribunal therefore is not satisfied that the applicant will face serious harm if she returns to China. The Tribunal does not accept that the applicant fled China because she feared for her safety.

65. Having considered all of the applicant's claims, singly and cumulatively, the Tribunal is not satisfied that the applicant has a well-

founded fear of persecution for a Convention reason if she returns to China now or in the reasonably foreseeable future.

CONCLUSIONS

66. 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).

67. 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).

DECISION

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

[1] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1183 – China: RRT Information Request: CHN36990*, 10 August

[2] Immigration and Refugee Board of Canada 2009, *CHN103133.E – China: Whether the Public Security Bureau (PSB) has set up a national computer network for information sharing; nature and extent of communication between PSB offices across the country; whether a link to a police computer network is available at international airports in China (2006 - May 2009)*, 2 July http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=452429&l=e – Accessed 14 September 2010

[3] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1183 – China: RRT Information Request: CHN36990*, 10 August

[4] Immigration and Refugee Board of Canada 2008, *CHN102869.E - China: Exit controls and security measures at airports in China for mainland citizens travelling overseas and to Hong Kong*, 8 July http://www2.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=451972 - - Accessed 7 April 2009

[5] DIMIA Country Information Service 2006, *Country Information Report No.06/42 – China: Failed asylum seeker return decision*, (sourced from DFAT advice of 7 August 2006), 25 August

[6] DIMIA Country Information Service 2006, *Country Information Report No.06/65 – China: Passport and exit arrangements*, (sourced from DFAT advice of 8 November 2006), 10 November

[7] Department of Foreign Affairs and Trade 2008, *DFAT Report No. 943 – China: RRT Information Request: CHN34077*, 16 December.



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Refugee Review Tribunal of Australia

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←1213050 → [\[2013\] RRTA 197 \(12 March 2013\)](#)

Last Updated: 10 May 2013

←1213050 → [\[2013\] RRTA 197 \(12 March 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←1213050 →

DIAC REFERENCE(S): CLF2012/77075

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Sue Raymond

DATE: 12 March 2013

PLACE OF DECISION: Adelaide

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

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration and Citizenship (DIAC) for the visa on [date

deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2012.

3. The delegate refused to grant the visa [in] July 2012, and the applicant applied to the Tribunal for review of that decision. The delegate considered the applicant's claims under the Refugees Convention and the complementary protection provisions.

4. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources, in particular other material about the applicant's circumstances which form part of the DIAC file. The following material was produced at the hearings with the first two items produced at the first hearing [in] January 2013 and the next four items produced at the second hearing [in] February 2013:

- A list of transactions from [2012] to [2013] for a [bank] account in the name of [the applicant]; and
- Medical information dated from [2012] relating to the applicant's mother which establishes a condition needing monitoring with the potential for further treatment.
- Payment confirmation-[mobile] account in name of [Ms A]
- A list of transactions from [a second time period in] 2012 to [2013] for [the same bank] account in the name of [the applicant]; and
- Seven pages of medical information related to the applicant's mother which evidence [details of] a medical condition
- Five receipts for grocery, chemist and rent.

5. The applicant appeared before the Tribunal [in] January 2013 and [February] 2013 to give evidence and present arguments. On the first occasion the hearing was conducted via video-link and on the second occasion the hearing was conducted in person. The Tribunal also received oral evidence on both occasions from [Ms A], the applicant's mother. The Tribunal hearing was conducted on both occasions with the assistance of an interpreter in the Mandarin and English languages.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations).

7. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

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

Refugee criterion

9. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

12. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

The relevant criteria in the Act and the Regulations

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

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

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

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

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

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country , there is a real risk that the non-citizen will suffer significant harm ; or

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

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

(ii) holds a protection visa; or

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

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

(ii) holds a protection visa.

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

866.21 Criteria to be satisfied at time of application

866.211

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

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

(b) makes specific claims under the Refugees Convention.

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

(a) mentioned in subclause (2); and

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

(4) The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

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

(a) mentioned in subclause (4); and

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

866.22 Criteria to be satisfied at time of decision

866.221

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

(2) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

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

(3) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and

(b) the applicant mentioned in subclause (2) has been granted a Protection (Class XA) visa.

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

(4) The Minister is satisfied that the applicant:

(a) is not a person to whom Australia has protection obligations under the Refugees Convention; and

(b) is a person to whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

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

(5) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and

(b) the applicant mentioned in subclause (4) has been granted a Protection (Class XA) visa.

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

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

18. There is a slight difference in the wording of section 36(2)(b) and subclause (3) of clause 866.221 of the Regulations. Essentially they are the same but the provision of the Act makes no reference to an “applicant” in the context of the other person. The Tribunal determines that nothing turns on the difference in wording and essentially to satisfy this criterion the applicant needs to be dependent on a person to whom Australia has protection obligations and who holds a protection visa.

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

The applicant’s claim

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

21. A summary of his claims is outlined below:

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

22. Consequently, at time of application, the claim was made under clause 866.211(2) of the Regulations.

23. The Tribunal is satisfied that the applicant has claimed protection in his visa application lodged with DIAC [1]. He claims protection so that he does not have to return to China.

24. Consequently, on the basis of the visa application the Tribunal is satisfied that clause 866.211 is satisfied at the time the application was lodged on [on a certain date in] 2012. The Tribunal determines that subclause (2) is satisfied.

25. The Tribunal notes that in a statement attached to the application the applicant makes reference to his mother being granted a protection visa but his claim for protection is not couched in those terms. In such circumstances the Tribunal has not relied on subclause (3) in determining the time of application criteria.

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

26. Having considered the material on the departmental file, the departmental interview, in addition to evidence given at the hearing the Tribunal was of the view that the applicant's claim to be a person to whom Australia has protection obligations under the Refugees Convention in his own right was not a strong claim.

27. Consequently the Tribunal proposes to consider what it regards as the stronger basis for determination of this matter without elaborating further on the applicant's own claims. The Migration Act[2] contemplates that a protection visa may be granted by virtue of the family relationship, as opposed to an applicant making claims in their own right. The Tribunal will consider whether the applicant is a member of the same family unit of a person to whom Australia has protection obligations under the Refugees Convention and who has been granted a protection visa.

28. It involves consideration of two main issues; namely

- o whether the applicant is a member of the same family unit as
- o a person to whom Australia has protection obligations under the Refugees Convention and who has been granted a protection visa.

The Tribunal will deal with these issues in turn.

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

29. The Tribunal recounts below the provisions of the law relevant to the consideration of whether the applicant is a person who is a member of the same family unit as his mother who has claimed, and been granted, a protection visa.

30. 'Member of the same family unit' is defined in section 5(1) of the Act as follows:

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

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

'member of the family unit of a person has the meaning given by the regulations made for the purposes of this definition'.

31. Regulation 1.12 defines 'member of the family unit' as follows:

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

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

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

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

.....

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

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

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

(iii) is dependent on the family head.

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

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

'dependent child',

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

(a) has not turned 18; or

(b) has turned 18 and:

(i) is dependent on that person; or

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

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

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

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

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

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

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

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

(d) a Protection (Class XA) visa;

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

34. The Tribunal finds that the applicant's date of birth is [date deleted: s.431(2)][3]. The Tribunal finds that he arrived in Australia on [date deleted: s.431(2)].[4] He arrived on a subclass 571 visa. At that time he was [age deleted: s.431(2)] years old. He has lived with his mother, [Ms A], since coming to Australia aside from a period of [circumstances deleted: s.431(2)]. Since [month deleted: s.431(2)] 2012 he has lived with his mother in [suburb deleted: s.431(2)] NSW. His mother was granted a protection visa on [date deleted: s.431(2)][5] The Tribunal is satisfied of the relationship of mother and son between the applicant and his mother on the basis of a birth certificate translation[6] which appears on the departmental file. The Tribunal is satisfied[7] that [name deleted: s.431(2)] is the applicant's father and the Tribunal notes that he was granted a Class BC-100 visa on [date deleted: s.431(2)]. On the basis of this information the Tribunal finds that the applicant's father is the spouse of the applicant's mother.

Dependency of the applicant

35. As the applicant is over 18 years of age he can only be regarded as a dependent child of the family head, or of a spouse of the family head, if he is dependent on that person, or is incapacitated for work due to loss of bodily or mental functions (of which there is no suggestion in this case). The question of whether a person is dependent on another person is specifically dealt with in regulation 1.05A. The categorisation of dependency in an application for a protection visa is different from other visa types. The person will be regarded as being dependent on another person 'if the first person is wholly or substantially reliant on the other person for financial, psychological or physical support' The Tribunal notes the difference in the definition for the purpose of a protection visa as compared with other visa classes. There is no requirement for the dependency to be for any particular period of time.

36. The applicant and his mother gave evidence almost reticently and the Tribunal determined that there were complex emotions of guilt on the part of them both for different reasons which are elaborated on hereunder. However

based on oral evidence of both the applicant and his mother, in addition to documentary evidence submitted at both hearings and contained in the departmental file, the Tribunal concludes as follows:

- The applicant and his mother arrived in Australia in [date deleted: s.431(2)]. He arrived on a subclass 571 student visa and she came on a Guardian visa.
- The applicant resides with his mother and has done so since his arrival in Australia in [year deleted: s.431(2)] aside from a period of [circumstances deleted: s.431(2)]. They live together in a house occupied by another family. He was [age deleted: s.431(2)] years old when he arrived and is now [age deleted: s.431(2)] years old. He is an only child.
- The applicant was studying after he came to Australia but after a while they could no longer afford for him to continue. When he was studying he had some paid work in a restaurant but said that it was about 10 hours a week. The Tribunal finds that such work was limited. He looked for work but could not find any.
- The applicant is not working and has not done any paid work since [year deleted: s.431(2)] when he was [circumstances deleted: s.431(2)]. He referred to himself undertaking house “decoration” work with a friend. He referred to himself as an apprentice but the Tribunal understood that he was not paid a wage but was given some support by way of food and accommodation and payments towards his mobile phone. He said that his mother did not give him any money [during this time] but she said that occasionally she did.
- The applicant applied for permission to work in an application for a bridging visa in [2012]. That form contains statements that his mother supported the applicant.
- Since obtaining the bridging visa he has not obtained work despite looking for it.
- The applicant's mother has worked for a period until approximately [date deleted: s.431(2)] when she became unwell. At the time of the second hearing she was still unable to work due to her ill-health.
- [During this time] he has been looking after his mother, trying to learn English and studying the bible. He has not been looking for work as he has been caring for his mother.
- At hearing evidence was given that the applicant's father has [arrived] in Australia. The Tribunal has ascertained that he arrived on [date deleted: s.431(2)] on a subclass 100 visa. He [resides] with the applicant and his mother. They initially rented one-room of the house but they now rent two rooms with the applicant's mother and father sharing a room and the applicant having a separate room.
- The applicant's mother meets expenses for the applicant's accommodation, food, transportation and mobile phone. She has met those expenses from her own wages and savings, and later in 2012, from money given to her by her spouse who is now working in Australia.
- From [a certain date in] 2012 the applicant's mother has transferred [money] each week to the applicant's [bank] account so

that he could buy clothes food etc. [D]ocumentation supported the evidence in that regard.

- o The regular payments faltered as from [the date] when the applicant's mother became unable to work. A[n amount of] credit was paid on [a certain date in] 2013 and regular [payments] per week from [Ms A] to the applicant appear on the list of transactions for his [bank] account from [that date]. The applicant and his mother lived off her savings for the period she did not work before her husband arrived in Australia and commenced working.

- o The applicant is not provided with financial support by anyone other than his mother.

37. The applicant gave evidence that he believed he was dependent on his mother for financial support. He expressed regret at being supported by her.

38. The applicant's mother gave evidence that the applicant couldn't find work and then she became sick and he looks after her. She said she has not been well since [month deleted: s.431(2)]. The Tribunal asked whether he did look for work before she became sick and he said he did but he was not successful.

39. The Tribunal asked the applicant if his mother was well would he rely on her and he said that he would probably look for work if she was well. The Tribunal asked the applicant's mother whether he was reliant on her for financial support and her answer was that she thought "temporarily yes". In the context of the other evidence the Tribunal interprets this to be a situation which is hoped not to be permanent but nor is it fleeting.

40. He is not working at the present time and has not looked for work recently. He expressed the view that his parents' English is not good, he would like to study English and if he was able to study "they don't have to bring their troubles to others" His mother indicated her preparedness to support him in that study. The Tribunal detects frustration and some guilt on the part of the applicant in relation to his situation of dependency and his lack of skills. The Tribunal also detected guilt on the part of the applicant's mother that the applicant had not been able to continue to study when he came to Australia as she could not afford it. She said "I owe him a lot".

41. On the basis of the above evidence, the Tribunal is satisfied that the applicant is wholly, or substantially, reliant on his mother for financial support. The Tribunal is satisfied that this is the case from a least the date of the visa application and up until and including the date of decision.

42. The Tribunal notes that the applicant's father has been working recently and has essentially been the wage earner for the family. However the applicant's mother gave evidence that her husband gives her part of his wages for living costs and from that amount she has paid the applicant [amounts] per week from [a certain date in] 2013. Consequently the Tribunal is satisfied that the dependency is on the applicant's mother. Even if the dependency is on the father, as opposed to the mother, the definition of 'dependent child' includes the 'spouse of the family head'.

43. The Tribunal is satisfied that the applicant's dependency is not contrived and at the present time there is a dependency for financial support by the applicant on his mother. He is wholly, or substantially, reliant on his mother for financial support. The Tribunal notes that the case law in relation to the definition of dependency is to the effect that the proper construction of

'dependent' does not carry any implication of the notion of necessity or the lack of choice and therefore there is no need to prove more than reliance in fact.[8]

44. The Tribunal is further satisfied that the dependency is for financial support and whilst there is some physical support provided, for example if the applicant is ill, he in fact is providing physical support in terms of cleaning duties and doing his own washing for himself. In terms of psychological support there is much discussion about religion and his parents provide guidance in that regard but the Tribunal's finding is based on the financial support of the applicant.

The applicant's mother

45. An additional requirement is that the person on whom the applicant is dependent needs to be someone to whom Australia has protection obligations under the Refugees Convention and that person has been granted a protection visa.

46. The Tribunal has had regard to the reasons for decision of the Tribunal (differently constituted) which related to the review of an application of [Ms A].[9] The Tribunal is mindful that it is not rehearing a protection application from [Ms A], and it would be inappropriate for it to do so.

47. On the basis of information contained in the decision record of [Ms A] the Tribunal finds that she claimed that her religious activities attracted the adverse interest of the PRC authorities in [year deleted: s.431(2)] when she was detained and mistreated by the police. She further claimed that in [date deleted: s.431(2)] her husband was detained for the same reasons and he was sent to prison for three months. The applicant in that case claimed that she and her husband have attracted the adverse interest of the PRC authorities because of their religious activities.

48. The differently constituted Tribunal found that the mother of this applicant had been implicated in religious activities in China relating to an underground Christian church which attracted the adverse interest of the PRC authorities. The Tribunal accepted her claim that the authorities may arrest or otherwise mistreat her in the reasonably foreseeable future because of her involvement in illegal religious activities. The Tribunal further accepted the claim that she may be prevented by the authorities from participating in religious activities of her choice if she returns to China in the reasonably foreseeable future. The Tribunal found that such treatment amounts to persecution for Convention purposes and was satisfied that there is a real chance that the [mother of the] applicant would be subjected to persecution by the PRC authorities for reasons of religion[10].

49. At the hearing [Ms A] gave evidence that she had been granted a protection visa. The Tribunal has checked that this visa was granted and determines that it was granted on [date deleted: s.431(2)].

50. There is no evidence before the Tribunal to suggest that the applicant's mother's circumstances have altered in so far as her protection claims are concerned, nor that there is any material change in China since the protection visa application has been determined in so far as underground churches are concerned.

51. Having considered the Tribunal's findings and reasoning in the applicants mother's case, the Tribunal is satisfied that his mother continues to be a 'noncitizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention'. The Tribunal is satisfied that the applicant's mother holds a protection visa.

CONCLUSIONS

52. The applicant's mother has been granted a protection visa and her husband now has a permanent spouse visa. If the applicant is dependent on his mother, as the Tribunal has determined he is, it is appropriate that a determination be made by this Tribunal that the he satisfies the requirements of the Migration Act.

53. Consequently the Tribunal is satisfied that subclause 866.221(3) is made out and that the applicant satisfies the requirements of section 36(2)(b) of the Act. Given the different basis of the decision the Tribunal will make reference to both the Act and Regulations in its decision.

DECISION

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

[1] Folios 9-34 DIAC file

[2] Section 36(2)(b) and cl.866.221(3)

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

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

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

[6] Folio 1 of DIAC file

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

[8] Huynh v MIMIA [2006] FCAFC 122; (2006) 152 FCR 576

[9] [case details deleted: s.431(2)]

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

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←1210725 → [2013] RRTA 142 (11 February 2013)

Last Updated: 10 April 2013

←1210725 → [\[2013\] RRTA 142 \(11 February 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←1210725 →

DIAC REFERENCE(S): CLF2012/23511

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Suhad Kamand

DATE: 11 February 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

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 applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of China (PRC), applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the

Migration Act 1958 as this information may identify the applicants] February 2012.

3. The delegate refused to grant the visas [in] June 2012 and the applicants applied to the Tribunal for review of that decision.

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] HCA 62; (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] HCA 19; (2000) 201 CLR 293, MIMA v Haji Ibrahim [2000] HCA 55; (2000) 204 CLR 1, MIMA v Khawar (2002) 210 CLR 1, MIMA v Respondents S152/2003 [2004] HCA 18; (2004) 222 CLR 1, Applicant S v MIMA [2004] HCA 25; (2004) 217 CLR 387, Appellant S395/2002 v MIMA [2003] HCA 71; (2003) 216 CLR 473, SZATV v MIAC [2007] HCA 40; (2007) 233 CLR 18 and SZFDV v MIAC [2007] HCA 41; (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.

Member of the same family unit

19. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and dependent child.

CLAIMS AND EVIDENCE

20. The Tribunal has before it Department's files relating to the applicants. The Tribunal also has had regard to material referred to in the delegate's decision and other material available to it from a range of sources.

Department files

21. The Protection visa application forms appear to have been completed with the assistance of Registered Migration Agent [name and agency deleted: s.431(2)]. They identify three visa applicants, with express claims for Australia's protection being made only by the first named applicant (first applicant). The second named applicant (second applicant) is identified as the husband of the first named applicant. The third named applicant (third applicant) is identified as the son of the first and second named applicants.
22. In respect of the first applicant, the information provided indicates that she: was born in [year deleted: s.431(2)] in Shandong, China, where she is a Citizen; speaks, reads and writes in the Chinese language; is of Han ethnicity and of Christian ("Local Church") religion; married in [1995]; holds a Chinese passport issued in [2010]; has lived at only one address in China between February 2002 and January 2012 (folio 51); was self-employed in China; departed China legally "with helps of my friends"; has [family] residing in China.
23. In respect of the second applicant, the information provided indicates that he: was born in [year deleted: s.431(2)] in [Fujian], China, where he is a citizen; holds a Chinese passport issued in [2009]; was self-employed in China; is of Han ethnicity and Christian ("Local Church") religion.
24. In respect of the third applicant, the information provided indicates that he: was born in [date deleted: s.431(2)] in Shandong, China, where he is a citizen; is the son of the first and second applicant; is of Han ethnicity and Christian (Local Church) religion; holds a Chinese passport issued in [2010]; was attending [school] in Shandong between September 2009 and January 2012.
25. In support of the applications the applicants provided copies and certified copies of documents including marked pages of their passports.
26. Only the first applicant has made express claims to fear harm in China, detailing those claims at folios 45-48 of the Tribunal file, as well as in a typed statement in alternating English and Chinese paragraphs at folios 60-65.
27. In summary, her claims at folios 45-48 are that:
- a. she fears harm by the Chinese authorities as an active Christian who developed secret gatherings of the Local Church (which she also refers to as the "Shouters") in [City 1], Shandong, and departed China with her husband and son to escape persecution; and
 - b. she fears being arrested and imprisoned by the Chinese authorities and being unable to practice her religion and that her husband and son will also be implicated. Her activities in connection with the Local Church are already known to the Chinese authorities who consider the Local Church to be an evil cult.
28. Her statutory declaration, sworn in March 2012, at folios 60 to 65, adds that:
- a. the applicants arrived in Australia [in] January 2012 as part of a tour group. [Details of siblings deleted: s.431(2)], leaving her as the only child of her parents.
 - b. since leaving school in [year deleted: s.431(2)] she worked in a [shop] run by [Ms A];
 - c. she met the second applicant in 1994. They married [in] 1995 and their son was born on [date deleted: s.431(2)];

- d. [Ms A] transferred the [shop] to the first and second applicants in January 2003. They changed the name to “[name]” and expanded it into a trading company. Wanting her to enjoy a happy home life her husband established the company “[name]” in August 2006. The first applicant remained home as a housewife after this;
- e. in early 2010 her husband began gambling and in June 2010 had to return to [Fujian] to “dodge” creditors. This left the first applicant with pressure from creditors. She began thinking of leaving China and obtained passports for herself and son in [2010];
- f. in August 2010 [Ms A], who had already become a Christian in the Local Church, approached her and gave her “strong support” in: running the company; helping her repay the debts; encouraging her creditors to allow repayment by instalment. She also evangelised to the first applicant and arranged for her to attend the Local Church. The first applicant was baptised in the home of [Ms A] [in] October 2010 and has been “a genuine and devout Christian of the Local Church” since;
- g. from January 2011 [Ms A] and the first applicant employed Local Church members at the company. They also set up a “new meeting group of the Local Church based on these members who had worked with us”, these meetings taking place every Tuesday, Thursday and Sunday. Their meeting places varied, and they had up to 27 attendees;
- h. [in] November 2011 the PSB raided their “Lord’s Day” meeting at [Ms A]’s home. All attendees were taken to the [City 1] PSB. Based on the evidence of other attendees the first applicant and [Ms A] were identified as the leaders of the group. The first applicant and [Ms A] were then transferred to [City 1] Detention Centre. The first applicant was “interrogated, mistreated and tortured by police” and forced to do hard manual jobs while in detention. This made her seriously ill;
- i. at the time of her arrest her husband was in [Fujian] and had heard that she had repaid his debts and kept the company running. Even though she had earlier tried to persuade him to return to Shandong, he refused, saying he would only return if he had enough money. However, he returned as soon as he heard of her arrest and spent a lot of money on contacts in the PSB. He paid a PSB officer RMB50,000 for her release. She was released on bail, temporarily, for medical treatment [in] December 2011. She was required, during this time, to report to the local police station every Monday;
- j. her husband then began, after her release, to plan their escape from China. He had a friend working at a hotel in [City 1] who had many contacts. It was this friend who arranged for the applicants to join a tour and depart China [in] January 2012, far from Shandong Province;
- k. [in] January 2012 the police went to her home in [City 1] as she had failed to report to the police on time. Her parents were taken to the PSB and questioned for a whole night. On learning that she had left China the authorities “sealed my husband’s company and froze all of our properties. The police warned my parents that all of our properties would be confiscated by the authorities if we failed to return to China within one month. Right now, our properties have already confiscated by the PRC authorities”; and

l.in Australia she has “been continuously attending the Local Church” which is considered an evil cult in China. She is a “major activist of the Local Church, actively establishing and developing secret gathering group of the Local Church”, and is already known to the authorities. She fears being imprisoned by the PRC authorities, that she will not be able to practice her religion and that her husband and son will be implicated and persecuted by the PRC authorities if they return to China.

Department interview – [in] March 2012

29. The applicants were interviewed by the department in respect of their claims, with the assistance of a Mandarin/ English interpreter. A summary of the oral evidence given during that interview, as recorded in the audio recording at folio 68, follows.

30. The first applicant decided to come to Australia in July 2010 when her husband was in debt. She thought about it again in July 2011. They used money from their business to come to Australia. Their travel was arranged by [name deleted: s.431(2)], the manager of a motel, who organised their travel within twenty days.

31. The applicants left the tour group immediately on arrival to Australia. They did this after passing customs.

32. Regarding their circumstances in China, her husband returned to Fujian from Shandong in 2010 because he lost RMB160,000 in gambling and owed RMB500,000. He didn't want to face her or their son. She didn't return with him because the money was borrowed from his friends and they had a business to run, however she maintained phone contact with him. She was going to repay the debt slowly.

33. When asked why she considered leaving China at the time she applied for her passport ([2010]) she responded that her husband had many debts and the debtors were coming to her. It was difficult. She had gone to Fujian but he didn't want to see her as he couldn't face her. They reconciled and started being together again after she was arrested and jailed.

34. She was introduced to the Local Church through [Ms A] who she worked for after school. They maintained contact and the applicants later took over her shop. [Ms A] introduced her to the Local Church in around August 2010, by evangelising and asking her to pray to Lord Jesus. What appealed to the first applicant was that the people in the Local Church have good hearts and are very willing to help others. The first applicant started to believe in Jesus by being with Local Church people who made her feel happy.

35. [Ms A] also helped the first applicant with her business because she sympathised with the first applicant and used her money to help the business's cash flow. It took around three quarters of a year to repay the debts. [Ms A] lent her the money as she is a dedicated Christian and is happy to help others. They also had a close connection as the first applicant had worked with her a long time. [Ms A] had been a member of the Local church around seven years.

36. The first applicant practiced Christianity in China by believing in the Trinity and that every word in the bible is imbued with the Holy Spirit. The gatherings involved four steps: hymn singing, reading the bible, sharing, and praying. She attended gatherings once a week, but sometimes on Saturday

also. The gatherings lasted around two hours. In these gatherings they would pray approximately three to five minutes in the last prayer session. Most of the time at the gatherings would be taken up singing and bible reading. Then they would share their testimony about God. They can call on the Lord Jesus' name at any time.

37. The gatherings in China were held at a residential complex, the address of which she provided. The place belonged to [Ms A]. The gatherings were held at the same time each week, on Sundays between 6:30 and 8:30.

38. When asked what the difference is between the church she attended and normal unregistered house churches she responded that they believe in the Trinity and every word in the bible is from the Spirit and they call on God's name in a loud voice. The baptism is different, involving full submersion, and they use the Recovery version of the Bible. There are no leaders in the Local Church. The Recovery Version of the Bible is distinct because it has the original text and notes. The notes are by Li Changshou.

39. She started organising gatherings in around July 2011. These were held at her home sometimes. Her role was to organise people to come, read the bible and give more testimonies than others. Normally around 12 or 13 people would attend. Later there were about 27 attendees as she invited some classmates and friends of friends. She took the risk of holding gatherings at her home because they believe in Jesus and that the Lord is Almighty and everyone should believe. Without belief we are like empty shells. When asked why she decided to hold gatherings at her home given that they were already being held at [Ms A]'s home, she responded that, initially the gatherings were held on Sunday. Later there were more gatherings on Saturday and they had to move location due to concerns of detection. The gatherings were held at her home around once a week. On Sunday they were at [Ms A]'s home.

40. She first came to the adverse interest of the authorities [in] November 2011 when plain clothed police entered [Ms A]'s home and took them away. Around thirteen or fourteen attendees were taken away. Six police officers came into her home. Everyone at the gathering was taken to the police station. It took five to eight minutes to get there by police car. At the police station they were interrogated separately and accused of spreading anti-revolutionary speech. She thinks they knew she was from the Local Church. They said the Local Church is anti-revolutionary and a cult. She was kept at the police station one day. On the second day she was transferred to [a] Detention Centre which was around an hour by car from the police station, [location details deleted: s.431(2)]. Only [Ms A] and the first applicant were transferred there. The other attendees paid a fine and got out a few days later. They weren't sent to the detention centre because the gatherings were held at the homes of [Ms A] and the first applicant, and they were the organisers. The police knew she held gatherings at her home as the brothers and sisters had confessed this.

41. She was detained until [a date in] December 2011 and got out for medical reasons. She had stomach and intestinal problems. While she was detained her son was looked after by her father.

42. On the day of her release she was taken to the [Hospital] as she was beaten on her head and leg. She first got sick [in] December. She had digestive problems, couldn't eat and lost weight. She was hospitalised for six or seven days. Her husband found a contact within the police. He paid him RMB50,000 to arrange medical bail. They found the money quickly, despite their gambling

debts, as [Ms A] helped their business to operate well and profitably. The Lord Jesus protected her.

43. When asked why her husband didn't return to Shandong when the debts were repaid she responded that he didn't have the face to see friends and relatives.

44. After being released from hospital she had to report every Monday morning and couldn't travel. When she reported she had to sign against her name on a calendar and identify what she had done in the week. This would normally take around thirty minutes.

45. She was able to depart China by asking a hotel manager to use connections. The delegate noted that Chinese airports have watch lists of people of adverse interest and that passports of such people are often confiscated by the Chinese authorities. She responded that her contact had engaged people at Customs to arrange her trip and the gate to pass through. Her contact did not accompany them to the airport. When asked how her contact had these connections she responded that he has run his hotel for many years and has many social connections. They lent the contact capital to start his motel in the past, without charging him interest.

46. The Local Church has been considered an illegal and evil cult by the Chinese government since 1995. The government doesn't like any people gathering. She has been baptised. She described her baptism at [Ms A]'s home [in] October 2011. Her whole body was submerged in water. [Ms A] and [name deleted: s.431(2)] baptised her. The whole body is submerged so their sins can be washed away and she can start her new life.

47. She attends church in Australia at a [location] at [address not audible]. She began attending around 20 days after arriving in Australia. She heard about it from [Ms B], from Sichuan Province, who enquired from her colleagues. The applicant's lives at this lady's home. The second applicant does not attend the church as he works in construction in Canberra. Her son does attend. They attend on Sunday night and sometimes on Saturday night also. Less people attend on Saturday night. Last weekend she attended and they discussed Jerusalem. The mountain is where God is and is the highest point of Jerusalem. The person who runs the gatherings in [Suburb 2] is [name deleted: s.431(2)]. There is an [older person] also. There are around 50 for 60 attendees on a Sunday night, and on Saturday there are around 20.

48. The Local Church was started in China by Ni Tousheng in around 1920. Witness Lee is Li Changshou. His role was big. He did the Recovery version of the Bible and the Living Stream Ministry. When asked about the second coming of Christ she hesitated before offering that they are God's children and are to worship God. They are like Jesus' body and the cup containing the body, soul and spirit. When Jesus revisits his disciples will be able to enjoy eternal blessing in His new kingdom. When God returns he will build his eternal kingdom.

49. In China, she has never been to a registered church and the Local Church's in China do not register or work with the government. There is not much freedom in the government churches. She knows this, despite not attending one, as she has a friend and neighbour who attended said participants are not allowed to speak. The government may also give you money to just sit there.

50. The duty of every Local Church member is to evangelise and believe in every word of the Bible. When asked what the Local Church view of Christian clergy such as priests and bishops is she responded that they are just like us, children of God. However, there are no formal roles in the Local Church, no priests, and everyone is equal and referred to as brother and sister.

51. If she returns to China she thinks she will be arrested and detained. She will lose her ability to attend her church. She would be arrested straight away as she left [in] January and was meant to report [in] January. [In] January they went to her home and questioned her parents for a day. They confiscated her property and told her parents that if she does not return within a month she will be considered to have absconded. Since [a date in] January her parents were taken again for questioning one week later and again asked when she will be returning. Now she dares not contact them. Her son was a top student in China. If she had other options she wouldn't have risked her son's future. He didn't want to come here and was popular.

Delegate's decision – [in] June 2012

52. The delegate was not satisfied that the applicants are persons in respect of whom Australia has protection obligations. The decision record notes the following: concerns the first applicant's account of the frequency and nature of Local Church gatherings did not appear consistent with her written claims (folio 73); she did not identify the two formal positions in the Local Church (elder and deacon); did not identify the belief in multiple baptisms and did not distinguish the Local Church from government registered churches by reference to the Local Church principles that the church is not a human institution or the registered church's "curbed view on the 'second coming'" The delegate was not satisfied that she was detained, noting independent information that cult leaders may be sentenced to seven years in prison as opposed to the one month she claims to have been detained. The delegate also considered it doubtful that the first applicant could retain her passport and depart China if she was of adverse interest as claimed. Being unsatisfied that the first applicant was a member of the Local Church in China, the delegate considered her attendance at the Local Church in [Suburb 2] to be conduct engaged in solely for the purpose of strengthening her refugee claims. Based on the above findings of fact the delegate was also not satisfied that there are substantial grounds for believing that there is real risk that the applicant will suffer significant harm in China.

Tribunal review

53. The applicants sought this Tribunal's review and continued to be represented by the same migration agent. They appeared before the Tribunal [in] January 2013 to give evidence and present arguments, in the company of their agent. The hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

54. At the commencement of the hearing each applicant produced their original Chinese passport and photos depicting the first applicant's participation in Local Church activities in Australia. They also produced

letters from the [Local Church] stating that the first and third applicant have each been regular attendees since February 2012.

55. In response to questions put to them the applicants indicated that they are each nationals of China and of no other country, and they have no right to enter or reside elsewhere. Their passports contain their correct identification details, were issued by the Chinese authorities and contain only official, unaltered stamps and markings.

56. The Tribunal noted that the Local Church letters (Tribunal folios 38-39) appear to be generic letters. The representative explained that this is just how they are issued by the Local Church in Australia. Regarding the photos copied at Tribunal folios 40-41, they are of a Local Church conference between [a date in] December 2012 and [a date in] January 2013. The first and third applicant attended.

57. The Tribunal asked the second applicant if he has any religion. He responded that he has believed in Jesus since coming to Australia and he did not have this belief in China. The first and second applicant waited outside the hearing room while the first applicant gave evidence to the following effect.

First applicant's oral evidence

58. The first applicant's remaining family in China comprises only her parents only who live in Shandong, around a 15 minute walk from the applicants' home. The address given at department folio 51 is her *hukou* and has been since her son was born in [year deleted: s.431(2)]. Before that her *hukou* was in Shandong District. She has always lived in Shandong. The second applicant shares the first applicant's current *hukou*, which is urban.

59. The second applicant's family in China comprises his [family composition deleted: s.431(2)]. They all live in [Fujian].

60. Regarding the current status of their business in Shandong, it has been confiscated. When asked what that means and how the confiscation occurred she referred to being a leader of the Local Church and being arrested. When asked what she means by her business being confiscated she responded that it is hard to explain, but the business has gone and the things in the shop don't belong to her anymore. When she left China in January 2012 the business was ongoing and there were five paid employees. She heard that the business was confiscated around four or five days after arriving in Australia. Her father phoned and told her that, because she didn't report to police [in] January, they went to her home. When asked how her father knew that if they didn't live at the same address, she responded that the police asked her neighbour for her parents' number. When asked what her father told her of the confiscation of her business, she responded that he said: the police went to her home and arrested her father and asked where she is; her father said he doesn't know and the police said if she is not back in a month the business will be confiscated. However, at that time they had already frozen her properties. They did this [in] January 2012 when they took her father away and said it was because she didn't report. She understands that: her assets were frozen [in] January 2012 and confiscated one month later; the goods in the business are still there but the premises is sealed. When asked how many properties she had in China at the time of her departure she responded that she had around RMB100,000 in [goods] at the property and RMB40,000 in savings. The home she lived in was

owned by her and has now been sold at auction by the Chinese government. Her father said that this happened around the end of March 2012. She has one more property but at that time it wasn't built. She bought the property two years prior, paying RMB830,000 in full two years ago. She borrowed half from [a] Bank and paid half up-front. It is part of [a multi] story building, with a view. It was still being constructed but may have been finished by now, as it was almost complete when she was there. She does not know if this was confiscated. That property is also in [City 1], Shandong Province, and is registered in her name only.

61. The business the applicants had in Shandong, which has been confiscated, was registered only in the second applicant's name. When asked why the police would confiscate his business and not her RMB830,000 property because of her failure to report she responded that this is common in China.

62. Regarding the claims set out in the Protection visa application form and written information provided in support, including her statement, she is certain the contents are true and correct. She has read her statement. She expressed her story orally and her agent wrote it. She wrote the Chinese version. All the information she gave at her department interview is also true and correct. However, she was nervous and had low blood pressure, so she misstated some dates. Since being released from prison has suffered dizziness. When asked if she has seen a doctor about this she responded that she did in China but not in Australia as the symptoms are not severe when she isn't nervous. She added that sometimes she can't open her eyes fully. When asked what dates she thinks she misstated in her department interview she responded that the Local Church meetings at home were always held on Tuesday, Thursday and Sunday, but at [Suburb 2] they are on Saturday and Sunday. She told the department that the gatherings were on Saturday and Sunday as she thought she was being asked about the [Suburb 2] meetings. She added that, in relation to arranging for brothers and sisters of the church to work in her business, this was in January 2011, but in her department interview she said it was June 2011. The Tribunal put to her that it seems her recollections are very strong if she remembers such detail. She responded that she makes mistakes when she is nervous.

63. In relation to the claimed transfer of the shop from [Ms A] to the applicants in 2003, she explained that the applicant's paid [Ms A] RMB250,000 for the business. [Ms A] did not retain any business interest in the shop. After this [Ms A] was not [physically well]. [Ms A] just attended the Local Church and became a devoted attendee. She supported herself financially from the RMB 250,000 she sold the business for and from savings. [Ms A] was not married. She owned the home in which she lived and as far as the first applicant knows, had no other investments.

64. In relation to how she first discovered her husband's gambling debts, she responded that creditors came to their house to ask for money. Her husband had already gone to Fujian at that time. When asked why she originally thought he had returned to Fujian if she discovered his gambling later, she responded that he told her that he wanted to visit his parents and brother-in-law who was unwell. He left Shandong in early June 2010. The creditors approached her around six days later. Then she phoned her husband and asked when he borrowed so much money. He was silent. He told her he

doesn't have the face to stay in Shandong. He had borrowed money from three people named [names deleted: s.431A(2)], to a total sum of RMB 500,000. The creditors told her he borrowed the money to gamble. She and her husband spoke only a few times when he was in [Fujian]. She repaid the debt in less than a year and told him immediately.

65. At this point the Tribunal invited the second applicant into the hearing room. He gave evidence that: his wife didn't initially know about his gambling and found out after he returned to [Fujian] that he had lost money and borrowed money from friends; he had borrowed money from [names deleted: s.431(2)] and owed them around RMB500,000; he is not sure how long it took to repay this as his wife repaid it and told him so in around 2011. The first conversation he had with wife regarding his gambling took place by phone. He had a lot of work in [Fujian] at that time and when she called him he was sometimes busy. He was working in a [company] named [name deleted: s.431(2)] in [Fujian]. He was not sending his wife money as he was doing business and thought he would invest it in other things to have face to return to Shandong. He later said that he would occasionally send his wife money. He started working at the [name deleted: s.431(2)] after graduating High School and then stopped when he owned his own business. He re-commenced working there after he lost money gambling, in around July 2010.

66. As to why he got his passport in [2009] he explained that: he was doing business and his first passport was going to expire; his friends were talking about travelling to Singapore and other places, however he never actually travelled outside China. After giving the above evidence the second applicant again left the hearing room while the first applicant continued to give evidence.

67. The first applicant indicated that she applied for her own and her son's passport in around [2010] because there were many creditors asking for money. She felt angry that her husband lied and many people knew. She felt she had lost face and wanted to leave China. She didn't though, as in August 2010, [Ms A] came to visit and said she would help financially and told her to get over the difficulty. The Tribunal asked why she needed [Ms A]'s help if her husband was working and investing in [Fujian] and she could afford to invest in an RMB830,000 property around that time. She responded that her husband had already lost the money and they had already bought the property. She was very angry and messy in her mind and wanted to go away.

68. The Tribunal put to her that its question is about why she would need financial assistance from [Ms A], an elderly lady with health difficulties and a limited amount of money to live off from the sale of her business in 2003, while the applicants seemed well off at the time. She responded that they had a mortgage from the bank and their property had not been paid off yet. The bank wouldn't allow them to sell the property. The Tribunal noted her earlier evidence that she paid around RMB415,000 in cash for the property and was also paying to develop it. She responded that she only bought one unit in the 18 story development.

69. She continued that [Ms A] helped her with the with cash flow of the business by giving the applicants RMB300,000. She had this money in savings as she had done business for over twenty years and has a lot of money. She gave it to the applicants as they were very close. The applicants have since paid [Ms A] back as well as the creditors, in the order of RMB800,000. They

managed to do this because their business was good, having a daily turnover in the order of RMB10,000. It was a [business].

70. In relation to the Australian Protection visa, she first heard about it in Australia, from a person named [Ms B], whose home the applicants lived in in Australia. That lady helped her find a migration agent.

71. Regarding her involvement with the Local Church in China, the Tribunal asked when she first realized that the church [Ms A] was encouraging her to participate in was considered an illegal and evil cult in China. She responded that [Ms A] didn't tell her it is illegal. She preached the Gospel and told her to pray to God. When asked what that meant to her at the time, as her evidence does not reveal any prior contact with Christianity, she repeated that [Ms A] just told her to pray to God to save her husband and once she believes, she will be saved. The first applicant didn't ask [Ms A] what church she attends and [Ms A] just made arrangements for the applicant to go to a home to attend a gathering. When asked when she first realized [Ms A] was part of a church considered an illegal cult in China, she responded that she was already a believer when she learnt this and did not know that the gatherings were unregistered or illegal when she first started attending. She didn't ask. She didn't think in that direction. The Tribunal put to her that this seems surprising. She responded that she didn't think in that way as she had many problems at the time.

72. The Tribunal asked if she is saying she did not turn her mind to the safety implications for her business, family and son of attending secret religious gatherings, and when she did start thinking about such things. She responded that she didn't think that way until later, when [Ms A] would tell them to keep their voices down in case they get reported. When the Tribunal noted the centrality of singing and praying aloud in the Local Church, and asked whether she is saying that these things did not occur when she first started attending gatherings, she responded that they happened early on, and [Ms A] told them to sing low so others wouldn't hear. When asked whether she ever wondered why [Ms A] would say this she responded that she didn't think about what that meant and thought that [Ms A] didn't want to disturb the neighbours if they were resting. The Tribunal put to her that it finds this explanation unconvincing. She started attending the gatherings on a weekly basis, on Sundays, in August 2010. The gatherings kept changing location. When asked if she wondered why that was she responded that she wasn't sure and would just follow. Later, [Ms A] told her it was to avoid detection. [Ms A] told her this after she was baptised. The Tribunal put to her that it finds it very difficult to accept that a successful business woman who was worried about saving face, was already embarrassed by her husband's conduct and who had a [son] to worry about, would not make more enquiries regarding what gatherings she was getting involved in. She responded that she didn't think much at the time as she was furious about her husband's conduct and felt happy at the gatherings. When asked about how long [Ms A] had been a member of the Local Church she responded that she learnt, prior to her baptism, that [Ms A] had been a member of the Local Church for 7 years.

73. She gave evidence that, when she was phoning her husband in [Fujian] she told him about the gatherings she was attending. He told her to not attend and warned her that she should know what she is doing and where she is going. He told her this after her baptism but she isn't sure. She probably told

him of her attendance once before her baptism. No family attended her baptism. She continued to participate in the Local Church after learning that it could cause problems for herself and her son in China as she believed in the Lord by then. Her son was living with her when she first started attending the Local Church in China, but he was spending a lot of time at [school] in Shandong. Her son and husband did not attend any church gatherings in China. They first started attending in Australia.

74. When the first applicant found out the Local Church is considered illegal in China she was not communicating much with her husband. He came to know much later that she was baptized. They were still in China when he found out. When he found out he told her to check if the church is legal or safe. The Tribunal put to her that it seems she would have already known this by the need to change locations. She responded "yes" but she can't recall when she told him about her baptism. When she did she was only considering getting her husband back so her son could have a complete family and she and was relying on God for that. When asked again if she recalls whether she knew it was illegal at the time she responded that she can't recall. The Tribunal put to her that it seems, from what she has said of her husband's response, that acting within the law was an important matter for him, and that she herself was mindful of the welfare of her son, wanting her family to be united for her son's sake, and in such context it is wondering what made her participate in a religion which could result in harm to her family. She responded that the law considers it illegal but she finds it reasonable. She didn't take her husband's words seriously and was only thinking on relying on the Lord.

75. When asked about whether she explored the legal options to practice Christianity in China, she responded that [Ms A] preached to her so she was attracted to [Ms A]'s church, which was the Local Church. In particular she was attracted by the many brothers and sisters in the gathering who, even though they didn't know her husband, prayed for him. It was mainly the kindness of those people which influenced her. She has heard that the gatherings she used to attend in China don't happen anymore, that the former attendees have not seen [Ms A] and she has not been sentenced yet.

76. When asked about what [Ms A] said in terms of evangelizing which made her want to attend the gatherings, she responded that she asked her to pray to Lord Jesus. She said that human power is limited and God controls everything. When asked if she said anything further she responded that she said nothing else. She explained that her parents had no religion and she was not brought up in any particular religion. The only other Christian she knew, before [Ms A], was an accountant at her company who also preached the gospel to her but she wasn't in a good state at that time and didn't accept it. That was before her husband started gambling.

77. In explaining when she first experienced adverse attention in connection with her religion in China, she stated that it was [in] November 2011. They were singing at a gathering at the time. Around thirteen or fourteen attendees were taken by the police. There were around six police officers. They were held for one night at the police station before she and [Ms A] were taken to a detention center. She has not heard from [Ms A] since then.

78. When asked how she and her family spent Christmas 2012 she indicated that she cannot recall, but they were probably at a gathering.

Normally they don't celebrate Christmas as it is considered a "God of the Sun" festival and has nothing to do with the Bible.

79. In relation to whether there is any difference between reading the bible aloud and reading in silence, she offered that reading aloud allows spirit to be open. In explaining what is calling the Lord's name about she responded that, like when children call the names of their parents, this makes their parents happy. Similarly, when we call the Lords name, as our father in heaven, this makes Him happy. When asked about the significance of consuming bread and wine she responded that bread is the body of Christ. It is the bread of life. Wine is the blood of Jesus.

80. The Tribunal put to the first applicant that, independent sources indicate that elders of the Local Church are appointed based on their spiritual maturity^[1] and asked how she was determined to have the spiritual maturity to be a leader or organiser of the Local Church in China. She responded that [Ms A] appointed her but she is not sure when. It was maybe two or three months after her baptism. When asked what made [Ms A] think the first applicant had spiritual maturity by then, she responded that [Ms A] thought she had accepted God very fast. The Tribunal noted that there were presumably attendees who had been attending the gatherings much longer than her and asked why they were not considered to have the spiritual maturity to be leaders. She responded it isn't based on length of time and [Ms A] thought that she was an appropriate leader. Maybe it is because she made great progress, but she is not sure.

81. Regarding her time in Australia, the Tribunal asked about her movements [on her arrival] to Australia. She responded that she is not sure where they went from [the] Airport, but they arrived at around 8 or 9pm. They followed others to the exit. They saw a Chinese looking man near the taxi rank and asked him if he knew of any Chinese suburbs and asked her to specify one. She didn't know, so the driver took them to a Chinese supermarket where they bought biscuits. When asked if she, her son and husband, after a long haul flight, went, with their luggage, directly from the airport to a Chinese shop to buy biscuits, she responded that they did not have much luggage. They had some Australian currency. After they bought the biscuits they ate them near the supermarket and, by chance, started speaking to a woman named [Ms B]. They told her what happened in China and that they had fled. [Ms B] was very kind and let them stay in her home. When asked if she is saying that [Ms B] was a complete stranger they bumped into while eating biscuits outside a Chinese supermarket, on the night of their [arrival] and before they had arranged a place to sleep that night, and that on meeting her she told her that she had suffered persecution in China, she responded that she had no choice. The Tribunal asked why she didn't simply ask for [Ms B]'s assistance in locating a hotel to sleep in. She responded that they knew no-one in Australia and their English language skills were poor. The Tribunal noted her evidence of having received assistance in leaving China and that it is difficult to understand why they did not at least organize a place to sleep on the night of their [arrival]. She responded that they didn't have time. The Tribunal noted that it seems her arrangements in arrival in Australia may have been pre-arranged.

82. When asked why she thinks the Chinese authorities didn't confiscate her passport if she was of ongoing adverse interest and required to report on a

weekly basis, she responded that she doesn't know. The Tribunal noted that all the passports provided appear to have been issued in each applicant's name. When asked if they had to show their passports as they were departing the airport in China she responded that they followed arrangement made by their contact. When asked again if they actually showed their passports when passing through the airport in China she responded that they went through gate 2 and channel 4. When asked again she said they were not required to present their passports. The Tribunal put to her that normally international travelers are required to show their passports at several points of departure at the airport. She responded that she recalls that they went through straight away.

83. Regarding her church attendance in Australia, she began attending in February 2012. Her son began attending at the same time and her husband has only attended three times as he works far away. The Tribunal put to her that it must assess whether she has participated in Local Church activities in Australia, including learning about Local Church beliefs and practices in Australia, just to strengthen her refugee claims, and whether or not she is a genuine believer in the Local Church. She responded that she needs the Lord more than she needs a Protection visa and this is not the reason for her participation in the Local Church.

84. The Tribunal asked the second applicant to re-enter the hearing room. In response to the Tribunal's questions he gave evidence that: he did not attend any Christian gatherings in China as he was not interested in the religion; his wife would sometimes phone him when he was in [Fujian] and tell him about believing in God and would give him blessings regarding his mistakes; in China he was brainwashed by Mao's ideology so he didn't take this seriously and told her not to say such things and to not participate in an evil cult; his wife didn't say anything about knowing it is considered a cult and only told him she believes in God; she told him of her baptism when he was still in [Fujian].

85. Since coming to Australia he has participated in Christian gatherings only three times. When asked why, he responded that he believes now, a little bit. When asked what he believes he responded that believing in the Lord Jesus brings benefits, for example, in Australia his son can go to school and things have become smoother. Before, in [his employment], he couldn't work as his hands shook. After praying to God his heart becomes calmer and more energetic. He first attended a gathering in Australia around twenty days after his arrival. He accompanied his wife. When asked why he chose to attend a Christian gathering for the first time in Australia, given the availability or registered and legal Christian gatherings in China, he responded that in the past he had no interest. The Tribunal noted that it has to assess whether he started attending gatherings in Australia just to support his refugee application, and whether he is a genuine believer in the Local Church as claimed. He responded that his reason for attending is because he got interested and believed that the Lord Jesus can bring blessings.

86. When asked what it would mean to him if he could not attend Local Church gatherings he responded that, at the moment he can't attend, so he gets up every day, prays every day for forgiveness and when he [returns] he will attend gatherings every week. He has looked into Local Church gatherings near his work but he has no car and the gatherings are usually far away.

87. The third applicant was asked to enter the hearing room at this point. The Tribunal explained to him that it must assess whether he is genuine in his claimed belief in the Local Church and whether he has participated in Local Church activities in Australia for the sole purpose of strengthening his claims to be a refugee. His evidence was that he: did not attend Local Church gatherings in China; he has been attending in Australia since he arrived. When asked why he started attending in Australia he responded that he believes it does no wrong and seems good to him. When the Tribunal noted it has concerns about the genuineness of his mother's claimed faith and asked if he would attend if his mother didn't, he responded that he would, as he thinks it is good. When asked what he means by that, he responded that it is in his heart and he can't explain it. When asked if he has been to any other Christian gatherings in Australia he responded that he hasn't. The Tribunal asked if his sole purpose in participating in Local Church gatherings in Australia is to strengthen his refugee claims. He responded that he couldn't attend in China and if the situation was the same in China as it is here, his mother would have taken him.

88. When asked if they have anything further they wish to bring to the Tribunal's attention, their representative indicated that: the conference the first and third applicant attended in Australia was an annual conference of the Local Church; he does not think that people in China would necessarily turn their minds to whether the gatherings are legal. The Tribunal noted that the first applicant's evidence suggests that her husband did turn his mind to this matter and mentioned this to her.

FINDINGS AND REASONS

89. The mere fact that a person claims fear of persecution or significant harm 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] FCA 470; (1992) 38 FCR 191, *Prasad v MIEA* [1985] FCA 47; (1985) 6 FCR 155 at 169-70).

Nationality

90. On the basis of the passports sighted by the Tribunal, and the oral and written evidence provided, the Tribunal is satisfied that each applicant is a national of China and of no other country, and that none of the applicants have a right to enter or reside in any country other than China.

Refugee claims

91. The claims made and arising on the evidence in respect of the first applicant are that she faces serious or significant harm in China because: of her past and intended future participation in the Local Church; she will be unable to practice her chosen religion in China; she is known by the Chinese authorities to have been an active member of the Local Church who “developed” secret gatherings, and has previously been arrested, detained and required to report on that basis; she failed to comply with the conditions of her bail, in particular her obligation to report to the local police every Monday.

92. The claims made and arising on the evidence in respect of the second applicant are that he faces serious or significant harm in China because: of the first applicant’s adverse profile (in particular he has had his business confiscated); he is also a Local Church believer and he will not be able to practice his faith in China.

93. The claims made and arising on the evidence in respect of the third applicant are that he faces serious or significant harm in China because: of his mother’s adverse profile; he is a Local Church believer and he will not be able to practice his faith in China.

94. Having had the opportunity to: review the written information submitted in support of the application; listen to the audio recording of the first applicant’s department interview; consult independent information; discuss the applicants’ claims and evidence face-to-face with them when they appeared before the Tribunal to give evidence and provide arguments; the Tribunal considers some aspects of the applicants’ evidence regarding their circumstances to be true, but considers other significant aspects of the claims and evidence to be unconvincing and lacking in credibility. Considering all the claims and evidence before it, including cumulatively, for the reasons set out below the Tribunal is not satisfied that the applicants are persons in respect of whom Australia has protection obligations.

95. In assessing the claims and evidence overall, on the basis of the overall consistency of the evidence provided over time in respect of the following matters, and the consistency of the oral evidence given to the Tribunal by the first and second applicant on those matters, the Tribunal accepts that: the first and second applicant are spouses and the third applicant is their son; the first and second applicant owned and ran a [business] in Shandong which was registered only in the second applicant’s name; the second applicant’s family originates from [Fujian] and his parents and siblings continue to live there; the second applicant incurred some gambling debts causing him and the first applicant to feel ashamed and feel that they had “lost face” amongst their community in Shandong, that their high regard for how they are viewed by that community caused the first applicant to feel so ashamed that she wanted to leave China, and the second applicant to leave Shandong for [Fujian] where he continued to work and invest in an effort to rebuild and repair his reputation and restore his “face” in Shandong.

Assessment of first applicant’s claims

96. In assessing the first applicant’s claims and evidence the Tribunal has the following cumulative and significant concerns.

97. Firstly, in respect of the first applicant’s claimed attendance at Local Church gatherings in China, she volunteered to the Tribunal, unprompted, that

during her department interview she erroneously stated that the gatherings in China took place on Saturday and Sunday, rather than Tuesday, Thursday and Sunday. She explained that: she thought she was being asked about the [Suburb 2] gatherings, not the gatherings in China; she gets nervous, has low blood pressure and has experienced dizziness since being released from prison in China. While claiming to have obtained medical attention regarding this in China, she did not produce any such medical documentation and gave no indication, in the extensive statement and detailed oral evidence she gave to the Tribunal, of experiencing any difficulty recalling detailed information of claimed past events. The Tribunal is unconvinced that the first applicant thought she was being asked by the department about her Local Church attendance in [Suburb 2] when she stated that she attended gatherings on Saturdays and Sundays, and considers that if she did in fact attend Local Church gatherings on Tuesdays, Thursdays and Sundays on a weekly basis in China, as claimed in her written statement and her oral evidence to the Tribunal, she would have mentioned this to the department. Her oral evidence to the Tribunal indicates that she did not, which casts doubt on the truth of her claims to have attended the Local Church at all while in China.

98. A further significant concern for the Tribunal, as put to the first applicant, is that she has given evidence to the effect that: she was the last remaining child of her parents; was the mother of a child whose welfare she considered a priority; was, with her husband, the owner and operator of a successful business and owner of several properties, and appeared to be doing very well financially in China; cared about how she was perceived within her community in Shandong to such an extent that the loss of face she felt at the public awareness of her husband's gambling in 2010 caused her to want to leave China in around July 2010 and caused her husband to leave Shandong for [Fujian] for a time. The Tribunal accepts that the applicants cared deeply, in China, about how they were viewed amongst their community. In such a context, as put to the first applicant, the Tribunal considers the following matters to be significant: the timing of the first applicant's awareness that the religion she claims to have begun participating in in mid-2010 was considered an illegal cult in China; and why she would participate in such gatherings given the social stigma and adverse repercussions it could have on her family and business. In response to these concerns and related issues, the first applicant's evidence impressed the Tribunal as confused, evasive and unconvincing. For instance, she indicated that [Ms A], a long term and dedicated friend, wanted to help her deal with her husband's gambling debts and encouraged her to attend Local Church gatherings, but did not warn her that these gatherings are considered illegal in China or that her participation in such gatherings, if detected, could compromise the welfare of her business, herself, her family and other attendees. The Tribunal does not consider it credible that a kind lady and long term friend wanting to help the first applicant would not warn her at the outset that the gatherings she is being introduced to are considered illegal, and her claim that she did not know until after she became a believer some months later casts doubt on the truth of her claim to have participated in the Local Church at all in China.

99. This concern is compounded by the following contradictions. The first applicant informed the Tribunal that she did not realise the Local Church gatherings she was attending were illegal or unregistered and that she didn't

think to ask [Ms A] about this as “she didn’t think in that direction”. However, she also gave evidence that: [Ms A] instructed attendees to keep their voices down so others would not hear them singing and praying aloud; the location of the gatherings frequently changed. Yet she also claims that these factors did not prompt her to suspect that the gatherings were not registered and not lawful, nor to ask her good friend, [Ms A], if this was the case. The Tribunal does not consider this to be credible in the context of the first applicant’s demonstrated interest and concern for how she is viewed in her community.

100. While claiming on the one hand that she did not become aware that the gatherings she was attending were illegal, nor turn her mind to that possibility, until after she became a believer, she contradicted this by also stating that, when she told her husband about attending these gatherings he told her to check if they are legal or not. Her written statement also makes clear reference to her attendance at “secret meetings”, casting further doubt on her claims to have not known that that the gatherings she claims to have attended in China were illegal, until after she became a believer. The Tribunal considers the “secret” nature of the meetings would have alerted the first applicant to their unregistered nature if she did in fact attend such gatherings, and does not accept that, if she was attending Local Church gatherings, she would not have known from the outset that they were considered illegal in China and that they must be kept discrete to protect all attendees, including the first applicant, from detection and harm. That the first applicant claims to have been oblivious to this at the outset casts significant doubt on the truth of her claim to have ever attended or otherwise participated in the Local Church in China.

101. Casting further doubt on the first applicant’s claimed belief and participation in the Local Church in China is her evidence regarding how she came to believe in the faith of the Local Church. Her claim is that, when she was upset about her husband’s gambling, [Ms A] helped her financially and evangelized to her. However, when asked to elaborate on what [Ms A] said to her when evangelizing which made her want to attend gatherings, she responded only that she told her to pray to Lord Jesus, that human power is limited and God controls everything. She stated that [Ms A] said nothing more than that. The Tribunal considers, however, that such “evangelizing” and notions of God and the Lord Jesus would have little if any meaning for or persuasive impact on a person such as the first applicant, who, on her own evidence, was not from a religious family, was not brought up in any religious tradition, and had not demonstrated prior involvement with Christianity but for hearing a former colleague speak about the gospel at a time when the first applicant claims she had no interest in the gospel. The Tribunal is not persuaded on the evidence before it that such simplistic “evangelizing” would persuade the first applicant to risk her business interests, marriage, safety and that of her family to attend unregistered gatherings of a religion considered an illegal cult in China.

102. Further, while claiming that she was, by the time of her arrest [in] November 2011, a leader of the Local Church in China, when the Tribunal put to her its understanding that elders of the Local Church are appointed based on their spiritual maturity and asked how she was determined to have the spiritual maturity to be a leader or organiser of the Local Church in China, she offered only that [Ms A] considered her ready one or two months after her baptism

(83) but she is not sure why. The Tribunal considers this simplistic account of how and why she became a Local Church leader in China to be unconvincing. 103. Casting doubt on the overall reliability and truthfulness of the first applicant's claims and evidence, is her oral account to the Tribunal of how the applicants came to meet a lady in Australia named [Ms B], who is identified as the applicants' landlord and the person who referred them to their migration agent. The first applicant described this meeting as being a pure chance encounter with [Ms B] on the night of their arrival in [Australia]. According to the first applicant, they bumped into [Ms B] by chance outside a Chinese grocery store where they had stopped to buy and eat biscuits after disembarking their flight at [the] airport at around 8 or 9pm. On meeting [Ms B], at around 11pm on the night of their arrival, with their luggage and with no idea as to where they would sleep that night and with no prior knowledge of [Ms B], they told her of their persecution in China. When asked why they would tell a random stranger about their persecution in China rather than simply asking where they could find a hotel to sleep at that late hour, the first applicant offered variously that "she had no choice" and her English language skills are not strong. However this does not explain why the first applicant opted to tell a complete stranger, on first meeting her, about her persecution in China rather than simply asking about where she and her family could find a hotel to sleep. The Tribunal also considers it far-fetched that, having claimed to have received assistance departing from China, the applicants would not have pre-arranged a place to sleep, at least on the first night of their arrival in Australia. The Tribunal considers the above account to be highly lacking in credibility, and to cast significant doubt on the first applicant's reliability and credibility as a witness. The Tribunal considers her account to be evasive, far-fetched, and does not accept it as true. The Tribunal considers that account to compound the Tribunal's concerns about the truth of significant aspects of the applicants' claimed circumstances in China, including their reasons and method of departure from Australia, and the truth of their claimed reasons for seeking Australia's protection.

104. Regarding the first applicant's claims to be of adverse interest to the Chinese authorities now and at the time of her departure from China, the Tribunal has the following additional concerns. She claims to be of such adverse interest that, on learning that she had left China the authorities took her parents to the PSB, questioned them the whole night, sealed her company, "froze all our properties" and that "right now, our properties have already confiscated by the PRC authorities" She informed the Tribunal also that her home was auctioned by the authorities in March 2012. However, she also informed the Tribunal that she and her husband and son were able to depart China on their own passports, in their own names, and her passport was not seized at any point after her claimed release from detention, despite her remaining of adverse interest to the authorities. Her evidence regarding how this occurred impressed the Tribunal as highly evasive and unconvincing, with the Tribunal asking her three times whether she, her husband or son had to show their passports when exiting China's airport, with her responding variously about the "arrangements" her contact made, without providing any detail as to what those arrangements were, and by reference to a range of gate numbers. She stated that the business which was confiscated was registered only in her husband's name but could not explain why the authorities would

confiscate her husband's business for her claimed failure to report to the authorities, but had not confiscated a further property she bought for RMB830,000 which was registered in Shandong and only in her name. The Tribunal considers her response that this is common in China, to be unconvincing in the context of the balance of its concerns, and considers this evidence cumulatively to cast significant doubt on the claim that any of the applicants are or have at any time been of adverse interest to the Chinese authorities.

105. Based on all the evidence before it, including cumulatively, and taking into consideration the significant and extensive concerns identified above, the Tribunal is not satisfied that the first applicant was, in China, a participant or leader of the Local Church, nor that she was perceived to be. The Tribunal does not report that she was ever arrested or detained in China in connection with the Local Church, nor that she was otherwise harmed in connection with the Local Church in China. The Tribunal does not accept that she was required to report to the local authorities in connection with the Local Church in China, nor does any other reason arise on the evidence. The Tribunal does not accept, on the evidence before it, that the first applicant was of any adverse interest to the Chinese authorities in China for any reason, before her departure from China, nor that any of her own or her husband's properties or assets have been confiscated, sold or adversely impacted by the Chinese authorities for the reasons claimed.

106. Notwithstanding the above, the Tribunal accepts that the first applicant has, since her around February 2012, participated in Local Church gatherings and activities in Australia. The Tribunal accepts that this has been evidenced by letters provided by elders of the Local Church in Australia. The Tribunal also accepts that the first applicant has, in her evidence to the department and Tribunal, demonstrated an understanding of aspects of the Local Church practice and beliefs. Because the Tribunal does not accept that the first applicant had any participation or involvement in the Local Church in China, the Tribunal finds that the applicant's contact with the Local Church, her participation in the Local Church and her learning of Local Church practices and beliefs, is entirely conduct engaged in by her in Australia. Given that the Tribunal does not accept that the first applicant had any involvement in the Local Church while in China, and its extensive and cumulative credibility concerns above, while mindful of the first applicant's claimed genuine faith in the Local Church, the Tribunal does not accept that evidence as convincing or true, and is not satisfied that the first applicant engaged in conduct linked to the Local Church in China otherwise than for the sole purpose of strengthening her claims to be a refugee. The Tribunal is not satisfied on the evidence before it that she is a genuine believer of the Local Church, nor that she is perceived by the Chinese authorities to have any connection to the Local church which would give rise to a real chance of persecution. The Tribunal is not satisfied that the first applicant has any genuine desire to practice the Local Church faith in the future.

107. On the basis of all the evidence before it, including cumulatively, and on the basis of the cumulative reasoning and findings of fact detailed above, the Tribunal is not satisfied that the first or second applicant face a real chance of serious harm in China for reason of their religion or any other Convention reason in the reasonably foreseeable future. It follows that the Tribunal is not

satisfied, on the evidence before it, that the applicants have a well-founded fear of persecution in China within the meaning of the Convention.

108. Further, the Tribunal is not satisfied, on the basis of all the evidence before it, and on the basis of the cumulative reasoning and findings of fact detailed above, the Tribunal is not satisfied that the first applicant faces real chance of persecution in China in the reasonably foreseeable future in connection with the Local Church or for any Convention reason. It follows that the Tribunal is not satisfied that the first applicant has a well-founded fear of persecution in China for a Convention reason: s.36(2)(a).

109. The Tribunal has also considered whether the first applicant is a person in respect of whom Australia has protection obligations under Complementary Protection. However, based on the cumulative concerns and findings of fact above, the Tribunal is not satisfied, on the evidence before it, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the first applicant being removed from Australia to a receiving country, there is a real risk that she will suffer significant harm: s.36(2)(aa).

110. In relation to the second applicant, the Tribunal accepts his oral evidence to the Tribunal to the effect that: as at the time of his Tribunal hearing [in] January 2013, he has attended Local Church gatherings on three occasions since arriving in Australia in around January 2012; he had not attended any Local Church gatherings in China or any other Christian gatherings in China, even registered ones, as he was influenced by the atheistic ethos of Mao Zedong and was not interested in Christianity. The Tribunal has not been provided with any evidence of the second applicant's baptism and is satisfied that he has not been baptised in the Christian faith or the Local Church. While the Tribunal accepts that, since coming to Australia the second applicant has come to identify "benefits" of attending the Local Church, his evidence regarding the nature of these benefits impressed the Tribunal as being practical (ie, his son can attend school in Australia) rather than spiritual, and extremely simplistic. Given the second applicant's expressed absence of any interest in Christianity while in China, his infrequent attendance at the Local Church or any other Christian gatherings in Australia, and the absence of any demonstrated substantive belief in the Local Church, the Tribunal is not satisfied, on the evidence provided, that the second applicant is a genuine believer in Christianity generally, or the Local Church, or that he has any desire to practice the Local Church or Christian faith in the future. The Tribunal accepts that he has participated in Local Church gatherings in Australia, but is not satisfied that this was conduct engaged in otherwise than for the sole purpose of strengthening his refugee claims. The Tribunal is not satisfied that he would, nor that he would be perceived by the Chinese authorities, in the reasonably foreseeable future, to be a participant of the Local Church. For the above reasons cumulatively, the Tribunal is not satisfied that the second applicant faces a real chance of persecution in China in the reasonably foreseeable future for reason of any actual or perceived connection to the Local Church, nor for any Convention reason. It follows that the Tribunal is not satisfied that the second applicant has a well-founded fear of persecution in China for a Convention reason in China, in the reasonably foreseeable future: s.36(2)(a).

111. The Tribunal has also considered whether the second applicant is a person in respect of whom Australia has protection obligations under

Complementary Protection. However, based on the cumulative concerns and findings of fact above, the Tribunal is not satisfied, on the evidence before it, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the second applicant being removed from Australia to a receiving country, there is a real risk that she will suffer significant harm: s.36(2)(aa).

112. In relation to the third applicant, the Tribunal also accepts his oral evidence to the Tribunal that he has, since coming to Australia, participated in Local Church gatherings and events (such as an annual conference) and that he did not participate in any Local Church activities while in China. From the evidence presented, the Tribunal accepts that the third applicant has participated in Local Church activities in Australia with the first applicant. While the third applicant claims that he would participate in the Local Church even if his mother did not, as he “thinks it is good”, when asked, he was unable to elaborate on what that means, other than to state that it is in his heart. However, the evidence presented reveals him to be only [age deleted: s.431(2)], and to have commenced attending the Local Church with his mother, and does not reveal him to have had any independent interest or involvement in any Christian religion, or the Local Church before coming to Australia. In that context and on the evidence before it, the Tribunal is not satisfied that the third applicant’s participation in Local Church activities in Australia is conduct engaged in otherwise than to strengthen his refugee claims. The Tribunal does not accept that he is a genuine believer in the Local Church faith or that he has any genuine desire to express that faith in the reasonably foreseeable future. The Tribunal is also not satisfied that he is perceived to have any connection to the Local Church or that he faces a real chance of persecution in China in the reasonably foreseeable future in connection with the Local Church or for any other Convention reason. It follows that the Tribunal is not satisfied that the third applicant has a well-founded fear of persecution in China for a Convention reason in China, in the reasonably foreseeable future: s.36(2)(a).

113. The Tribunal has also considered whether the third applicant is a person in respect of whom Australia has protection obligations under Complementary Protection. However, based on the cumulative concerns and findings of fact above, the Tribunal is not satisfied, on the evidence before it, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the third applicant being removed from Australia to a receiving country, there is a real risk that she will suffer significant harm: s.36(2)(aa).

CONCLUSIONS

114. The Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a).

115. Having concluded that the applicants do 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 applicants are persons to whom Australia has protection obligations under s.36(2)(aa).

116. There is no suggestion that any of the applicants satisfy 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 applicants do not satisfy the criterion in s.36(2) for a Protection visa.

DECISION

117. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

[1] 'II. In the Local Church' (undated), Witness Lee and the Offices in the Church website <http://www.local-church-offices.org/local-church-elders/index.html> – Accessed 28 September 2009

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←1219589 → [2013] RRTA 336 (7 May 2013)

Last Updated: 18 June 2013

←1219589 → [\[2013\] RRTA 336 \(7 May 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←1219589 →

DIAC REFERENCE(S): CLF2011/140402

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Patricia Leehy

DATE: 7 May 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS INTRODUCTION

1. There are two applicants in this matter. They are partners. The male applicant was born in Pingtang County, Fuzhou City, Fujian, China, on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants], and lived there all his life until he came to Australia on a student visa [in] June 2007. The female applicant was born in China on [date deleted: s.431(2)] and came to Australia on a student visa [in] May 2007.

The applicants met about the end of 2010 and became lovers. Their student visas ceased at the same time, [in] March 2009, and they have been living in Australia since, without legal status.

2. The male applicant says that he left China to get a better education, and to practise his religion as a Christian more freely than he could in China. He fears that if he goes back to China his religious practice will be restricted by the Communist government. He is also afraid that he will be prevented from expressing any dissident views against the regime if he returns to China.

3. The female applicant did not make her own claims to protection, but relied on her membership of her partner's family unit. She said in a statement that she is also Christian, and that she and her partner were involved in Christian activities together after they met. She had not given oral evidence in relation to her protection claims to either the Department's officers or to the Tribunal (differently constituted) at a previous hearing of this matter [in] May 2012. She did not attend the earlier Tribunal hearing because she was pregnant, and was due to give birth in [month and year deleted: s.431(2)]. She gave evidence at the Tribunal hearing she attended with her partner and their child [in] March 2013.

4. Additional claims were made at the 2013 Tribunal hearing by the female applicant. She said that, apart from her concerns about the consequences of her partner's Christianity, she was also very worried about her child's unregistered status and the consequences of the contravention of the Family Planning laws in China by herself and her partner. She was afraid that the child would be deprived of rights such as education, and was also worried that she and her partner would be penalised by the authorities because they were unmarried.

APPLICATION FOR REVIEW

5. The applicants are applying for review of the decision made by a delegate of the Minister for Immigration to refuse to grant them Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

6. The applicants had applied to the Department of Immigration for the visas [in] August 2011 and the Delegate refused to grant the visas [in] December 2011. The applicants then applied to the Tribunal (differently constituted) for review of the decision [on a later date in] December 2011. The Tribunal affirmed the decision [in] May 2012.

7. The applicants applied to the Federal Court for review of the Tribunal's decision, and the matter was remitted to the Tribunal for reconsideration [in] November 2012.

8. The applicant's case was also considered under the Ministerial guidelines for stay in Australia under the Public Interest Guidelines Assessment. [In] June 2012 it was found that the case did not satisfy the requirements for consideration of the exercise of the Minister's discretion under Section 417(1) of the Act.

9. The applicants appeared before the Tribunal [in] March 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicants brought their child, born on [date deleted: s.431(2)] in Sydney, to

the hearing. There is no decision before the Tribunal to review in respect of this child.

RELEVANT LAW

10. 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

11. 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 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

12. 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.

13. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

14. 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.

15. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

16. 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)). Examples of 'serious harm' are set out in 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.

17. 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.

18. 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.

19. 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 '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.

20. 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.

21. 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

22. 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').

23. '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.

24. 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.

Member of the same family unit

25. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition.

CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issues in this case are: the applicants' country of reference; whether the applicants are Christian; whether the applicants will be seriously harmed in China for reason of their Christianity; whether the male applicant has publicly expressed any dissident political views against the current regime in China or is likely to do so if he returns; whether the applicants will be penalised because they have contravened the Family Planning laws, and whether any such penalties amount to serious or significant harm in relation to the Refugees Convention or to the Complementary Protection legislation respectively.

27. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Nationality and Country of Reference

28. On the evidence before it, including the evidence of their passports, the Tribunal finds that the applicants are nationals of China, and have no right of entry to any other country. The Tribunal finds that the country of reference for the applicants is China.

Are the applicants Christian?

29. The male applicant in this matter was located by Compliance and interviewed [in] August 2011. When asked whether there were any reasons why he could not return to China, he said that there were not. He loved Australia and did not want to go back to China. The male applicant was then detained.

30. The male applicant submitted to the Department a statement by his mother, undated but translated [in] October 2011, in which she stated that after she returned to China [in November 2010] from Australia, where she had been on a student guardian visa to support her son in his studies, she attended "preaching meetings" which were held twice a week in her home town in Fujian. In mid-June 2011 the meetings were reported to the authorities, and a woman was arrested and detained. The applicant's mother said she then stopped attending the preaching meetings, and with her friends raised money to get the imprisoned colleague released. She said in her letter that she had not wanted to tell her son about this previously, but decided to do so since his interview with a Departmental officer was near.

31. The male applicant also submitted to the Department a statement by a woman named [Ms A] who said she had known him for about two years. She is a friend of the applicant's mother. [Ms A] attended the [Australian church deleted: s.431(2)] from 2008, apart from a short period when she lived in [city deleted: s.431(2)]. She said that she usually saw the applicant participating in a variety of Christian activities and discussing the Bible. She believed him to be a genuine Christian. [Ms A] had applied for refugee status and had been found to be a refugee by the Tribunal in March 2010. The Tribunal, differently constituted, had put it to the applicant at his Tribunal hearing in May 2012 that through his friendship with [Ms A] he would have known about Protection Visas some considerable time before he had lodged his application for protection. The applicant had responded that he knew [Ms A] had lodged an application, but had never asked her about it.

32. The male applicant submitted to the Tribunal evidence of his baptism together with a letter from [name deleted: s.431(2)], an elder of [Church 1], who said that the applicant had come to the church in 2011, had received basic instruction and had been baptised [in] October 2011. He said that the applicant also studied the bible with the Fellowship at the church. The applicant said at his Tribunal hearing in May 2012 that he started attending church soon after he arrived in Australia. After he and his mother moved to [suburb deleted: s.431(2)], they attended a Gospel Church which the applicant attended on and off for about six months. When he and his mother moved to central Sydney, the applicant attended the [church deleted: s.431(2)] about once a month, because he was working as a [tradesman] and did not have the time to go every week. The applicant delayed getting baptised because he did not think he was a "religious follower" He explained this at his Tribunal hearing in May 2012 as meaning that he did not feel he was religious enough to be baptised.

33. At his interview [in] October 2011 with an officer of the Department in relation to his Protection Visa application, lodged some two weeks after he was first detained, and at his Tribunal hearing [in] May 2012, the applicant said that he began attending Christian church services in China at a Government church with his parents at the age of six, but discontinued

because of a warning from his school to stop attending. He told the Tribunal that he was about 8 at the time. The applicant told the Tribunal that his parents kept on attending a government church, but that they both stopped in July 2011.

34. The Delegate said that the applicant was confused at his interview about the denomination of the church he claimed to have attended since he arrived in Australia in 2007. The applicant said that he had been baptised in October 2011, shortly before his interview. His knowledge of Christian beliefs and practices was considered by the Delegate to be vague. The Delegate in conclusion did not accept that the male applicant was a Christian “whose depth of commitment would bring him to the adverse attention of the PRC authorities should he return to China” The Tribunal (differently constituted) appeared to accept that the applicant was Christian but found that there was not more than a remote chance that he would be harmed for this in his home province of Fujian.

35. At his Tribunal hearing [in] March 2013, the male applicant said that he was currently attending [Church 1] where he goes about once every two weeks. The baby’s birth means that he is unable to go more frequently. The male applicant said that his partner attends church with him. This evidence is supported by a letter dated [in] April 2013, submitted to the Tribunal [the following day], from [Pastor B] of [Church 1]. In his letter [Pastor B] reiterates that in August 2011 the male applicant “took part in a Christian faith course” and was baptised [in] October 2011. [Pastor B] states that the church has a home bible study fellowship program which the male applicant attended, and says that the male applicant “and his wife” have also been attending their Sunday Worship Service.

36. It was put to the applicant that it was surprising that as a practising Christian he did not feel it necessary to marry his partner. He said that they felt married in the sight of God, having sworn in front of the Cross to stay together. It was put to him that a marriage in the sight of God without a formal marriage might not be sufficient for most Christians to feel comfortable. He said that he and his partner did not know how they should go about getting married, and in any event it would be too expensive for them. Their parents would want to attend the ceremony.

37. The male applicant said that his parents were still not attending church in China. They had stopped any church activities after the incident referred to by his mother.

38. When asked why he had not applied for a Protection Visa until he had been located by the Department’s Compliance officers, the male applicant said that in the past he did not know there were so many restrictions on religious practice in China. It was put to him that he must have known about this from [Ms A] who appears to have obtained a Protection Visa on the basis of her religion. The applicant said that although he knew she was a refugee, he only knew about it after he had been located by Compliance.

39. The applicant was questioned about his religious beliefs, with particular reference to the meaning of Easter. He spoke readily about what Easter meant to him and other Christians. He said that he owned a Bible, and read it.

40. The Tribunal read out independent information before it on the treatment of Christians in Fujian in China, from which both applicants come.

It was explained that a 2009 report on the Protestant Church in Fujian Province in a Global Chinese Ministries newsletter confirms [earlier reports] that there are large numbers of independent house churches in Fujian. The report also indicates that '[i]n general, local government in Fujian seems fairly tolerant of unregistered believers as it is rare that one reads of cases of persecution of house-church Christians in this province'[1]

41. The independent information provided to the applicant also indicated that Fujian was rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China. In November 2007 the Department of Foreign Affairs and Trade (DFAT) advised that they had no information on the treatment of unregistered churches in Fujian and reported on the difficulty in gaining politically sensitive information in China.[2] Nevertheless a few actions against local Protestants in Fujian have been reported, including a December 2012 crackdown on members of a Christian sect, Eastern Lightning, condemned as an "evil cult" by the authorities. [3] Similarly there was a report in 2009 of members of the Local Church, or Shouters, being targeted.[4] Other than these incidents, there were reports in 2006 of police closing unregistered places of worship in various provinces including Fujian, according to the US Department of State.[5]

42. In response to this information, the male applicant said that the churches in Australia are different from the government churches in China. An elder in his church had told the applicant that someone who had translated the Bible had been arrested. The applicant said that the Chinese government thinks it is above everything, including the church.

Will the applicants be seriously harmed in China for reason of their Christianity?

43. On the evidence before it, the Tribunal accepts that the male applicant is a practising member of a Protestant Christian church, and would seek to continue to practise his religion if he returned to China. The Tribunal is not satisfied, however, on the basis of the country information outlined above, that there is a real chance that the male applicant would be persecuted for reason of his Protestant religion if he returned to China. On the applicant's evidence, he might well be reluctant to attend a registered church, but even if he attended an unregistered church, the Tribunal is not satisfied that there is other than a remote chance that he would be persecuted for this reason if he returned to China. The Tribunal is therefore not satisfied that the applicant has a well-founded fear of persecution in China for reason of his religion.

44. The female applicant said at the Tribunal hearing that she was worried that her husband might be harmed because he is a Christian. She said that she herself had not been baptised as a Christian, and did not claim that she thought that she would be harmed because she practised Christianity. She has, however, regularly attended Church services at [Church 1] with the male applicant.

45. On the evidence before it, the Tribunal accepts that the female applicant has attended Church services with her male partner, but it finds that she herself is not a committed Christian. Even if she were, the independent information before the Tribunal indicates that there is not a real chance that she would be persecuted for reason of her religious practice as a Protestant

Christian if she returned to China in the foreseeable future. The Tribunal is therefore not satisfied that the female applicant has a well-founded fear of persecution in China for reason of her religion.

46. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of their being removed from Australia to China there is a real risk that the applicants will suffer significant harm for reason of their religion.

47. The country information set out above indicates that in general Fujian province has a reasonably tolerant attitude towards Protestant churches and their adherents, even though this tolerance does not extend to what the authorities consider to be "evil cults". Having considered the evidence before it, and taking into account the exhaustive definition of "significant harm" in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicants will suffer significant harm because of their religious practice if they are returned to China. It is not satisfied that Australia has protection obligations in respect of the applicants within the meaning of the Complementary Protection legislation for reason of their religious beliefs or practice.

Has the male applicant publicly expressed any dissident political views against the current regime in China and is he likely to do so in future?

48. The applicant claimed in his Protection Visa application that he wanted to talk to the public about his ideas. He believes that he will be monitored by the government for doing this, and that he might be arrested or charged with serious crimes if he expresses his ideas which might be seen to threaten the leadership in China. He reiterated these concerns at his Tribunal hearing in March 2013.

49. The applicant had submitted no evidence that he had been engaged in any demonstrations or protests in Australia against the Chinese authorities. He had not been involved in any dissident activity in China. The applicant said that he had been working hard up to the time of his location by Compliance officers, and since then has been looking after his partner and their child. He has not engaged in any political activities in Australia. When questioned about his political activity at his Tribunal hearing in March 2013, the applicant said that he had not engaged in any activity against the regime, including posting any comments on the Internet. He said that he was afraid of his freedom being restricted and his activities monitored in China. He said that the Chinese government is even above the law in China.

50. On the evidence before it, the Tribunal is not satisfied that the applicant has engaged in any political activity against the Chinese regime in the past. It is not satisfied on his evidence that there is a real chance that he will engage in any political activities against the regime if he returns to China in the foreseeable future. The Tribunal is not satisfied that the applicant will be persecuted in a Convention sense for reason of his political opinion, real or imputed, if he returns to China in the foreseeable future. It is not satisfied that the applicant has a well-founded fear of persecution in China for reason of his political opinion, within the meaning of the Refugees Convention.

51. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being

removed from Australia to China there is a real risk that the applicant will suffer significant harm for reason of his political opinion, real or imputed, if he returns to China.

52. The Tribunal has found that the applicant has not engaged in any political activity, either on the internet or anywhere else in the past, and on the evidence before it, is unlikely to engage in any political activity if returned to China.

53. Having considered the evidence before it, and taking into account the exhaustive definition of “significant harm” in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicant will suffer significant harm because of his political opinion or activity if he is returned to China. It is therefore not satisfied that the applicant is a person in respect of whom Australia has protection obligations within the meaning of the Complementary Protection legislation.

Will the applicants be penalised for contravening Family Planning regulations in Fujian?

54. At the Tribunal hearing in March 2013, the male applicant was asked whether he was afraid there might be problems if he returned to China because he had a partner and child, but was unmarried. The applicant said that he was not worried, because he could get a false marriage certificate and other documents and they would not run into any problems.

55. The female applicant at the Tribunal hearing in March 2013 was not present in the hearing room when the male applicant was giving his evidence. She said at the hearing that she was afraid that she and her partner would be penalised for breaking the law in China. This was because, according to Chinese law, her partner had not reached the legal age for marriage, but they had had a child together. The child would not be able to get household registration and would be penalised.

56. It was put to the applicant that her partner had now reached the legal age for marriage, which was 22. It was explained that the country information indicated that the *Marriage Law of the People's Republic of China 2001* sets the minimum marriage age at 20 years for women and 22 years for men.^[6] Consequently, the state will not recognise the marriage of younger individuals and where children are born to couples who are too young to marry penalties are imposed.^[7] It was put to the female applicant that her partner had said he was not worried about this because he could get a false marriage certificate. The applicant said that she was nevertheless worried about their situation. It was put to the applicant that, according to the country information available to the Tribunal, the worst that could happen to her and her partner was the payment of a fine.

57. The applicant recounted the history of her own family. She said that there were three children in her family, and her parents had had to pay a fine for the second and third children. Not only did they have to pay a fine, but her parents and her grandmother were arrested and detained, and half of their house was demolished. The applicant said that she had been registered and her youngest sister had been registered but the penalty had been more than a fine. It was put to the applicant that this did not appear to be usual in China. The

applicant said that she had read a lot of reports on the internet, and even though people had paid fines for having a child, the mothers were also detained.

58. It was put to the applicants at their hearing that independent information before the Tribunal indicated that it was a breach of the law to have a child outside marriage. According to the 2012 US Department of State's report on human rights practices in China, having children out of wedlock is illegal in 'almost all provinces' of China and doing so attracts a social compensation fee.[8] In Fujian province, DFAT advised in February 2010 that if a couple marries after the birth of a child they will most likely still be charged a social compensation fee. DFAT further noted, however, that in Fujian 'If a child is conceived out of wedlock, but the parents marry prior to the birth of the child, no social compensation fee is charged'[9]

59. The applicant was given a document on Family Planning Fines in Fujian from 1991 to 2012 and it was explained that the tables on fines indicated that rural parents were required to pay a different fine from urban parents for having a child outside marriage[10]. Fines for rural parents ranged from 35116 yuan to 52674 yuan (about \$A5300 to \$A8088). Those for urban parents ranged from 99628 to 149442 yuan (about \$A15,700 to \$A23,600). These fines equate to four to six times the average annual disposable income of urban residents or the net average annual income of rural peasants in the previous year.

60. It was explained that the Tribunal needed to have considerably more information about the financial situation of the applicants and their parents before it could reach any conclusions about their capacity to pay the fines indicated, and whether any incapacity to pay would affect the status of their child as an unregistered or "black" child. The female applicant was also asked to submit any information she had about any punishment imposed on parents beyond fines.

61. The female applicant said that she came from a rural area in Fujian. Her parents ran a stall selling grains and rice. Her parents' income is only just sufficient to live on. Her younger sister is at school, her elder brother is engaged to be married. The applicant said that her parents had paid the fines for children outside the Family Planning regulations by borrowing money from friends and relatives. She and her younger sister are registered.

62. The female applicant said that she had completed two semesters' study in Australia, and then her parents could not afford to pay any more for her to continue studying. The female applicant then worked part-time until she had the baby. The applicants and their child live in two rooms of a house for which they pay rent. They share a kitchen and bathroom with another person. Three of them live in a granny flat behind a house. The applicants are helped financially by the male applicant's family and by her mother. The applicants were asked to submit to the Tribunal by [a date in] April 2013 the following documents: a letter from their church elder about their church attendance in the past year; a submission about their capacity to pay the fines set out in the document given to them at the Tribunal hearing about fines payable for contravention of Family Planning regulations in Fujian; any information they had about penalties imposed on people beyond fines.

63. It was explained to the applicants that the fines set out in the document that they had been given were applicable in the event that they were not

married. The female applicant was asked whether she intended to stay with the male applicant. She said that she did. She was asked why they had not married. She said that they had checked it out, and found it was too expensive to get married.

64. Two extensions of time were granted to the applicants to provide the information asked for by the Tribunal, up to [a date in] April 2013.

65. [In] April 2013, the applicant submitted a significant amount of country information apparently downloaded from *The Epoch Times*, as well as the letter from the [Church 1] elder referred to above at para 35.

66. According to Wikipedia, *The Epoch Times* is often connected with the Falun Gong spiritual group. A 2006 report by the U.S. Congressional Research Service listed the newspaper as a Falun Gong affiliated media source,[11] and Professor David Ownby, an expert on Falun Gong, said that after years of ill-treatment by journalists, "they decided to publish a newspaper by themselves to publicize their beliefs"[12]. According to Wikipedia, "The newspaper is heavily critical of the Chinese Communist Party (CCP) and the policies of Chinese government. In 2004, the newspaper published the "Nine Commentaries on the Communist Party", an in-depth critique of China's ruling regime. The newspaper covers causes and groups opposed to the CCP, including Falun Gong, dissidents, activists, and supporters of the Tibetan government-in-exile.

67. The English-language translation of *The Epoch Times* information submitted by the applicant was extremely poor, to the point of being unintelligible. This, combined with the fact *The Epoch Times* is a publication which is highly critical of the Chinese government and can hardly be considered to be "independent", has resulted in the Tribunal giving the information little weight.

68. The Tribunal attempted to make sense of the information from *The Epoch Times* submitted. One reported incident appears to relate to the selling of babies by family planning party cadres in Fujian. Another related to family planning inspections in Xianyou, Fujian, where the relatives of people who have breached family planning regulations are detained, and women who are pregnant or appear to be pregnant are closely monitored. Other articles submitted from *The Epoch Times* report on forced late-term abortions which appear to have taken place in Fujian in 2012. Other articles appear to be about the fate of those unable to pay fines. Many articles related to events which occurred some ten to fifteen years ago.

69. The Tribunal conducted a search of *The Epoch Times* English language version, and found a number of articles critical of family planning policy in China. However, over a period of some years up to the present there were few references to such matters as forced abortions as a result of the application of Family Planning laws. *The Epoch Times* published an article on 14 June 2012 headed "Late Term Forced Abortion Incenses Chinese Netizens" (<http://www.theepochtimes.com/n2/china-news/late-term-forced-abortion-incenses-chinese-netizens-252090.html>) which reported on the negative reaction of hundreds of thousands of Chinese internet users to a report of a late term forced abortion. Recently, on 5 March 2013, *The Epoch Times* published news that "China's One-Child Policy May Be Relaxed Province by Province" (<http://www.theepochtimes.com/n2/china-news/chinas-one-child-policy-may-be-relaxed-province-by-province-357307.html>).

70. The most recent human rights report by the US State Department (2012 *Country Report on Human Rights Practices*) published in April 2013 for China refers to the country having “a coercive birth-limitation policy that in some cases resulted in forced abortion (sometimes at advanced stages of pregnancy) or forced sterilization”. It states, relevantly:

In 2010 Xuzhou in Jiangsu Province was the site of a high-profile court proceeding in which a 30-year-old female plaintiff sued the local family-planning bureau, claiming that she had been barred from a civil service position in the county government for giving birth to a child before marriage. Although she married the father soon after the child’s birth, the court upheld the family-planning bureau’s decree that the birth of an out-of-wedlock child made her ineligible for the government position.

71. On the evidence before it, the Tribunal accepts that China continues to administer a highly coercive family planning policy which can result in substantial fines for breaches of the law, as well as other penalties, including punishment for unpaid fines which may result in children not being registered. The Tribunal accepts that unregistered children, commonly known as *black children*, do not have the full rights of a registered child.^[13] In particular, they are not entitled to public education and, as a result, their parents must pay for private education.^[14] The Tribunal notes that while there are some exemptions to family planning rules for Chinese students returning from study overseas, DFAT advised in February 2010 that the exemptions ‘do not apply to parents who have a child out of wedlock’^[15] As noted above at para 53, advice from DFAT indicates that even if the parents marry after the birth of their child, a social compensation fee, or fine, is “most likely” payable. In the applicants’ case, the child was born before the male applicant was 22, the legal age for marriage.

72. If the applicants were to return to China with their child, they would need to register the child in order for it to have access to free education and other benefits. The Tribunal accepts that it would quickly become apparent to the authorities that the applicants’ child was born out of wedlock, and before the legal age for marriage of the child’s father. Even if the applicants were to marry immediately, DFAT advice indicates that a social compensation fee is still “most likely” payable. The Tribunal finds that the applicants would be liable to pay a social compensation fee for having their child out of wedlock if they returned to China. The Tribunal does not accept on the evidence before it that they would be liable for any other penalties. The Tribunal accepts that if the applicants were unable to pay the fine imposed on them, they would be penalised by having an unregistered or “black” child. It also accepts that one or both of the applicants could be excluded from government employment, as indicated above at para 70.

73. Although the applicants were asked to provide information following their Tribunal hearing in March 2013 on their capacity to pay any fines imposed as a result of their breaching family planning regulations, the only information submitted in relation to their financial circumstances were two bank statements, one for a joint bank account and the other for a bank account in the name of the male applicant. The bank statement for the joint account gives the balance in the account [in] March 2013 as \$466.39 (credit), but gives no transaction information. The bank statement for the male applicant is for the period from [September] 2012 to [March] 2013, and show a credit balance of \$16.77.

74. The applicants' evidence at the Tribunal hearing indicates that they are currently in poor financial circumstances. The Tribunal accepts that they would be unable by themselves to raise the amount of money required to pay the social compensation fee for breaching family planning regulations, an amount ranging from some \$A5,000 (for rural parents, as in the case of the female applicant's former residence) to an amount of about \$A24,000 (for urban parents, as in the case of the male applicant's former residence).

75. On the basis of the applicants' evidence at their Tribunal hearing, the Tribunal finds that the applicants' families support their relationship, and would therefore be willing to offer them financial assistance. The female applicant's evidence indicated that her parents are unlikely to be able to offer financial assistance, having had themselves to borrow to pay social compensation fees in the past for their children, including the female applicant. They also appear from the female applicant's evidence to be in poor financial circumstances currently. They were unable to support her continued study in Australia.

76. The male applicant's evidence about his family indicates that that his father is not working although his mother now works running a [stall]. The applicant's younger brother is [studying] in China, and his parents own their own home. The male applicant described his family's circumstances at his Tribunal hearing as "just average". No further evidence has been submitted about the financial circumstances of the male applicant's family, and the Tribunal is unable to make a finding about whether his family is likely to be able to raise the money to pay a social compensation fee for the breach of family planning laws.

77. In the worst case, if the applicants are unable to raise the money to pay the requisite fine, their child will be an unregistered or "black" child, unable to access the advantages of a registered child. On the evidence before it, the Tribunal accepts that the applicants may be penalised if they return to China in the foreseeable future, by being unable to register their child. It also accepts, on the evidence before it, that the applicants may be excluded from government employment. The Tribunal does not accept, on the evidence before it, that the applicants will be subjected to any other penalties for having a child born outside wedlock.

Do the penalties for the contravention of family planning laws by the applicants amount to persecution in a Convention sense?

78. The Family Planning regulations in China, while acknowledged to be highly coercive, apply to all its citizens. There is no evidence before the Tribunal to indicate that the applicants would be treated differently from any other Chinese citizen in relation to the family planning legislation. While it has considered whether the male applicant's Christianity would affect his treatment in this regard, the Tribunal does not accept, on the evidence of the country information set out above, that it would make any difference to the authorities' treatment of the applicants for breaching family planning regulations. While the Tribunal acknowledges that these laws place a very heavy penalty on the applicants, it finds that any such penalty would be imposed as a result of the administration of a law of general application, and

therefore any harm to the applicants would not constitute persecution in a Convention sense.

79. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicants will be subjected to Convention-based persecution if they return to China in the foreseeable future because they have breached the Family Planning regulations of that country. The Tribunal is not satisfied that the applicants have a well-founded fear of persecution in China within the meaning of the Refugees Convention.

Do the penalties for the contravention of family planning laws by the applicants constitute significant harm for the purposes of the Complementary Protection legislation?

80. The Tribunal has accepted that the applicants are likely to incur penalties as a result of breaching family planning laws in China. It has accepted that the fines are onerous, and that the applicants are unlikely to be able to pay them without substantial assistance from their families, assistance which may not be able to be provided, despite the families' willingness to support the applicants. The Tribunal has further accepted that there are substantial grounds for believing that there is a real risk that as a result of failure to pay the social compensation fees the applicants' child may be an unregistered or "black" child. It has not accepted that the applicants would be subjected to any further penalties as a result of their contravention of family planning policy, but it does accept that having a "black" child would be a source of great distress to the applicants.

81. The Tribunal accepts that the penalties faced by the applicants may well amount to harm, although it does not accept on the evidence that this harm amounts to "significant harm" according to the definition set out in the legislation at s36(2A):s5(1). However, even if it were to accept that the penalty constituted significant harm within the meaning of the legislation, s36(2B) of the Act states that "there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: ...(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally".

82. As discussed above in relation to the Refugees Convention, the Tribunal has found that any penalty incurred by the applicants for breaching the family planning regulations would be imposed on them as a result of the administration of a law of general application. There is no evidence before the Tribunal that the applicants would be treated differently in this respect from other Chinese nationals. It has made this finding having taken into account that the male applicant is a practising Christian, as detailed above at para 73. The real risk faced by the applicants is therefore one faced by the population of the country generally, and for this reason the Tribunal is not satisfied that there is a real risk that the applicants will suffer significant harm if they are returned to China.

83. For the reasons given above the Tribunal is not satisfied that either of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to

satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

[1] Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April http://www.omf.org/omf/us/resources_1/newsletters/global_chinese_ministries/gcm_newsletter_2009/global_chinese_ministries_apr_09/the_protestant_church_in_fujian_province> Accessed 2 November 2009. The information is said to be taken from information has been taken from November 2008 *Tianfeng* and *History of Christian Missions in China* by K.S. Latourette. *Tianfeng* is a Protestant magazine published by the TSPM/CCC and can therefore not be taken to be unbiased in relation to house churches.

[2] Department of Foreign Affairs and Trade 2007, *DFAT Report No.07/83 – China: 'Shouters' Christian group and Fujian Province*, 28 November.

[3] Li, Yao 2012, 'Christians warn against cult influence', *China Daily*, 20 December <http://www.chinadaily.com.cn/china/2012-12/20/content_16033787.htm> Accessed 18 March 2013

[4] Congressional Executive Commission on China 2009, *Annual Report 2009*, 10 October, pp. 138-139.

[5] US Department of State 2007, *International Religious Freedom Report 2007: China (includes Tibet, Hong Kong, and Macau)*, 14 September, Introduction & Section 2.

[6] *Marriage Law of the People's Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People's Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People's Republic of China <<http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm>> Accessed 10 May 2006; see also US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186268>> Accessed 6 February 2013

[7] Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request: CHN37505*, 12 November

[8] US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186268>> Accessed 6 February 2013

[9] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February

[10] *Population and Family Planning Regulation of Fujian Province* (China),

- Promulgated 26 July 2002, (Effective 1 September 2002), UNHCR
 <<http://www.unhcr.org/refworld/pdfid/4242b7394.pdf>> Accessed 7 April 2005 ;
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- [12] Radio Canada ombudsman report, Pg10
- [13] Zhou, Y 2005, *Uncovering Children in Marginalization: Explaining
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 October
- [15] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China:
 RRT Information Request: CHN36059*, 12 February

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Refugee Review Tribunal of Australia

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←**1217265** → **[2013] RRTA 393 (15 May 2013)**

Last Updated: 23 July 2013

←**1217265** → [\[2013\] RRTA 393 \(15 May 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←**1217265** →

DIAC REFERENCE(S): CLF2011/113736

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Rowena Irish

DATE: 15 May 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

statement of decision and reasons

BACKGROUND

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of China (PRC), applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2011.

The delegate refused to grant the visas [in] September 2011, and the applicants applied to the Tribunal for review of that decision.

3. The Tribunal affirmed the delegate's decision, and that decision was set aside by the Federal Magistrates Court. The matter is now before the Tribunal pursuant to an order of the Court.

4. The first named visa applicant (referred to as the wife applicant) is the wife of the second named visa applicant (referred to as the husband applicant) and the mother of the third named visa applicant (referred to as the child applicant). The wife applicant claims to be a Mormon and to have been detained in China for attending an underground Christian gathering. She claims to have sent information back to China in relation to the Jasmine Revolution which came to the attention of the authorities. She also claims to fear harm for having breached Fujian's family planning laws for the conception of the child applicant before she was married and when the husband applicant was under marriageable age. At the time of the Tribunal hearing in the current matter the wife applicant was pregnant with their second [child].

Claims and evidence

5. The application form (completed without assistance) states that the wife applicant was born on [date deleted: s.431(2)] in Fujian, China. She speaks, reads and writes Mandarin. She claims to be a Chinese citizen (a certified copy of her passport was provided) and not to have citizenship of, or a right to enter or reside in, any other country. She lists her religion as Christian (a certified copy of her Baptism and Confirmation certificate was provided). She has been married since [2010] (a certified copy of the marriage certificate was provided). She arrived in Australia as a student [in] June 2007 and returned to China for a visit in January 2009. Her parents [and siblings] all live in China.

6. The husband applicant was born on [date deleted: s.431(2)] in Fujian, China. He is a Chinese citizen (a certified copy of his passport was provided). He completed a Part D of Form 888 stating that he had no claims of his own for protection. He lists his religion as "Christian" The child applicant is the [child] for the first and second named applicants (a certified copy of her birth certificate was provided). [Specific details of child deleted: s.431(2)]. A Part D of Form 888 was completed on [the child's] behalf stating that [the child has no claims of his/her] own for protection.

7. The Tribunal has received a copy of the recording of the interview which the first named applicant had with the delegate [in] September 2011. A summary of the discussions that occurred are set out in paragraph 26 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted: s.431(2)]. Having listened to the recording of the interview the Tribunal accepts that this summary is an accurate and comprehensive summary of the interview.

8. The Tribunal has also listened to a recording of the hearing before the first Tribunal [in] February 2012. A summary of the evidence provided at that hearing is set out in paragraphs 27-73 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted:

s.431(2)]. The Tribunal accepts that this summary is an accurate and comprehensive summary of the hearing.

9. Following the hearing [in] February 2012 the applicants submitted a copy of what appears to be a historical internet chat record dating from [July] 2011 with an English translation between the wife applicant and her [sibling]. They also submitted a statement addressing some of the concerns raised by the Tribunal at the hearing [in] February 2012.

10. The applicants appeared before the current Tribunal [in] April 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

11. Following the hearing an invitation to comment on or respond to information under s.424A was sent to the applicants by registered post on 9 April 2013. A copy of this letter is on the file (ff.56-60). Australia Post records show that the letter was delivered on 15 April 2013. The letter stated that any comments or response should be received at the Tribunal by 2 May 2013. It warned the applicants that if no response was received by that date (unless extended) the Tribunal may make a decision on the review without taking any further action to obtain the applicants' views on the information. No response was received.

Findings and reasons

12. The law upon which the findings below are based is set out in Attachment 1.

Nationality

13. On the basis of their Chinese passports, which were presented to the Tribunal, the Tribunal finds that the wife and husband applicants are citizens of the People's Republic of China.

14. On the basis of the birth certificate provided, the Tribunal accepts that the child applicant [is the [child] of the wife and husband applicants. Article 5 of the *Nationality Law of the People's Republic of China (1980)* states, in part that any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. There is no evidence before the Tribunal indicating that the child applicant is not a national of the People's Republic of China and [the child's] claims have therefore been assessed against China as [the child's] country of nationality.

15. There is nothing in the evidence before the Tribunal to suggest that the applicants have a legally enforceable right to enter and reside in any country other than their country of nationality. Therefore the Tribunal finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicants are nationals of China, the Tribunal also finds that China is the applicants' "receiving country" for the purposes of s.36(2)(aa).

Credibility concerns

16. The Tribunal had a number of concerns about the evidence provided by the wife applicant. The Tribunal accepts the difficulties of proof faced by

applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* [1992] FCA 470; (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* [1984] FCA 57; (1984) 1 FCR 354 at 357; [1984] FCA 57; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraphs 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547.

17. The Tribunal sets out below its concerns about the wife applicant's credibility.

18. **First**, the Tribunal found the wife applicant's evidence in relation to her parents' employment history to be inconsistent and unpersuasive. As put to the applicants under s.424A, in her student visa application lodged [in] July 2009 the wife applicant provided a letter from [a business] dated [June] 2009 stating that her mother has been working there as a manager since June 2002 with an annual income of 68,000RMB. While the Tribunal is willing to accept that this document is a false document provided to support the student visa application, the Tribunal considers that the provision of a fraudulent document in support of the wife applicant's student visa application reflects poorly on her credibility.

19. As put to the applicants under s.424A at the Departmental interview [in] September 2011 she claimed that her mother was in charge of a small tea shop. At the current Tribunal hearing she initially claimed that her mother was involved in the family transport business but then claimed that her mother was mainly a housewife. She then claimed that her family had been running the tea business since early 2008 and that it closed in early 2012. She claimed that the business closed at the beginning of 2012 because once they were caught for having the gathering there no-one was willing to come to the meeting point so the tea business closed. However when the Tribunal put to her that the arrest for the gathering was in 2009 and the business did not close until 2012 she then stated that the business was still doing OK but not as well as it should have been.

20. She initially claimed that her mother was the only person in the business but then later claimed that she had a partner in the business and that the business was originally owned solely by the partner but then later her mother joined. As put to the applicants under s.424A, her evidence that the tea

shop opened in early 2008 appears contrary to her evidence at the previous Tribunal hearing [in] February 2012 where she initially claimed that the tea shop opened in 2009 and then later she claimed that it opened in early 2007. It also appears contrary to her claims at the previous Tribunal hearing that her grandmother was involved in the business, which was also put to the applicants under s.424A. The Tribunal finds it surprising that she did not previously mention her mother having a partner in the business.

21. As put to the applicants under s.424A at the Departmental interview the wife applicant claimed that her father works delivering goods. At the previous Tribunal hearing [in] February 2012 the wife applicant claimed that her father works for a [transport] company where he had been working for the past 10 years (as put to the applicants under s.424A). At the current Tribunal hearing she claimed that her father works [in a different field involved with] the transport business for someone else and that he has been doing this since 2009. She then later claimed that he had been doing this since 2010. When questioned about why she would say in the interview [in] September 2011 that he was working delivering goods, she stated that this was referring to when he worked in the transport business but did not explain why she would claim that was his current job in 2011, when he stopped doing that in 2009 or 2010.

22. **Second** at the Tribunal hearing the wife applicant's evidence in relation to when her family stopped supporting her financially, and why, was inconsistent and unpersuasive. She initially claimed that they stopped supporting her in June or July 2010 because they found out that she got married and that this was the only reason that they stopped supporting her. This evidence is inconsistent with the wife applicant's evidence at previous Tribunal hearing (as put to her in the s.424A letter) where she claimed that they stopped giving her money in about September 2009 because she was dating a man. It is also inconsistent with her written statement where she claimed that:

Then our family business met difficulty and went bankrupt due to the constant harass of police.

23. When it was put to the wife applicant at the Tribunal hearing that she had previously stated that it was due to her family business going bankrupt that her family stopped supporting her she changed her evidence and stated that this was also a reason and that her family were running a transport business before delivering stock and that her mother worked for the business with her father and some other family members. However the business stopped because of a downturn in business because it is not as popular anymore which happened to other transport companies also. When the Tribunal put to her that in her statement she claimed that it went out of business because of the harassment by police, she responded that this was only for a short period of time in January 2009 when she returned to China.

24. The Tribunal found the wife applicant's evidence in relation to her family's financial situation and when and why they stopped supporting her financial to be so inconsistent and changeable that it raises doubts for the Tribunal about whether her family have stopped supporting her as claimed.

25. **Third** the Tribunal found the wife applicant's evidence in relation to her family's knowledge of her relationship with the husband applicant to be inconsistent. She initially claimed that they stopped supporting her in 2009 because they did not approve of her relationship. However she later claimed

that her family only found out about the relationship [in] 2010 when she was [pregnant]. When this inconsistency was put to her at the hearing she changed her evidence and stated that they knew about the relationship in 2009 but she was not pregnant then. She also claimed at the previous Tribunal hearing in February 2012 that their families were not aware that they had gotten married (as put to her under s.424A). However at the current Tribunal hearing she stated that they did know about the marriage but do not support it.

26. At the current Tribunal hearing the wife applicant initially claimed that her family would force her and the husband applicant to separate if they were to return to China, consistently with her claims at the previous Tribunal hearing in February 2012. However when the Tribunal asked why they would do this unless they were willing to support her then she changed her evidence and claimed that the husband applicant's family were the ones who would force them to separate.

27. **Fourth** the Tribunal found the wife applicant's evidence in relation to her attendance at church in Australia to be inconsistent and unpersuasive. As put to the applicants under s.424A, she claimed at previous Tribunal hearing in February 2012 that she stopped going to church in mid-2008. However at the current Tribunal hearing she claimed that she continued attending church in Australia until she went to China in January 2009. She claimed at the previous Tribunal hearing in February 2012 that she was baptised in 2007 because she knew that she would hold onto that religion until the end (as put to her under s.424A). However, she stated at the current Tribunal hearing that she only started believing in the religion after the birth of her child and that she had previously only attended church in Australia because they helped her. She claimed at the previous Tribunal hearing in February 2012 that she attended sermons in May and July 2010 and thought she should join the church again but was pregnant and so she only attended sometimes as it was inconvenient (as put to her under s.424A). At the current Tribunal hearing she stated that she only started attending church again in May 2011 when her [child] was [young].

28. She consistently claimed that she stopped attending church in Australia for a period of time because her father disapproved of it. The Tribunal finds this unpersuasive as the wife applicant had chosen to disobey her father's wishes in relation to her husband over a number of years and cannot see why she would chose to obey her father about her religion but disobey him about relationship. When this was put to the wife applicant at the hearing she claimed that it was because she was reliant on her father to pay for her studies in Australia. However, she had stated that he had stopped supporting her financially since mid 2009 which does not explain why she did not attend church until 2011.

29. The wife applicant's evidence about why she started attending church in Australia was also inconsistent. As put to her under s.424A, in the Departmental interview [in] September 2011 she claimed that she wanted to attend church in Australia because she had friends who went with their parents to the family church in China. However at the current Tribunal hearing she claimed that she wanted to attend church in Australia because her mother had instructed her to seek out a church in Australia as they would help her.

30. **Fifth** the Tribunal found the wife applicant's evidence about her detention to be inconsistent, vague and unpersuasive. As put to her under

s.424A, she claimed in the Departmental interview [in] September 2011 and at the previous Tribunal hearing in February 2012 that the gathering where she was detained was held at the family home. However at the previous Tribunal hearing she also referred to it being held at the tea shop. When this was put to her at the previous Tribunal hearing she claimed that the tea shop and home were at the same place. However at the current Tribunal hearing she claimed that the tea shop and home were not the same place and that the gathering was at the tea shop. The Tribunal considers this to be a very significant fact and would expect her to be able to recall accurately where the gathering was and whether the tea shop was in her home or not. Her inability to do so causes the Tribunal to doubt that any tea shop exists.

31. At the current Tribunal hearing she claimed that she was taken to a police station 20 minutes drive away. This appears to be inconsistent with her evidence at the Departmental interview that she was taken to a detention centre 40 minutes drive away (as put to her under s.424A).

32. At the current Tribunal hearing she claimed that her mother was detained for one week and did not have to pay any money to be released. This appears to be inconsistent with her evidence at the Departmental interview and previous Tribunal hearing where she claimed that her mother had to pay 2000RMB to be released because she was supposed to be detained for 15 days but paid to be released early (as put to her under s.424A).

33. At the current Tribunal hearing she claimed that while in custody they only asked her why she attended the meeting and nothing else. However she later claimed that they thought she was evangelising. The Tribunal does not accept as credible that the police would only ask her about why she attended the meeting if they thought she was evangelising. In such circumstances it would expect them to ask her about her overseas activities, whether she was evangelising and her other church activities. Furthermore, this appears to be inconsistent with her evidence at the previous Tribunal hearing that the authorities questioned her about whether she attended church overseas (as put to her under s.424A).

34. At the current Tribunal hearing she claimed that her father had organised payment of the bail for her. This is consistent with her claims at the Departmental interview (but not at the previous Tribunal hearing) where she claimed that her grandmother organised the payment of the bail for her (as put to her under s.424A).

35. **Sixth**, the Tribunal found the wife applicant's evidence in relation to the claimed material sent to China to be unpersuasive and inconsistent. She claimed in her written statement:

Recently, I have been discussing about Chinese Christian joining the Jasmine Revolution in China with some Chinese Christians online. I have sent out some information and photos. But not long ago, one of my friends was taken by the police. My family was also searched and warned.

36. As put to her under s.424A, this appears to be inconsistent with her claims at the previous Tribunal hearing where she initially claimed that she sent information by email and then that she sent a document via QQ communications to her [sister] and her sister called some friends in to look at it. She initially claimed that her sister was not able to open the document, then that she did open it and then later that her sister could not open her computer. She claimed that both her sister and her friend were detained. In her

submission to the previous Tribunal dated [February] 2012 she stated that she sent the information to her sister who then forwarded it to friends and that her friend was detained for much longer than her sister. However, at the current Tribunal hearing she stated that her friend was detained for one day and her sister was released the same day. She also claimed that the QQ conversation she had was not just with her sister but also with a number of friends to whom she sent the document as well. She claimed that she only sent the information on one occasion. She claimed that as a result of sending the information on the same day her computer was infected with a virus which resulted in it freezing. However when she rebooted it it worked again. She initially claimed that this happened as soon as she sent the information. However when the Tribunal put to her that it could not understand why she would agree to resend the information (as her QQ communication suggests) she then changed her evidence and claimed that she had sent the information twice and that it only occurred after she sent it the second time. The Tribunal found this unpersuasive. Also, the Tribunal does not accept that just because a computer freezes it has a virus, especially when it starts working again after being rebooted. Even if it did have a virus there is no evidence to suggest that this was linked to sending information overseas as viruses are very common in computers.

37. Furthermore, the Tribunal does not accept that the wife applicant would send information about the Jasmine Revolution to China when she knew it was banned (which she stated at the current Tribunal hearing). This appears to be contrary to her claimed beliefs that as a Mormon one of the tenets of her faith is that she should follow the law. Also she was unable to provide any persuasive reason why she would take this risk. When this was put to her at the current Tribunal hearing she stated that she showed the material to her sister and friends so that they would know better about the Chinese authorities.

38. The Tribunal found the wife applicant's evidence in relation to the claimed communications to be so vague, inconsistent and unpersuasive as to not be credible. The Tribunal does not accept that the wife applicant sent any information to China as claimed.

39. In the purported copy of a QQ conversation with her sister provided to the previous Tribunal [in] February 2012 the wife applicant agrees to send her sister the information again as her sister is no longer able to access it. This appears to be inconsistent with the wife applicant's evidence that she only sent the information once. This conversation suggests that the information was a link to a website as her sister states that "the websites looks like been hacked", which appears to be inconsistent with the wife applicant's evidence that it was a document that she sent and not a link to a website. Also, the Tribunal does not accept that the wife applicant would be willing to resend the information if her computer had been infected with a virus as a result of sending it the first time. Furthermore the QQ conversation does not refer to the information having been sent or shown to any friends or that her sister's computer or document could not be opened or that the wife applicant's computer suffered any problems. This leads the Tribunal to place little weight on the QQ conversation provided in support of the wife applicant's claims.

40. For the reasons set out above, the Tribunal finds that the wife applicant is not a credible witness, has fabricated her religious claims to give herself the

profile of a refugee and has not been honest about her reasons for leaving China and coming to Australia. The Tribunal does not accept that she attended underground Christian gatherings in China, was detained in China for attending an underground Christian gathering or that she sent religious or political materials back to China.

41. In light of the Baptism and Confirmation Certificate provided for the wife applicant and the Blessing Certificate provided for the child applicant the Tribunal accepts that the first named applicant has attended a Mormon church in Australia (although it is not clear to the Tribunal how often she has been attending). For the reasons set out above the Tribunal has found that the wife applicant is not a credible witness and the Tribunal is not satisfied that she holds genuine Mormon beliefs. This, together with the inconsistencies in the evidence from the wife applicant about when she started holding genuine religious beliefs, when she was attending church in Australia and why she started attending church in Australia, leads the Tribunal to find that the wife applicant's involvement in Mormon activities in Australia was solely for the purpose of strengthening her claim to be a refugee. In accordance with s. 91R(3), the Tribunal disregards the wife applicant's conduct since arriving in Australia for the purpose of assessing her claims to be a refugee.

Claims relating to the Mormon church

42. For the reasons set out above the Tribunal finds that the wife applicant is not a genuine Mormon. Therefore the Tribunal finds that the wife applicant will not attend Mormon gatherings in China nor engage in evangelism or any Mormon related activities if she were to return to China now or in the reasonably foreseeable future because she has no genuine interest in doing so. Therefore, the Tribunal finds that there is no real chance that the wife applicant will face persecution because of her religion if she was to return to China now or in the reasonably foreseeable future.

Claims relating to attending underground gatherings in China

43. As set out above, the Tribunal does not accept that the wife applicant was detained in China for attending an underground Christian gathering. Therefore the Tribunal finds that there is no real chance that the wife applicant will face persecution because of this if she was to return to China now or in the reasonably foreseeable future.

44. Although the wife applicant had previously claimed that she would attend underground Christian gatherings in China if she was to return, at the current Tribunal hearing she stated that this was unlikely and that she would just practice her Mormon religion in private. Therefore the Tribunal finds that the wife applicant would not attend underground Christian gatherings if she was to return to China in the foreseeable future and therefore there is no real chance that she will face persecution for doing so.

Claims relating to materials sent to China

45. As set out above, the Tribunal does not accept that the wife applicant sent any religious or political materials from Australia to China as claimed.

Consequently the Tribunal does not accept that the wife applicant, her sister or her friend suffered any consequences for this, including being detained, having their computers hacked or having their computers being infected with a virus. Therefore, the Tribunal finds that there is no real chance that the mother applicant will face persecution as a result of this if she was to return to China now or in the reasonably foreseeable future.

Claims relating to family planning provisions

46. On the basis of the birth certificate provided the Tribunal accepts that the child applicant is the [child] of the wife and husband applicants. The marriage certificate provided states that the wife and husband applicants were married [in] 2010 and the birth certificate provided shows that the child applicant was born on [date deleted: s.431(2)]. Therefore the Tribunal accepts that the wife and husband applicants were not married at the time of the child applicant's conception. Furthermore, the Tribunal accepts that the husband applicant would have been [under the marriageable age] in China. Article 6 of the *Marriage Law of the People's Republic of China* states that women can legally marry at the age of 20 and men at the age of 22.[1] Therefore the Tribunal accepts that the birth of the child applicant was in breach of Fujian's family planning laws.

Non-payment of social compensation fee

47. The Tribunal has considered the relevant provisions in Fujian's family planning laws. Fujian family planning regulations set out guidelines for social compensation fees for out of plan children.[2] It is forbidden for a couple to give birth 'before the stipulated time' under Article 14 of the *Population and Planning Regulation* for Fujian Province. Article 14 states:

Under any of the following circumstances, the child born is regarded as born before the stipulated time by the Regulation:

(1) Those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age).[3]

48. A DFAT cable (Department of Foreign Affairs and Trade 2010, DFAT Report 1210 – RRT Information Request: CHN37505, 12 November) provides advice in relation to household registration:

Fines are payable for contravening the regulations. Under Article 39, a social compensation fee is required to be paid by anyone who violates the Regulation in the following ways:

(1) A social compensation of zero point six to one time shall be imposed on those who give birth to a child ahead of the schedule

(2) A social compensation of two to three times shall be imposed on those who give birth to the first additional child. A social compensation of four to six times shall be imposed on those who give birth to the second additional child. A much more heavy social compensation fee shall be imposed on those who give birth to the third or more additional child.

(3) A social compensation of four to six times shall be imposed on those who give birth to a child born out of an extramarital affair. A much more heavy social compensation fee shall be imposed on those who give birth to the second child born out of an extramarital affair.

49. Therefore the Tribunal accepts that a social compensation fee will be payable in order for the child applicant to be registered in China. The wife applicant gave evidence at the Tribunal hearing that both she and the husband applicant's hukous are registered in a rural area of Fujian. The average rural Fujian annual net income in 2010 was 7,427RMB^[4] which means that the fine will be between 4,456RMB and 7,427RMB which equates to between AUD696 and AUD1160.^[5] At the hearing, the Tribunal quoted the information derived from Fujian family planning regulations and statistical information. The wife applicant claimed that the fine would be at least 40,000-50,000RMB and that she knew this because she had a friend who returned and had to pay this much for registration of her child (a claim also made by the husband applicant at the hearing). She initially claimed that she had not made any enquiries with the authorities in China in relation to the fees to be paid but when the Tribunal put to her that she had claimed in writing to the previous Tribunal that she had made enquiries and was told that there was no leeway then she changed her evidence and stated that she had made enquiries with the authorities. She provided no evidence to support this claim, nor any explanation of why she had previously claimed that she did not make any enquiries. In light of the credibility concerns that the Tribunal has in relation to the wife applicant, and the lack of evidence about why the fine would be 40-50,000RMB, the Tribunal does not accept that this is accurate. The Tribunal prefers the independent information obtained by the Tribunal from sources which it considers to be reliable. Although not raised directly by the applicants, the Tribunal accepts that the couple would be required to pay an additional fee for the registration of their second child after its [birth].

50. The Tribunal has considered whether the imposition of a fee on the wife applicant constitutes persecution of the wife applicant. The Tribunal is satisfied on the evidence before it that China's family planning policies and laws apply generally to the Chinese population and penalties apply to those who have breached China's family planning laws by having a child out of wedlock, prior to the prescribed age, or having additional or subsequent children without permission. The laws provide that a 'social compensation fee' shall be paid by anyone who breaches the family planning laws. The Tribunal is not satisfied there is any evidence that the *Population and Family Planning Regulation* of Fujian Province and associated provisions will be applied to the applicant in a discriminatory manner for any reason or that it is selectively enforced. The Tribunal is satisfied that such laws are appropriate and adapted to achieve a legitimate national objective in the context of China's need to control its overall population growth. As such, the Tribunal does not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.

51. The Tribunal has also considered whether there is a real chance that the child applicant may be subject to persecution on this basis. The wife applicant claims that she could not afford to pay the social compensation fee because neither her nor the husband applicant's families are willing to support them financially, the couple have no savings to use to pay the fee, she and the husband applicant have no qualifications and therefore would not be able to get a job in China or it would be poorly paid; and the husband applicant's

family would force she and the husband applicant to separate so that she would have the child applicant to look after unsupported.

52. However, the Tribunal considers that the fee required to be paid is a relatively modest one. The wife and husband applicants have been able to support themselves in Australia since 2009, and the [baby], including with accommodation, two mobile phones on monthly plans, food and daily essentials. They have been able to find work in Australia despite their visa issues, although the wife applicant is not currently working. This suggests to the Tribunal a resourcefulness which would assist them if they were to return to China. The wife applicant claimed that the husband applicant is only working 2-3 days per week and only earns \$120 per day. She gave evidence at the hearing that he sometimes works more days per week than this but, despite repeated questioning, claimed that the maximum amount he ever earns is \$300-\$360 per week. The Tribunal does not find this credible as if he is working more than 3 days and earns \$120 per day then he would receive more than \$360 per week for those weeks. Furthermore (as put to the applicants under s.424A) at the previous Tribunal hearing in February 2012 she claimed that the husband applicant earns \$100-\$200 per day. The Tribunal believes that the wife applicant was attempting to minimise her evidence in relation to their income and was not being honest about how much the husband applicant earns here in Australia.

53. In addition, the applicants provided evidence at the hearing that the wife applicant came to Australia on a student visa which cost her family 200,000RMB and the husband applicant came on a student visa which cost his family 150,000RMB. While the wife applicant claims that her family no longer supports her financially her evidence in relation to when and why this occurred was inconsistent and unpersuasive (as discussed above). She gave evidence at the hearing that she speaks with her family fortnightly which suggests that her family have not disowned her (the husband applicant gave evidence consistent with this). They also both gave evidence that the husband applicant speaks with his family fortnightly which again suggests to the Tribunal that the family are not as opposed to the relationship as the wife and husband applicants are claiming. They claim that the husband's family would not support the [child applicant] but have not provided any evidence in support of this. The wife applicant's evidence in relation to her parents' employment history was inconsistent and unpersuasive, as discussed above. The Tribunal does not accept that the wife applicant has been honest about her family's financial situation. In light of the credibility concerns discussed above, the evidence that their families have been willing and able to provide significant financial assistance in the past (whether through savings or borrowings) and their own evidence that they have regular ongoing contact with their family, the Tribunal is not satisfied that both the wife and husband applicant's families in China would be unwilling or unable to assist in the payment of the fee for registration of the child applicant.

54. Furthermore, the Tribunal accepts that in Fujian there also exists the possibility of paying the fee by instalments. Although this was disputed by the wife applicant it has been confirmed by DFAT[6]:

According to Article 10 of Management Measures for the Collection of the Fujian Province Social Compensation Fee:

- the person concerned shall make a lump sum payment, in person, within 30 days from the time of receiving a payment notice;
- if the person concerned has difficulty in paying the social compensation fee, they should submit a written request within 30 days of receiving notice. Their request should be addressed to the authority who issued the payment notice (such as the county or town-level family planning administrative office), requesting to pay via instalments;
- the written request will require supporting documentation (unspecified) from employers, residence or village committees, or other relevant authorities;
- the authority responsible for collecting payment shall make a decision on approving or refusing the instalments within 30 days from the application date, and advise the person concerned of the authority's decision in writing; and
- the period permitted for payment instalments shall not exceed three years.

55. Therefore, while the Tribunal accepts that it will be difficult financially for the applicants if they return to China (particularly if they are required to pay for the registration of two children), it is not satisfied that the wife and husband applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to state provided education and healthcare available to all other registered Chinese citizen. Article 25 of the Marriage Law of the People's Republic of China stipulates:

Children born out of wedlock shall enjoy the same rights as children born in wedlock. No one may harm or discriminate against them.

56. In light of the above, the Tribunal is not satisfied that there is a real chance that the child applicant will suffer persecution.

57. The Tribunal has also considered whether the child applicant would face harm in the form of persecution until such time as [the child] is registered (if the first named applicant pays by instalment) for reason of her status as an unregistered child.

58. The *Hukou* (household registration system) records a child's birth, testifies to its citizenship, and registers its permanent residence. The *Hukou* registration is one of the most important components of the household management system in China. A child cannot acquire most of his or her rights without their *Hukou* registration. Without a *Hukou* registration, an unregistered child would not be entitled to either government funded public education or subsidised health care.[7] The parents of an unregistered child would have to arrange and pay for private education and medical services. According to DFAT advice, if a non-government school exists in the area an unregistered child would be able to attend but may be charged higher fees than a registered child.[8] DFAT has advised that there are many private schools in Fujian that will enroll unregistered children and that their fees are not excessive by Chinese standards.[9] It should however be noted that DFAT advice of August 2007 states that China does not have a national health insurance system for children so a child's registration status is not relevant to accessing medical services.[10] A 2009 research paper titled 'The Emerging Role of Private Health Care Provision in China: A Critical Analysis of the Current Health System' published by Stanford University notes the burgeoning role of private health providers in the form of clinics and hospitals and this may be a response to the negligible difference in cost to a patient between using a private health provider or a public one.[11] The cost can be

broken down to show that the government covers only 20.4% of total health expenditure (with local governments currently accounting for 90 % of total government spending), while citizens paid 45.2% directly out of their pockets and the health insurance share (in 2003 only 46% of the population had insurance) was 34.5%.[12] Apart from health and education an unregistered child would only be denied welfare payments to the unemployed and elderly, many of the other services that the local government would have normally provided in the past to a registered individual, have now been outsourced to privately run entities.[13]

59. Given the child applicant's young age it is likely that [the child] would be registered by school age even if [the] parents paid by instalments. However, even if [the child] was not, the Tribunal notes the independent information referred to above in respect of education indicates that higher school fees would be applicable for an unregistered child but there are a number of reasonably priced private schools which can be accessed. While the wife applicant claimed that such schools were prohibitively expensive she has not provided any evidence of this. The country information on health care is somewhat contradictory but the latest DFAT information indicates that there is no public health system in China and all residents must fund their own medical costs, whether they are registered or unregistered. The Tribunal is not satisfied that the implications of not being eligible in the interim period for state funded education and/or health benefits as an unregistered child constitutes harm of such a nature or extent as to amount to persecution (having regard to the example of 'serious harm' referred to in s.91(R)(2)).

Discrimination for having a child out of wedlock

60. The wife applicant claims that if the family were to return to China she and the husband applicant would be forced to separate. At the hearing she initially claimed that her family would force them to separate. However when the Tribunal queried why her family would force them to separate unless they were willing to support her and the child, the wife applicant then changed her evidence and stated that the husband applicant's family would force them to separate as their birthdates do not match and therefore they would bring bad luck on the whole family. The wife and husband applicants would be returning to China as adults who have lived independently from their families since they were each in high school. The Tribunal does not accept as credible that they would be forced against their wills to separate. They claim that the families would withhold their hukous from them to force them to separate. However, in light of the credibility concerns outlined above and the wife applicant's inconsistent evidence about who would force them to separate the Tribunal does not accept that the families would do this or that the couple would be forced to separate if they were to return to China. Furthermore, as the husband applicant acknowledged at the Tribunal hearing, even if the families did withhold the hukous, the Tribunal does not accept that it would not be possible to get copies of the hukous from the relevant authorities. Although the Tribunal accepts that this may require payment of a fee it appeared to be purely speculation on the part of the husband applicant that they could not afford this as he gave evidence that he did not know how much it would cost to get a copy.

61. However, the Tribunal is willing to accept that it may become known that the child applicant was conceived outside of wedlock. The wife applicant claimed that this would result in discrimination against herself and the child applicant. The Tribunal has considered independent information about the treatment of unwed mothers and their children. DFAT provided advice in 2004 on the treatment of children born out of wedlock (in Guangdong), noting that ‘being a child out of wedlock still attracts some degree of social stigma’.[14] However, the DFAT report also advised that the children ‘might be subject to bullying or teasing at school, but are unlikely to suffer serious social disadvantage’[15]

62. In 2010 Dr. Alice de Jonge provided additional advice to the RRT on the treatment of children born out of wedlock in China. Dr. de Jonge advised: Such children are still regarded with pity and disdain. They are teased at school. Single mothers are subject to discrimination when it comes to accessing housing, education and medical services.[16]

63. Regarding the treatment of such children in Fujian specifically, Dr. de Jonge advised: Fujian is a relatively prosperous province in SE China It is not the worst place to be a child born out of wedlock. Nor the best. The private sector is active in Fujian so that access to employment is at a reasonable level, even for single mothers, depending upon qualifications.[17]

64. The Tribunal accepts that the applicants may be subject to social stigma and ostracism. It accepts that if this occurs it would be distressing for the applicants. However, in light of the country information set out above the Tribunal is not satisfied on the evidence before it that they will face societal discrimination, stigma or ostracism that is sufficiently serious to constitute ‘serious harm’ (having regard to the examples provided in s.91R(2) of the Act).

Forced abortion and sterilisation

65. The wife applicant stated at the hearing that she is [pregnant]. The Tribunal accepts this evidence. At the hearing the husband applicant raised new claims in relation to the wife applicant being pregnant. While the wife applicant did not initially refer to any claims relating to herself as a result of her pregnancy, after the husband applicant raised these claims she then claimed to fear that she would be forced to undergo an abortion or sterilisation in China should she return there. The Tribunal has carefully considered the country information in relation to the existence and prevalence of forced abortions and sterilisations in Fujian.

66. The law prohibits the use of physical coercion to force abortions but pressure on local birth planning officials to meet family planning targets has resulted, according to the US DOS, in the use of physical coercion and “the abortion of certain pregnancies”.[18] A 2008 article by Amnesty International states that “reports persist of local authorities forcing women to undergo abortions”, and that “officials responsible for such practices are rarely prosecuted”.[19] According to a Freedom House report from 2009 “compulsory abortion or sterilization by local officials citing family-planning rules still occurs but is illegal and far less common than in the past”.[20]

67. Forced abortions and sterilisations were also said to occur in Fujian Province. One reported case of forced abortion occurring in Fujian in 2012 was located.^[21] The Fujian family planning regulations do not overtly stipulate a requirement for compulsory abortion or sterilisation for couples who have out of plan children. However, *Article 18* of the Regulations does state that those who have out of plan pregnancies “should take remedial action in time” and that the relevant committees and units “should urge them to take remedial measures in time”.^[22] The US Congressional-Executive Commission on China’s *Annual Report 2009*, alleges that “the term remedial measures is used synonymously with compulsory abortion”.^[23] There have been reports of forced abortions within Fujian province.^[24] The Tribunal accepts that some of these relate to pregnancies occurring outside of marriage.

68. Despite these incidents, according to a 2004 DFAT report, compulsory abortions and sterilisation in Fujian are much rarer than in the 1980s.^[25] The official view of the Fujian Province Birth Planning Committee (FPBPC), is that there have been no cases of forced abortion or sterilisation in Fujian in the last 10 years. Since the early 1990s, it was claimed that all women and men who undergo surgical procedures for family planning reasons provide informed, written consent before surgery.^[26]

69. The Tribunal accepts that there are examples of forced abortions and sterilisations occurring in Fujian. However, given Fujian’s large population^[27] the Tribunal does not accept that these reports show that the practise is widespread or that there is a real chance of the applicant being forced to undergo a forced abortion or sterilisation upon return from Australia. Furthermore, as referred to above, the country information states that compulsory abortions and sterilisations are illegal under Chinese law and as far less common than in the past. The Tribunal does not accept that there is a real chance that the applicant would be subject to a forced abortion or sterilisation should she return to China now or in the reasonably foreseeable future.

Other claims

70. The wife applicant also claimed that her and the husband applicant’s families would disown them if they returned to China because they did not completed their studies, got married and had a child together. The Tribunal accepts that it is likely that their families would be disappointed in the wife and husband applicants not having completed their studies in Australia despite their families having invested significant amounts of money in them. It is also willing to accept that their families may not approve of the relationship. However, the Tribunal does not accept that their families have or will disown them as a result of this because they have had regular ongoing contact with the families despite the birth of their [child] and despite having lived together for many years. Furthermore, the Tribunal does not accept that any harm suffered by the husband and wife applicants as a result of being ostracised by their families would constitute serious harm as they are adults who have already been living independently away from their families for many years in Australia.

71. The wife applicant also claimed that they would not be able to afford to live in China because they could not earn a sufficient wage to support

themselves and the child. While the Tribunal accepts that the couple do not have formal qualifications, it does not accept that they would not be able to earn sufficient money to survive in China. The husband applicant has been working in [a trade] in Australia, work which is consistent with the experience and business run by his parents who the wife applicant stated work in [the same industry] in China. The husband applicant stated that they had raised the 150,000RMB required to send him to Australia from their own money. Therefore the Tribunal does not accept that the husband applicant is unable to find [work] which would enable him to support his family in China. Therefore it does not accept that any financial difficulties they have would constitute serious harm.

72. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that any of the applicants has a well-founded fear of persecution for a Convention reason if they were to return to China now or in the reasonably foreseeable future.

Complementary protection

73. Having concluded that none of the applicants meets the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative complementary protection criterion in s.36(2)(aa).

74. As discussed above the Tribunal has found that the wife applicant is not a genuine Mormon and would not attend Mormon gatherings or engage in Mormon related activities in China if she was to return now or in the reasonably foreseeable future. Therefore, the Tribunal has no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

75. As discussed above the Tribunal has found that the wife applicant did not post any political or religious materials from Australia to China as claimed. Therefore, the Tribunal has no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

76. The Tribunal has accepted that a social compensation fee may be imposed on the first named applicant. The Tribunal accepts also that the imposition of such a fee may cause financial hardship. The Tribunal considers, however, that in the circumstances of this case, the imposition of such a fee on the first named applicant and resulting financial hardship, would not constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). While a fine may be considered punishment, the Tribunal does not consider, on the information before it, that the imposition of a fine would be intended to cause extreme humiliation which is unreasonable (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or that the imposition of a fine would cause (or was intended to cause) severe pain or suffering or that the imposition of a

fine in these circumstances could be regarded as cruel or inhuman (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

77. As discussed above, the Tribunal is not satisfied that the mother and father applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to the benefits associated with household registration (including education and healthcare) and that in the meantime [the child] would have access to private education and healthcare. Therefore, there are no substantial grounds for believing that, as a necessary and foreseeable consequence of [the child] being removed from Australia to China, there is a real risk that [the child] will suffer significant harm on this basis.

78. The Tribunal has accepted that it is possible that the applicants may face some societal discrimination as a result of the child applicant being born outside of marriage. However, the Tribunal is not satisfied that such bullying, teasing, pity and disdain would constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). The Tribunal does not consider, on the information before it, that such discrimination would be intended to cause extreme humiliation (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or would cause (or was intended to cause) severe pain or suffering (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

79. In light of the country information discussed above, the Tribunal does not accept that there is a real risk of the mother applicant being forced to undergo an abortion or sterilisation in China as a result of her current pregnancy.

80. As discussed above, the Tribunal does not accept that the wife and husband applicants' families would disown them in China. The wife and husband applicants have been living in Australia for many years as adults without their parents. Therefore, even if their families did disown them, the Tribunal does not accept that any harm they suffered would be sufficient to constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act.

81. For the reasons discussed above, the Tribunal does not accept that the husband applicant would be unable to obtain employment in China sufficient to support his family. Therefore, while the Tribunal accepts that they may suffer from some financial difficulties, it does not accept that these would be sufficient to constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act.

82. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of either or both of them being removed from Australia to China, there is a real risk that either or both of them will suffer significant harm.

Conclusions

83. The Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

decision

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

ATTACHMENT 1 - Relevant law

1. 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

2. 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.

3. 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.

4. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant*

S395/2002 v MIMA [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

5. 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.

6. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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

13. 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').

14. '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.

15. 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.

MEMBER OF THE SAME FAMILY UNIT

16. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and dependent child.

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RRTA 393

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←**1217265** → **[2013] RRTA 393 (15 May 2013)**

Last Updated: 23 July 2013

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DECISION RECORD

RRT CASE NUMBER: ←**1217265** →

DIAC REFERENCE(S): CLF2011/113736

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Rowena Irish

DATE: 15 May 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

statement of decision and reasons

BACKGROUND

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of China (PRC), applied to the Department of Immigration for the visas on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2011.

The delegate refused to grant the visas [in] September 2011, and the applicants applied to the Tribunal for review of that decision.

3. The Tribunal affirmed the delegate's decision, and that decision was set aside by the Federal Magistrates Court. The matter is now before the Tribunal pursuant to an order of the Court.

4. The first named visa applicant (referred to as the wife applicant) is the wife of the second named visa applicant (referred to as the husband applicant) and the mother of the third named visa applicant (referred to as the child applicant). The wife applicant claims to be a Mormon and to have been detained in China for attending an underground Christian gathering. She claims to have sent information back to China in relation to the Jasmine Revolution which came to the attention of the authorities. She also claims to fear harm for having breached Fujian's family planning laws for the conception of the child applicant before she was married and when the husband applicant was under marriageable age. At the time of the Tribunal hearing in the current matter the wife applicant was pregnant with their second [child].

Claims and evidence

5. The application form (completed without assistance) states that the wife applicant was born on [date deleted: s.431(2)] in Fujian, China. She speaks, reads and writes Mandarin. She claims to be a Chinese citizen (a certified copy of her passport was provided) and not to have citizenship of, or a right to enter or reside in, any other country. She lists her religion as Christian (a certified copy of her Baptism and Confirmation certificate was provided). She has been married since [2010] (a certified copy of the marriage certificate was provided). She arrived in Australia as a student [in] June 2007 and returned to China for a visit in January 2009. Her parents [and siblings] all live in China.

6. The husband applicant was born on [date deleted: s.431(2)] in Fujian, China. He is a Chinese citizen (a certified copy of his passport was provided). He completed a Part D of Form 888 stating that he had no claims of his own for protection. He lists his religion as "Christian" The child applicant is the [child] for the first and second named applicants (a certified copy of her birth certificate was provided). [Specific details of child deleted: s.431(2)]. A Part D of Form 888 was completed on [the child's] behalf stating that [the child has no claims of his/her] own for protection.

7. The Tribunal has received a copy of the recording of the interview which the first named applicant had with the delegate [in] September 2011. A summary of the discussions that occurred are set out in paragraph 26 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted: s.431(2)]. Having listened to the recording of the interview the Tribunal accepts that this summary is an accurate and comprehensive summary of the interview.

8. The Tribunal has also listened to a recording of the hearing before the first Tribunal [in] February 2012. A summary of the evidence provided at that hearing is set out in paragraphs 27-73 of the decision record of the first Tribunal as set out in folio 111-134 of Tribunal file [file number deleted:

s.431(2)]. The Tribunal accepts that this summary is an accurate and comprehensive summary of the hearing.

9. Following the hearing [in] February 2012 the applicants submitted a copy of what appears to be a historical internet chat record dating from [July] 2011 with an English translation between the wife applicant and her [sibling]. They also submitted a statement addressing some of the concerns raised by the Tribunal at the hearing [in] February 2012.

10. The applicants appeared before the current Tribunal [in] April 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

11. Following the hearing an invitation to comment on or respond to information under s.424A was sent to the applicants by registered post on 9 April 2013. A copy of this letter is on the file (ff.56-60). Australia Post records show that the letter was delivered on 15 April 2013. The letter stated that any comments or response should be received at the Tribunal by 2 May 2013. It warned the applicants that if no response was received by that date (unless extended) the Tribunal may make a decision on the review without taking any further action to obtain the applicants' views on the information. No response was received.

Findings and reasons

12. The law upon which the findings below are based is set out in Attachment 1.

Nationality

13. On the basis of their Chinese passports, which were presented to the Tribunal, the Tribunal finds that the wife and husband applicants are citizens of the People's Republic of China.

14. On the basis of the birth certificate provided, the Tribunal accepts that the child applicant [is the [child] of the wife and husband applicants. Article 5 of the *Nationality Law of the People's Republic of China (1980)* states, in part that any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. There is no evidence before the Tribunal indicating that the child applicant is not a national of the People's Republic of China and [the child's] claims have therefore been assessed against China as [the child's] country of nationality.

15. There is nothing in the evidence before the Tribunal to suggest that the applicants have a legally enforceable right to enter and reside in any country other than their country of nationality. Therefore the Tribunal finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicants are nationals of China, the Tribunal also finds that China is the applicants' "receiving country" for the purposes of s.36(2)(aa).

Credibility concerns

16. The Tribunal had a number of concerns about the evidence provided by the wife applicant. The Tribunal accepts the difficulties of proof faced by

applicants for refugee status. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* [1992] FCA 470; (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* [1984] FCA 57; (1984) 1 FCR 354 at 357; [1984] FCA 57; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraphs 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. In addition, the Tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547.

17. The Tribunal sets out below its concerns about the wife applicant's credibility.

18. **First**, the Tribunal found the wife applicant's evidence in relation to her parents' employment history to be inconsistent and unpersuasive. As put to the applicants under s.424A, in her student visa application lodged [in] July 2009 the wife applicant provided a letter from [a business] dated [June] 2009 stating that her mother has been working there as a manager since June 2002 with an annual income of 68,000RMB. While the Tribunal is willing to accept that this document is a false document provided to support the student visa application, the Tribunal considers that the provision of a fraudulent document in support of the wife applicant's student visa application reflects poorly on her credibility.

19. As put to the applicants under s.424A at the Departmental interview [in] September 2011 she claimed that her mother was in charge of a small tea shop. At the current Tribunal hearing she initially claimed that her mother was involved in the family transport business but then claimed that her mother was mainly a housewife. She then claimed that her family had been running the tea business since early 2008 and that it closed in early 2012. She claimed that the business closed at the beginning of 2012 because once they were caught for having the gathering there no-one was willing to come to the meeting point so the tea business closed. However when the Tribunal put to her that the arrest for the gathering was in 2009 and the business did not close until 2012 she then stated that the business was still doing OK but not as well as it should have been.

20. She initially claimed that her mother was the only person in the business but then later claimed that she had a partner in the business and that the business was originally owned solely by the partner but then later her mother joined. As put to the applicants under s.424A, her evidence that the tea

shop opened in early 2008 appears contrary to her evidence at the previous Tribunal hearing [in] February 2012 where she initially claimed that the tea shop opened in 2009 and then later she claimed that it opened in early 2007. It also appears contrary to her claims at the previous Tribunal hearing that her grandmother was involved in the business, which was also put to the applicants under s.424A. The Tribunal finds it surprising that she did not previously mention her mother having a partner in the business.

21. As put to the applicants under s.424A at the Departmental interview the wife applicant claimed that her father works delivering goods. At the previous Tribunal hearing [in] February 2012 the wife applicant claimed that her father works for a [transport] company where he had been working for the past 10 years (as put to the applicants under s.424A). At the current Tribunal hearing she claimed that her father works [in a different field involved with] the transport business for someone else and that he has been doing this since 2009. She then later claimed that he had been doing this since 2010. When questioned about why she would say in the interview [in] September 2011 that he was working delivering goods, she stated that this was referring to when he worked in the transport business but did not explain why she would claim that was his current job in 2011, when he stopped doing that in 2009 or 2010.

22. **Second** at the Tribunal hearing the wife applicant's evidence in relation to when her family stopped supporting her financially, and why, was inconsistent and unpersuasive. She initially claimed that they stopped supporting her in June or July 2010 because they found out that she got married and that this was the only reason that they stopped supporting her. This evidence is inconsistent with the wife applicant's evidence at previous Tribunal hearing (as put to her in the s.424A letter) where she claimed that they stopped giving her money in about September 2009 because she was dating a man. It is also inconsistent with her written statement where she claimed that:

Then our family business met difficulty and went bankrupt due to the constant harass of police.

23. When it was put to the wife applicant at the Tribunal hearing that she had previously stated that it was due to her family business going bankrupt that her family stopped supporting her she changed her evidence and stated that this was also a reason and that her family were running a transport business before delivering stock and that her mother worked for the business with her father and some other family members. However the business stopped because of a downturn in business because it is not as popular anymore which happened to other transport companies also. When the Tribunal put to her that in her statement she claimed that it went out of business because of the harassment by police, she responded that this was only for a short period of time in January 2009 when she returned to China.

24. The Tribunal found the wife applicant's evidence in relation to her family's financial situation and when and why they stopped supporting her financial to be so inconsistent and changeable that it raises doubts for the Tribunal about whether her family have stopped supporting her as claimed.

25. **Third** the Tribunal found the wife applicant's evidence in relation to her family's knowledge of her relationship with the husband applicant to be inconsistent. She initially claimed that they stopped supporting her in 2009 because they did not approve of her relationship. However she later claimed

that her family only found out about the relationship [in] 2010 when she was [pregnant]. When this inconsistency was put to her at the hearing she changed her evidence and stated that they knew about the relationship in 2009 but she was not pregnant then. She also claimed at the previous Tribunal hearing in February 2012 that their families were not aware that they had gotten married (as put to her under s.424A). However at the current Tribunal hearing she stated that they did know about the marriage but do not support it.

26. At the current Tribunal hearing the wife applicant initially claimed that her family would force her and the husband applicant to separate if they were to return to China, consistently with her claims at the previous Tribunal hearing in February 2012. However when the Tribunal asked why they would do this unless they were willing to support her then she changed her evidence and claimed that the husband applicant's family were the ones who would force them to separate.

27. **Fourth** the Tribunal found the wife applicant's evidence in relation to her attendance at church in Australia to be inconsistent and unpersuasive. As put to the applicants under s.424A, she claimed at previous Tribunal hearing in February 2012 that she stopped going to church in mid-2008. However at the current Tribunal hearing she claimed that she continued attending church in Australia until she went to China in January 2009. She claimed at the previous Tribunal hearing in February 2012 that she was baptised in 2007 because she knew that she would hold onto that religion until the end (as put to her under s.424A). However, she stated at the current Tribunal hearing that she only started believing in the religion after the birth of her child and that she had previously only attended church in Australia because they helped her. She claimed at the previous Tribunal hearing in February 2012 that she attended sermons in May and July 2010 and thought she should join the church again but was pregnant and so she only attended sometimes as it was inconvenient (as put to her under s.424A). At the current Tribunal hearing she stated that she only started attending church again in May 2011 when her [child] was [young].

28. She consistently claimed that she stopped attending church in Australia for a period of time because her father disapproved of it. The Tribunal finds this unpersuasive as the wife applicant had chosen to disobey her father's wishes in relation to her husband over a number of years and cannot see why she would chose to obey her father about her religion but disobey him about relationship. When this was put to the wife applicant at the hearing she claimed that it was because she was reliant on her father to pay for her studies in Australia. However, she had stated that he had stopped supporting her financially since mid 2009 which does not explain why she did not attend church until 2011.

29. The wife applicant's evidence about why she started attending church in Australia was also inconsistent. As put to her under s.424A, in the Departmental interview [in] September 2011 she claimed that she wanted to attend church in Australia because she had friends who went with their parents to the family church in China. However at the current Tribunal hearing she claimed that she wanted to attend church in Australia because her mother had instructed her to seek out a church in Australia as they would help her.

30. **Fifth** the Tribunal found the wife applicant's evidence about her detention to be inconsistent, vague and unpersuasive. As put to her under

s.424A, she claimed in the Departmental interview [in] September 2011 and at the previous Tribunal hearing in February 2012 that the gathering where she was detained was held at the family home. However at the previous Tribunal hearing she also referred to it being held at the tea shop. When this was put to her at the previous Tribunal hearing she claimed that the tea shop and home were at the same place. However at the current Tribunal hearing she claimed that the tea shop and home were not the same place and that the gathering was at the tea shop. The Tribunal considers this to be a very significant fact and would expect her to be able to recall accurately where the gathering was and whether the tea shop was in her home or not. Her inability to do so causes the Tribunal to doubt that any tea shop exists.

31. At the current Tribunal hearing she claimed that she was taken to a police station 20 minutes drive away. This appears to be inconsistent with her evidence at the Departmental interview that she was taken to a detention centre 40 minutes drive away (as put to her under s.424A).

32. At the current Tribunal hearing she claimed that her mother was detained for one week and did not have to pay any money to be released. This appears to be inconsistent with her evidence at the Departmental interview and previous Tribunal hearing where she claimed that her mother had to pay 2000RMB to be released because she was supposed to be detained for 15 days but paid to be released early (as put to her under s.424A).

33. At the current Tribunal hearing she claimed that while in custody they only asked her why she attended the meeting and nothing else. However she later claimed that they thought she was evangelising. The Tribunal does not accept as credible that the police would only ask her about why she attended the meeting if they thought she was evangelising. In such circumstances it would expect them to ask her about her overseas activities, whether she was evangelising and her other church activities. Furthermore, this appears to be inconsistent with her evidence at the previous Tribunal hearing that the authorities questioned her about whether she attended church overseas (as put to her under s.424A).

34. At the current Tribunal hearing she claimed that her father had organised payment of the bail for her. This is consistent with her claims at the Departmental interview (but not at the previous Tribunal hearing) where she claimed that her grandmother organised the payment of the bail for her (as put to her under s.424A).

35. **Sixth**, the Tribunal found the wife applicant's evidence in relation to the claimed material sent to China to be unpersuasive and inconsistent. She claimed in her written statement:

Recently, I have been discussing about Chinese Christian joining the Jasmine Revolution in China with some Chinese Christians online. I have sent out some information and photos. But not long ago, one of my friends was taken by the police. My family was also searched and warned.

36. As put to her under s.424A, this appears to be inconsistent with her claims at the previous Tribunal hearing where she initially claimed that she sent information by email and then that she sent a document via QQ communications to her [sister] and her sister called some friends in to look at it. She initially claimed that her sister was not able to open the document, then that she did open it and then later that her sister could not open her computer. She claimed that both her sister and her friend were detained. In her

submission to the previous Tribunal dated [February] 2012 she stated that she sent the information to her sister who then forwarded it to friends and that her friend was detained for much longer than her sister. However, at the current Tribunal hearing she stated that her friend was detained for one day and her sister was released the same day. She also claimed that the QQ conversation she had was not just with her sister but also with a number of friends to whom she sent the document as well. She claimed that she only sent the information on one occasion. She claimed that as a result of sending the information on the same day her computer was infected with a virus which resulted in it freezing. However when she rebooted it it worked again. She initially claimed that this happened as soon as she sent the information. However when the Tribunal put to her that it could not understand why she would agree to resend the information (as her QQ communication suggests) she then changed her evidence and claimed that she had sent the information twice and that it only occurred after she sent it the second time. The Tribunal found this unpersuasive. Also, the Tribunal does not accept that just because a computer freezes it has a virus, especially when it starts working again after being rebooted. Even if it did have a virus there is no evidence to suggest that this was linked to sending information overseas as viruses are very common in computers.

37. Furthermore, the Tribunal does not accept that the wife applicant would send information about the Jasmine Revolution to China when she knew it was banned (which she stated at the current Tribunal hearing). This appears to be contrary to her claimed beliefs that as a Mormon one of the tenets of her faith is that she should follow the law. Also she was unable to provide any persuasive reason why she would take this risk. When this was put to her at the current Tribunal hearing she stated that she showed the material to her sister and friends so that they would know better about the Chinese authorities.

38. The Tribunal found the wife applicant's evidence in relation to the claimed communications to be so vague, inconsistent and unpersuasive as to not be credible. The Tribunal does not accept that the wife applicant sent any information to China as claimed.

39. In the purported copy of a QQ conversation with her sister provided to the previous Tribunal [in] February 2012 the wife applicant agrees to send her sister the information again as her sister is no longer able to access it. This appears to be inconsistent with the wife applicant's evidence that she only sent the information once. This conversation suggests that the information was a link to a website as her sister states that "the websites looks like been hacked", which appears to be inconsistent with the wife applicant's evidence that it was a document that she sent and not a link to a website. Also, the Tribunal does not accept that the wife applicant would be willing to resend the information if her computer had been infected with a virus as a result of sending it the first time. Furthermore the QQ conversation does not refer to the information having been sent or shown to any friends or that her sister's computer or document could not be opened or that the wife applicant's computer suffered any problems. This leads the Tribunal to place little weight on the QQ conversation provided in support of the wife applicant's claims.

40. For the reasons set out above, the Tribunal finds that the wife applicant is not a credible witness, has fabricated her religious claims to give herself the

profile of a refugee and has not been honest about her reasons for leaving China and coming to Australia. The Tribunal does not accept that she attended underground Christian gatherings in China, was detained in China for attending an underground Christian gathering or that she sent religious or political materials back to China.

41. In light of the Baptism and Confirmation Certificate provided for the wife applicant and the Blessing Certificate provided for the child applicant the Tribunal accepts that the first named applicant has attended a Mormon church in Australia (although it is not clear to the Tribunal how often she has been attending). For the reasons set out above the Tribunal has found that the wife applicant is not a credible witness and the Tribunal is not satisfied that she holds genuine Mormon beliefs. This, together with the inconsistencies in the evidence from the wife applicant about when she started holding genuine religious beliefs, when she was attending church in Australia and why she started attending church in Australia, leads the Tribunal to find that the wife applicant's involvement in Mormon activities in Australia was solely for the purpose of strengthening her claim to be a refugee. In accordance with s. 91R(3), the Tribunal disregards the wife applicant's conduct since arriving in Australia for the purpose of assessing her claims to be a refugee.

Claims relating to the Mormon church

42. For the reasons set out above the Tribunal finds that the wife applicant is not a genuine Mormon. Therefore the Tribunal finds that the wife applicant will not attend Mormon gatherings in China nor engage in evangelism or any Mormon related activities if she were to return to China now or in the reasonably foreseeable future because she has no genuine interest in doing so. Therefore, the Tribunal finds that there is no real chance that the wife applicant will face persecution because of her religion if she was to return to China now or in the reasonably foreseeable future.

Claims relating to attending underground gatherings in China

43. As set out above, the Tribunal does not accept that the wife applicant was detained in China for attending an underground Christian gathering. Therefore the Tribunal finds that there is no real chance that the wife applicant will face persecution because of this if she was to return to China now or in the reasonably foreseeable future.

44. Although the wife applicant had previously claimed that she would attend underground Christian gatherings in China if she was to return, at the current Tribunal hearing she stated that this was unlikely and that she would just practice her Mormon religion in private. Therefore the Tribunal finds that the wife applicant would not attend underground Christian gatherings if she was to return to China in the foreseeable future and therefore there is no real chance that she will face persecution for doing so.

Claims relating to materials sent to China

45. As set out above, the Tribunal does not accept that the wife applicant sent any religious or political materials from Australia to China as claimed.

Consequently the Tribunal does not accept that the wife applicant, her sister or her friend suffered any consequences for this, including being detained, having their computers hacked or having their computers being infected with a virus. Therefore, the Tribunal finds that there is no real chance that the mother applicant will face persecution as a result of this if she was to return to China now or in the reasonably foreseeable future.

Claims relating to family planning provisions

46. On the basis of the birth certificate provided the Tribunal accepts that the child applicant is the [child] of the wife and husband applicants. The marriage certificate provided states that the wife and husband applicants were married [in] 2010 and the birth certificate provided shows that the child applicant was born on [date deleted: s.431(2)]. Therefore the Tribunal accepts that the wife and husband applicants were not married at the time of the child applicant's conception. Furthermore, the Tribunal accepts that the husband applicant would have been [under the marriageable age] in China. Article 6 of the *Marriage Law of the People's Republic of China* states that women can legally marry at the age of 20 and men at the age of 22.[1] Therefore the Tribunal accepts that the birth of the child applicant was in breach of Fujian's family planning laws.

Non-payment of social compensation fee

47. The Tribunal has considered the relevant provisions in Fujian's family planning laws. Fujian family planning regulations set out guidelines for social compensation fees for out of plan children.[2] It is forbidden for a couple to give birth 'before the stipulated time' under Article 14 of the *Population and Planning Regulation* for Fujian Province. Article 14 states:

Under any of the following circumstances, the child born is regarded as born before the stipulated time by the Regulation:

(1) Those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age).[3]

48. A DFAT cable (Department of Foreign Affairs and Trade 2010, DFAT Report 1210 – RRT Information Request: CHN37505, 12 November) provides advice in relation to household registration:

Fines are payable for contravening the regulations. Under Article 39, a social compensation fee is required to be paid by anyone who violates the Regulation in the following ways:

(1) A social compensation of zero point six to one time shall be imposed on those who give birth to a child ahead of the schedule

(2) A social compensation of two to three times shall be imposed on those who give birth to the first additional child. A social compensation of four to six times shall be imposed on those who give birth to the second additional child. A much more heavy social compensation fee shall be imposed on those who give birth to the third or more additional child.

(3) A social compensation of four to six times shall be imposed on those who give birth to a child born out of an extramarital affair. A much more heavy social compensation fee shall be imposed on those who give birth to the second child born out of an extramarital affair.

49. Therefore the Tribunal accepts that a social compensation fee will be payable in order for the child applicant to be registered in China. The wife applicant gave evidence at the Tribunal hearing that both she and the husband applicant's hukous are registered in a rural area of Fujian. The average rural Fujian annual net income in 2010 was 7,427RMB^[4] which means that the fine will be between 4,456RMB and 7,427RMB which equates to between AUD696 and AUD1160.^[5] At the hearing, the Tribunal quoted the information derived from Fujian family planning regulations and statistical information. The wife applicant claimed that the fine would be at least 40,000-50,000RMB and that she knew this because she had a friend who returned and had to pay this much for registration of her child (a claim also made by the husband applicant at the hearing). She initially claimed that she had not made any enquiries with the authorities in China in relation to the fees to be paid but when the Tribunal put to her that she had claimed in writing to the previous Tribunal that she had made enquiries and was told that there was no leeway then she changed her evidence and stated that she had made enquiries with the authorities. She provided no evidence to support this claim, nor any explanation of why she had previously claimed that she did not make any enquiries. In light of the credibility concerns that the Tribunal has in relation to the wife applicant, and the lack of evidence about why the fine would be 40-50,000RMB, the Tribunal does not accept that this is accurate. The Tribunal prefers the independent information obtained by the Tribunal from sources which it considers to be reliable. Although not raised directly by the applicants, the Tribunal accepts that the couple would be required to pay an additional fee for the registration of their second child after its [birth].

50. The Tribunal has considered whether the imposition of a fee on the wife applicant constitutes persecution of the wife applicant. The Tribunal is satisfied on the evidence before it that China's family planning policies and laws apply generally to the Chinese population and penalties apply to those who have breached China's family planning laws by having a child out of wedlock, prior to the prescribed age, or having additional or subsequent children without permission. The laws provide that a 'social compensation fee' shall be paid by anyone who breaches the family planning laws. The Tribunal is not satisfied there is any evidence that the *Population and Family Planning Regulation* of Fujian Province and associated provisions will be applied to the applicant in a discriminatory manner for any reason or that it is selectively enforced. The Tribunal is satisfied that such laws are appropriate and adapted to achieve a legitimate national objective in the context of China's need to control its overall population growth. As such, the Tribunal does not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.

51. The Tribunal has also considered whether there is a real chance that the child applicant may be subject to persecution on this basis. The wife applicant claims that she could not afford to pay the social compensation fee because neither her nor the husband applicant's families are willing to support them financially, the couple have no savings to use to pay the fee, she and the husband applicant have no qualifications and therefore would not be able to get a job in China or it would be poorly paid; and the husband applicant's

family would force she and the husband applicant to separate so that she would have the child applicant to look after unsupported.

52. However, the Tribunal considers that the fee required to be paid is a relatively modest one. The wife and husband applicants have been able to support themselves in Australia since 2009, and the [baby], including with accommodation, two mobile phones on monthly plans, food and daily essentials. They have been able to find work in Australia despite their visa issues, although the wife applicant is not currently working. This suggests to the Tribunal a resourcefulness which would assist them if they were to return to China. The wife applicant claimed that the husband applicant is only working 2-3 days per week and only earns \$120 per day. She gave evidence at the hearing that he sometimes works more days per week than this but, despite repeated questioning, claimed that the maximum amount he ever earns is \$300-\$360 per week. The Tribunal does not find this credible as if he is working more than 3 days and earns \$120 per day then he would receive more than \$360 per week for those weeks. Furthermore (as put to the applicants under s.424A) at the previous Tribunal hearing in February 2012 she claimed that the husband applicant earns \$100-\$200 per day. The Tribunal believes that the wife applicant was attempting to minimise her evidence in relation to their income and was not being honest about how much the husband applicant earns here in Australia.

53. In addition, the applicants provided evidence at the hearing that the wife applicant came to Australia on a student visa which cost her family 200,000RMB and the husband applicant came on a student visa which cost his family 150,000RMB. While the wife applicant claims that her family no longer supports her financially her evidence in relation to when and why this occurred was inconsistent and unpersuasive (as discussed above). She gave evidence at the hearing that she speaks with her family fortnightly which suggests that her family have not disowned her (the husband applicant gave evidence consistent with this). They also both gave evidence that the husband applicant speaks with his family fortnightly which again suggests to the Tribunal that the family are not as opposed to the relationship as the wife and husband applicants are claiming. They claim that the husband's family would not support the [child applicant] but have not provided any evidence in support of this. The wife applicant's evidence in relation to her parents' employment history was inconsistent and unpersuasive, as discussed above. The Tribunal does not accept that the wife applicant has been honest about her family's financial situation. In light of the credibility concerns discussed above, the evidence that their families have been willing and able to provide significant financial assistance in the past (whether through savings or borrowings) and their own evidence that they have regular ongoing contact with their family, the Tribunal is not satisfied that both the wife and husband applicant's families in China would be unwilling or unable to assist in the payment of the fee for registration of the child applicant.

54. Furthermore, the Tribunal accepts that in Fujian there also exists the possibility of paying the fee by instalments. Although this was disputed by the wife applicant it has been confirmed by DFAT[6]:

According to Article 10 of Management Measures for the Collection of the Fujian Province Social Compensation Fee:

- the person concerned shall make a lump sum payment, in person, within 30 days from the time of receiving a payment notice;
- if the person concerned has difficulty in paying the social compensation fee, they should submit a written request within 30 days of receiving notice. Their request should be addressed to the authority who issued the payment notice (such as the county or town-level family planning administrative office), requesting to pay via instalments;
- the written request will require supporting documentation (unspecified) from employers, residence or village committees, or other relevant authorities;
- the authority responsible for collecting payment shall make a decision on approving or refusing the instalments within 30 days from the application date, and advise the person concerned of the authority's decision in writing; and
- the period permitted for payment instalments shall not exceed three years.

55. Therefore, while the Tribunal accepts that it will be difficult financially for the applicants if they return to China (particularly if they are required to pay for the registration of two children), it is not satisfied that the wife and husband applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to state provided education and healthcare available to all other registered Chinese citizen. Article 25 of the Marriage Law of the People's Republic of China stipulates:

Children born out of wedlock shall enjoy the same rights as children born in wedlock. No one may harm or discriminate against them.

56. In light of the above, the Tribunal is not satisfied that there is a real chance that the child applicant will suffer persecution.

57. The Tribunal has also considered whether the child applicant would face harm in the form of persecution until such time as [the child] is registered (if the first named applicant pays by instalment) for reason of her status as an unregistered child.

58. The *Hukou* (household registration system) records a child's birth, testifies to its citizenship, and registers its permanent residence. The *Hukou* registration is one of the most important components of the household management system in China. A child cannot acquire most of his or her rights without their *Hukou* registration. Without a *Hukou* registration, an unregistered child would not be entitled to either government funded public education or subsidised health care.[7] The parents of an unregistered child would have to arrange and pay for private education and medical services. According to DFAT advice, if a non-government school exists in the area an unregistered child would be able to attend but may be charged higher fees than a registered child.[8] DFAT has advised that there are many private schools in Fujian that will enroll unregistered children and that their fees are not excessive by Chinese standards.[9] It should however be noted that DFAT advice of August 2007 states that China does not have a national health insurance system for children so a child's registration status is not relevant to accessing medical services.[10] A 2009 research paper titled 'The Emerging Role of Private Health Care Provision in China: A Critical Analysis of the Current Health System' published by Stanford University notes the burgeoning role of private health providers in the form of clinics and hospitals and this may be a response to the negligible difference in cost to a patient between using a private health provider or a public one.[11] The cost can be

broken down to show that the government covers only 20.4% of total health expenditure (with local governments currently accounting for 90 % of total government spending), while citizens paid 45.2% directly out of their pockets and the health insurance share (in 2003 only 46% of the population had insurance) was 34.5%.[12] Apart from health and education an unregistered child would only be denied welfare payments to the unemployed and elderly, many of the other services that the local government would have normally provided in the past to a registered individual, have now been outsourced to privately run entities.[13]

59. Given the child applicant's young age it is likely that [the child] would be registered by school age even if [the] parents paid by instalments. However, even if [the child] was not, the Tribunal notes the independent information referred to above in respect of education indicates that higher school fees would be applicable for an unregistered child but there are a number of reasonably priced private schools which can be accessed. While the wife applicant claimed that such schools were prohibitively expensive she has not provided any evidence of this. The country information on health care is somewhat contradictory but the latest DFAT information indicates that there is no public health system in China and all residents must fund their own medical costs, whether they are registered or unregistered. The Tribunal is not satisfied that the implications of not being eligible in the interim period for state funded education and/or health benefits as an unregistered child constitutes harm of such a nature or extent as to amount to persecution (having regard to the example of 'serious harm' referred to in s.91(R)(2)).

Discrimination for having a child out of wedlock

60. The wife applicant claims that if the family were to return to China she and the husband applicant would be forced to separate. At the hearing she initially claimed that her family would force them to separate. However when the Tribunal queried why her family would force them to separate unless they were willing to support her and the child, the wife applicant then changed her evidence and stated that the husband applicant's family would force them to separate as their birthdates do not match and therefore they would bring bad luck on the whole family. The wife and husband applicants would be returning to China as adults who have lived independently from their families since they were each in high school. The Tribunal does not accept as credible that they would be forced against their wills to separate. They claim that the families would withhold their hukous from them to force them to separate. However, in light of the credibility concerns outlined above and the wife applicant's inconsistent evidence about who would force them to separate the Tribunal does not accept that the families would do this or that the couple would be forced to separate if they were to return to China. Furthermore, as the husband applicant acknowledged at the Tribunal hearing, even if the families did withhold the hukous, the Tribunal does not accept that it would not be possible to get copies of the hukous from the relevant authorities. Although the Tribunal accepts that this may require payment of a fee it appeared to be purely speculation on the part of the husband applicant that they could not afford this as he gave evidence that he did not know how much it would cost to get a copy.

61. However, the Tribunal is willing to accept that it may become known that the child applicant was conceived outside of wedlock. The wife applicant claimed that this would result in discrimination against herself and the child applicant. The Tribunal has considered independent information about the treatment of unwed mothers and their children. DFAT provided advice in 2004 on the treatment of children born out of wedlock (in Guangdong), noting that ‘being a child out of wedlock still attracts some degree of social stigma’.[14] However, the DFAT report also advised that the children ‘might be subject to bullying or teasing at school, but are unlikely to suffer serious social disadvantage’[15]

62. In 2010 Dr. Alice de Jonge provided additional advice to the RRT on the treatment of children born out of wedlock in China. Dr. de Jonge advised: Such children are still regarded with pity and disdain. They are teased at school. Single mothers are subject to discrimination when it comes to accessing housing, education and medical services.[16]

63. Regarding the treatment of such children in Fujian specifically, Dr. de Jonge advised: Fujian is a relatively prosperous province in SE China It is not the worst place to be a child born out of wedlock. Nor the best. The private sector is active in Fujian so that access to employment is at a reasonable level, even for single mothers, depending upon qualifications.[17]

64. The Tribunal accepts that the applicants may be subject to social stigma and ostracism. It accepts that if this occurs it would be distressing for the applicants. However, in light of the country information set out above the Tribunal is not satisfied on the evidence before it that they will face societal discrimination, stigma or ostracism that is sufficiently serious to constitute ‘serious harm’ (having regard to the examples provided in s.91R(2) of the Act).

Forced abortion and sterilisation

65. The wife applicant stated at the hearing that she is [pregnant]. The Tribunal accepts this evidence. At the hearing the husband applicant raised new claims in relation to the wife applicant being pregnant. While the wife applicant did not initially refer to any claims relating to herself as a result of her pregnancy, after the husband applicant raised these claims she then claimed to fear that she would be forced to undergo an abortion or sterilisation in China should she return there. The Tribunal has carefully considered the country information in relation to the existence and prevalence of forced abortions and sterilisations in Fujian.

66. The law prohibits the use of physical coercion to force abortions but pressure on local birth planning officials to meet family planning targets has resulted, according to the US DOS, in the use of physical coercion and “the abortion of certain pregnancies”.[18] A 2008 article by Amnesty International states that “reports persist of local authorities forcing women to undergo abortions”, and that “officials responsible for such practices are rarely prosecuted”.[19] According to a Freedom House report from 2009 “compulsory abortion or sterilization by local officials citing family-planning rules still occurs but is illegal and far less common than in the past”.[20]

67. Forced abortions and sterilisations were also said to occur in Fujian Province. One reported case of forced abortion occurring in Fujian in 2012 was located.[21] The Fujian family planning regulations do not overtly stipulate a requirement for compulsory abortion or sterilisation for couples who have out of plan children. However, *Article 18* of the Regulations does state that those who have out of plan pregnancies “should take remedial action in time” and that the relevant committees and units “should urge them to take remedial measures in time”. [22] The US Congressional-Executive Commission on China’s *Annual Report 2009*, alleges that “the term remedial measures is used synonymously with compulsory abortion”. [23] There have been reports of forced abortions within Fujian province. [24] The Tribunal accepts that some of these relate to pregnancies occurring outside of marriage.

68. Despite these incidents, according to a 2004 DFAT report, compulsory abortions and sterilisation in Fujian are much rarer than in the 1980s. [25] The official view of the Fujian Province Birth Planning Committee (FPBPC), is that there have been no cases of forced abortion or sterilisation in Fujian in the last 10 years. Since the early 1990s, it was claimed that all women and men who undergo surgical procedures for family planning reasons provide informed, written consent before surgery. [26]

69. The Tribunal accepts that there are examples of forced abortions and sterilisations occurring in Fujian. However, given Fujian’s large population [27] the Tribunal does not accept that these reports show that the practise is widespread or that there is a real chance of the applicant being forced to undergo a forced abortion or sterilisation upon return from Australia. Furthermore, as referred to above, the country information states that compulsory abortions and sterilisations are illegal under Chinese law and as far less common than in the past. The Tribunal does not accept that there is a real chance that the applicant would be subject to a forced abortion or sterilisation should she return to China now or in the reasonably foreseeable future.

Other claims

70. The wife applicant also claimed that her and the husband applicant’s families would disown them if they returned to China because they did not completed their studies, got married and had a child together. The Tribunal accepts that it is likely that their families would be disappointed in the wife and husband applicants not having completed their studies in Australia despite their families having invested significant amounts of money in them. It is also willing to accept that their families may not approve of the relationship. However, the Tribunal does not accept that their families have or will disown them as a result of this because they have had regular ongoing contact with the families despite the birth of their [child] and despite having lived together for many years. Furthermore, the Tribunal does not accept that any harm suffered by the husband and wife applicants as a result of being ostracised by their families would constitute serious harm as they are adults who have already been living independently away from their families for many years in Australia.

71. The wife applicant also claimed that they would not be able to afford to live in China because they could not earn a sufficient wage to support

themselves and the child. While the Tribunal accepts that the couple do not have formal qualifications, it does not accept that they would not be able to earn sufficient money to survive in China. The husband applicant has been working in [a trade] in Australia, work which is consistent with the experience and business run by his parents who the wife applicant stated work in [the same industry] in China. The husband applicant stated that they had raised the 150,000RMB required to send him to Australia from their own money. Therefore the Tribunal does not accept that the husband applicant is unable to find [work] which would enable him to support his family in China. Therefore it does not accept that any financial difficulties they have would constitute serious harm.

72. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that any of the applicants has a well-founded fear of persecution for a Convention reason if they were to return to China now or in the reasonably foreseeable future.

Complementary protection

73. Having concluded that none of the applicants meets the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative complementary protection criterion in s.36(2)(aa).

74. As discussed above the Tribunal has found that the wife applicant is not a genuine Mormon and would not attend Mormon gatherings or engage in Mormon related activities in China if she was to return now or in the reasonably foreseeable future. Therefore, the Tribunal has no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

75. As discussed above the Tribunal has found that the wife applicant did not post any political or religious materials from Australia to China as claimed. Therefore, the Tribunal has no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm on this basis.

76. The Tribunal has accepted that a social compensation fee may be imposed on the first named applicant. The Tribunal accepts also that the imposition of such a fee may cause financial hardship. The Tribunal considers, however, that in the circumstances of this case, the imposition of such a fee on the first named applicant and resulting financial hardship, would not constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). While a fine may be considered punishment, the Tribunal does not consider, on the information before it, that the imposition of a fine would be intended to cause extreme humiliation which is unreasonable (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or that the imposition of a fine would cause (or was intended to cause) severe pain or suffering or that the imposition of a

fine in these circumstances could be regarded as cruel or inhuman (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

77. As discussed above, the Tribunal is not satisfied that the mother and father applicants are unable to pay the social compensation fee for the child applicant to be registered. The Tribunal is satisfied that if the child applicant was to be registered [the child] would have access to the benefits associated with household registration (including education and healthcare) and that in the meantime [the child] would have access to private education and healthcare. Therefore, there are no substantial grounds for believing that, as a necessary and foreseeable consequence of [the child] being removed from Australia to China, there is a real risk that [the child] will suffer significant harm on this basis.

78. The Tribunal has accepted that it is possible that the applicants may face some societal discrimination as a result of the child applicant being born outside of marriage. However, the Tribunal is not satisfied that such bullying, teasing, pity and disdain would constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act. It would not constitute the arbitrary deprivation of life and has no association with a death penalty. The evidence before the Tribunal indicates, and the Tribunal finds, that it would not constitute 'torture' as it would not involve severe pain or suffering of the type contemplated in the definition: s.5(1). The Tribunal does not consider, on the information before it, that such discrimination would be intended to cause extreme humiliation (as stipulated by the definition of degrading treatment or punishment in s.5(1)) or would cause (or was intended to cause) severe pain or suffering (within the meaning of the definition of 'cruel or inhuman treatment or punishment' in s.5(1)).

79. In light of the country information discussed above, the Tribunal does not accept that there is a real risk of the mother applicant being forced to undergo an abortion or sterilisation in China as a result of her current pregnancy.

80. As discussed above, the Tribunal does not accept that the wife and husband applicants' families would disown them in China. The wife and husband applicants have been living in Australia for many years as adults without their parents. Therefore, even if their families did disown them, the Tribunal does not accept that any harm they suffered would be sufficient to constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act.

81. For the reasons discussed above, the Tribunal does not accept that the husband applicant would be unable to obtain employment in China sufficient to support his family. Therefore, while the Tribunal accepts that they may suffer from some financial difficulties, it does not accept that these would be sufficient to constitute 'significant' harm as defined in ss.36(2A) and 5(1) of the Act.

82. Having considered the applicants' circumstances individually and cumulatively, for the reasons set out above, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of either or both of them being removed from Australia to China, there is a real risk that either or both of them will suffer significant harm.

Conclusions

83. The Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

decision

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

ATTACHMENT 1 - Relevant law

1. 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

2. 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.

3. 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.

4. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (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] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant*

S395/2002 v MIMA [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

5. 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.

6. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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

13. 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').

14. '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.

15. 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.

MEMBER OF THE SAME FAMILY UNIT

16. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and dependent child.

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←**1305188** → [\[2013\] RRTA 563 \(22 August 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←**1305188** →

DIAC REFERENCE(S): CLF2012/223606

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Angela Cranston

DATE: 22 August 2013

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.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the [Migration Act 1958](#) and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant

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). A copy of the law is at attachment 1.

2. The applicant who claims to be stateless because her parents were refugees in Australia, applied to the Department of Immigration for the visa on 7 November 2012 and the delegate refused to grant the visa on 12 March 2013. Her parents had previously arrived in Australia [in] February 2010 and applied for a protection visa on 30 March 2010. The delegate decided to refuse to grant them visas on 26 July 2010 and the Tribunal affirmed that decision on 8 October 2010. A copy of the claims and evidence is at attachment 2.

CONSIDERATION OF CLAIMS AND EVIDENCE

3. The issues in this case are whether the applicant has a well founded fear of being persecuted in China for one or more of the five reasons set out in the Refugee Convention and, if not, whether there are substantial grounds for believing that as a necessary and foreseeable consequence of her being removed from Australia to China, there is a real risk that she will suffer significant harm.

4. The applicant's mother has stated that she and her husband are from Shenzhen, China and that the applicant cannot return to China because she is Stateless, is the child of a Falun Gong practitioner and will therefore be subjected to persecution. In addition, she has stated if she returns, she will not be registered.

5. For the following reasons, the Tribunal has concluded that the decision under review should be remitted.

6. The Tribunal does not accept that the applicant is stateless. That is because nationality in China is governed by the *Nationality Law of the People's Republic of China 1980* and Article 5 states that any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national can acquire Chinese nationality at birth even if only one of their parents is Chinese. Accordingly, the Tribunal finds that in the absence of any other evidence, the applicant is a Chinese national and her claims will be assessed against China.

7. The applicant's mother has also argued that the applicant will suffer because the applicant's mother is a Falun Gong practitioner, however the former Tribunal who assessed the applicant's mother's claims was not satisfied that she was a Falun Gong practitioner in China or that she was targeted by the PRC authorities or that the applicant's mother had undertaken Falun Gong in Australia because she was genuine.

8. The Tribunal finds that it does not accept that the applicant's mother was a Falun Gong practitioner in China. That is because the Tribunal finds she provided inconsistent evidence in relation to when she distributed pamphlets, she and her husband provided inconsistent evidence in relation to when they saw each other after she was detained, and her husband stated that he commenced arrangements for her to leave the country two weeks after she was released from detention [in a certain month in] 2010 which is inconsistent with the Department's record of her application for a tourist visa [in the same month] which was less than a week after she allegedly was [released]. In reaching this conclusion, the Tribunal also considers the applicant's mother failed to provide a convincing explanation as to why she was allowed to leave

China even though she was allegedly a convicted person undergoing rehabilitation through labor. The Tribunal also finds she did not disclose to the Tribunal that she had only recently unsuccessfully applied for a 457 visa to come to Australia. The Tribunal is also not convinced that she told the truth in relation to her employment when she applied for the tourist visa.

9. Be that as it may, the Tribunal accepts that a number of years have passed since the applicant's mother arrived in Australia, and during that time, the Tribunal accepts she has participated in Falun Gong events, including Falun Gong practice and protest. In reaching this conclusion, the Tribunal has been persuaded by the evidence of [Mr A] both at the Tribunal hearing on 8 October 2010 and in his statutory declaration dated 26 July 2013. The Tribunal accepts that [Mr A] is a reputable Falun Gong practitioner who has previously appeared before the Tribunal. Indeed, given the statutory declaration of [Mr A] on 26 July 2013, the Tribunal accepts that even after the former Tribunal made its decision, the applicant's mother continued her practice. Accordingly, the Tribunal is prepared to give the applicant's mother the benefit of the doubt and accepts she is now a genuine Falun Gong practitioner who has engaged in genuine Falun Gong practice and activity. Given that, the Tribunal must determine what impact if any, those activities in Australia have on the applicant.

10. The Tribunal accepts the DFAT advice that it is likely that activists who have participated in protest activities against the Chinese government, including members of Falun Gong, will be monitored and questioned or detained on their return to China. Accordingly, given the applicant's mother's activities in Australia, the Tribunal accepts that it is likely she is known to the Chinese government as a Falun Gong practitioner or is perceived to be one. The Tribunal is of the view that the current information regarding circumstances in China for family members of known Falun Gong practitioners indicates that they remain of interest to authorities. Whilst the Tribunal does not think that the applicant herself would be detained, if her parents are or if she is denied a residence, she would become parentless or homeless. The Tribunal believes that there is a real chance that these serious harms could flow to the applicant should she return to China. The Tribunal is satisfied that should these harms eventuate, it would be directed at her by reason of the applicant's membership of her family and her mother's Falun Gong activities in Australia in particular which are Convention related and not subject to section 91S. The Tribunal considers that her mother's Falun Gong activities are the essential and significant reason for the persecution which the applicant fears, as required by paragraph 91R(1)(a) of the Act. The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason, namely her mother's religion. The Tribunal is also satisfied that the applicant could not avail herself of any State protection as it is clear that the State is the source of potential harm. The threat, in the Tribunal's view, extends throughout the country.

11. In the Tribunal's view therefore, the applicant holds a well-founded fear of being persecuted for reasons of the applicant's membership of her mother's family and that the reason for that harm is her mother's Falun Gong activities in Australia and religion which are Convention related and not

subject to section 91S. In the Tribunal's view, therefore, the applicant holds a well founded fear of being persecuted for Convention reasons if she travels to China. On this basis, she is owed protection obligations by Australia and satisfies the provisions of s.36(2)(a) of the Act.

CONCLUSIONS

12. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

13. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

14. The Tribunal remits the matter for reconsideration with the direction that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

DECISION

15. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Angela Cranston
Member

RELEVANT LAW

16. 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

17. 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 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).

18. 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.

19. 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.

20. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

21. 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)). Examples of 'serious harm' are set out in 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.

22. 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.

23. 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.

24. 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 '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.

25. 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.

26. 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

27. 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: s36(2)(aa) ('the complementary protection criterion').

28. '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.

29. 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.

Section 499 Ministerial Direction

30. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.

ATTACHMENT 2 - CLAIMS AND EVIDENCE

31. At Departmental interview on 20 July, the following conversation occurred between the applicant's mother and the department:

Had you previously helped your uncle with these flyers?

Yes I did

When?

Usually 1-2 times in a week I went over Tuesday and Thursdays

How many times prior had you helped your uncle with these flyers?

2 or 3 times and 3 times altogether

Were they the same pamphlets on previous occasions?

Yes, more or less

So you helped him on 3 or 4 occasions?

Yes...

How did you distribute them?

At night, when we saw that people had gone to bed we went out and put the pamphlets at the door of those people

How often did you do this?

It varied, it was not fixed...

How often did you distribute them?

..Many times, I don't recall...

When did your husband first visit you?

After I was arrested no one was allowed to visit me

When did you first see your husband after you were arrested?

In a week's time, after one week in the detention centre...

Were your travel documents checked before you went to Hong Kong?

Yes

Were there any problems

No problem

32. The following conversation is recorded at hearing between the Tribunal and applicant's mother on 8 October 2010:

You told the delegate at one point that you helped distribute the flyers at 2-3 times in total, and then later you said you did it all the time...

No, I said I helped distribute the flyers 3 times, however I was always involved in arranging the flyers.

33. The following conversation is recorded at hearing between the Tribunal and applicant's father (the applicant's mother's husband) on 8 October 2010:

How long after she was arrested did you get to see her or have contact with her

I think it was a month....

How long after she was released did you decide that you had to leave the country

About two weeks after that.

34. Also on the Department's data base is a file note stating that the applicant's mother's employer was contacted on 12 May 2010 and they stated that the applicant's mother was not an employee of the declared company.

35. In her application, the applicant stated as follows:

We (the parents of [the applicant]) left China because of the fear of persecution, and have been living in Australia since March 2010. [The applicant] was born here in Australia.

[The applicant] will be considered as an illegal person as she is our second child. She will not be registered in the Chinese household register and will be denied or basic rights that are given to other children. She will not be able to study, enrol in any school or get medical care. On top of that we will also be persecuted as we have gone against the official one child policy of the Chinese government by having a second child that too illegally while we were in Australia seeking protection.

The Chinese government because of the well-known one child policy and their active persecution of Falun Gong practitioners and their families.

Because by having [the applicant] we have gone against the official Chinese one child policy and also because of our belief in Falun Gong.

Because the authorities officially persecute Falun Gong practitioners and their families and does not recognise second or subsequent children and they are denied all basic human rights.

36. As the applicant is a baby, the applicant's mother appeared before the Tribunal on 1 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.

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

38. The applicant's mother confirmed that the applicant was born on [date], that the applicant's mother arrived in Australia [in] February 2010, and that she had lived in Shenzhen for 20 years before coming to Australia. She stated all her family were in Shenzhen, that is her parents and brother and her husband had [two siblings].

39. The applicant's mother stated she remarried her husband in 2008. The Tribunal asked what their plans were after they remarried. She stated after they married they had no plans, they just wanted to have a complete family.

40. The applicant's mother stated she was released from [detention in] 2010. She stated that about one month passed between her release from [detention] and her applying to come to Australia. The Tribunal put to her that her husband had told the Department that it was about two weeks after she was released from [detention] that he decided she had to leave. She stated she thought the Tribunal meant when she got the approval. She did know when her husband had applied. The Tribunal put to her that her husband told the department that two weeks after she was released he decided she had to leave but according to departmental records she applied for a tourist visa to come to Australia [in a certain month in] 2010 which was less than a week after she said she had been released from [detention]. She stated her husband had arranged it. The Tribunal also put to her that she and her husband applied for a 457 visa to come to Australia which was rejected in 2009. She stated it might be so but she was not happy to come to Australia because in Shenzhen they had an apartment, a car and job. The Tribunal put to her they had applied to come to Australia 2 months after they had allegedly got back together but she had not mentioned that when the Tribunal had asked about her plans after they got back together. She stated they weren't planning on coming to Australia after they got back together. She stated there were no opportunities where her husband was but she was not eager to come to Australia. She stated if the visa was granted she would have come to Australia, but she did not want to come. She stated they got back together not because they wanted to come to Australia and that if the application was not successful then it didn't matter.

41. The Tribunal put to her the department had said that all of her employment documents in relation to her tourist visa application were fraudulent. She stated because of her association with Falun Gong, then people (including her employers) would not want to be associated with her.

42. The applicant's mother stated she had lived in [a certain suburb] for almost a year with her husband and children and another woman. She paid \$500 per fortnight on rent, and weekly she spent \$50/60 on food and \$25 on telephone. She stated she and her husband were not well and did not work. She stated she received \$150 per fortnight from the Red Cross and the Refugee Relief Centre provided nappies, clothes and food and sometimes irregular payments (during the last year they gave \$1000, \$900, \$400 and \$1800). She stated she and her husband did odd jobs and her son sometimes picked up odd jobs. She did not get money from anywhere else.

43. The Tribunal put to the applicant's mother that on the basis of what she had said she could not make ends meet, that is her expenses were \$325 per fortnight and her income was \$75 a fortnight. She stated before her husband had the [an] operation [last year] he could work but after that he could not work and they had also some money they had brought from China. Before the operation he had irregular work. She stated she regularly worked on weekends

and earned \$80 a week for two days work. She stated her son also worked as a waiter and usually brought about \$100 every week. The Tribunal put to her that she still would not be making ends meet.

44. The adviser then left the room. When the adviser returned, the applicant's mother stated they just made ends meet. The Tribunal put to her that on the basis of her and her son's income they would be short about \$70 per week. She stated her husband made about \$2-\$300 a week. The Tribunal put to her she had said that he did not work. She stated he did not work full time.

45. The applicant's mother stated the applicant could not go back to China because she was not able to survive because she needed medical care and schooling and did not have the Hukou. She would also suffer prejudice. The applicant's mother did not know how much it would cost for her daughter to get the Hukou. She also stated she was Falun Gong and had been apprehended and if she was taken into custody the applicant did not have any chance of surviving.

46. The Tribunal put to her it needed to think about whether it accepted that she was a Falun Gong practitioner in China and/or Australia and whether any of that affected the applicant because the applicant's mother's case had already been assessed and she had been found not to be a refugee. The Tribunal put to the applicant's mother that the previous Tribunal had stated she had not given consistent information about the pamphlets, she and her husband had given inconsistent information in relation to when her husband had seen her after she was detained, at the Departmental interview she seemed to lack any interest in what had happened to her uncle and it was difficult to understand how it was that she left China when she was subject to rehabilitation by labour. The Tribunal put to her it may find the same conclusions. The Tribunal also put to her that her husband had stated two weeks after she was released he decided she should leave China, but Departmental records indicated she had applied for a tourist Visa [in a certain month in] 2010 which was less than one week after she allegedly left detention. The Tribunal also put to her she and her husband had applied to come to Australia on a 457 Visa which had been rejected. The Tribunal put to her it may have formed the view she was not a Falun Gong practitioner in China. The Tribunal said that if it formed that view it still had to think about what she had done in Australia and how that affected the applicant.

47. The applicant's mother stated if the Tribunal only believed her when she was dead then there was nothing she could do. She stated she gave documents about her arrest. The Tribunal did put to her that country information before the Tribunal suggested fraudulent documents came out of China and if the Tribunal did not accept she had practiced in China it may not place any weight on the documents. She stated she did not need to lie because Shenzhen was a special economic zone and the living standards were not worse than in Australia. She stated there was no need to come to Australia because the land was strange, she did not know people and they had spent all their savings and now they had to see psychiatrists and psychologists.

48. The Tribunal put to her that if it did not believe her story about China then it had to think about whether she had practised in Australia. The Tribunal put to her she had provided declarations from people who she said were

providing assistance in Falun Gong practice and sought permission to talk to Falun Dafa about those two people and their statutory declarations.

49. The Tribunal put to her that if it accepted that she had engaged in Falun Gong activities in Australia then these would be relevant to the extent that it affected the applicant. The applicant's mother stated it would affect the applicant because she would be arrested if she went back and who would look after the applicant. The Tribunal put to her that her husband had not practised Falun Gong. She stated he was in poor health and could not help much as he had [health problems]. She stated the applicant would have nowhere to live, she would be discriminated against because her mother was Falun Gong, no children would play with her and she would be abused as her brother had been.

50. The Tribunal talked about the social compensation fee. The applicant's mother stated she would not know where she would go if she went back to China as they had no house and no money to rent. The Tribunal asked if she would go back to where her family was. She stated the family members had their own family. The Tribunal put to her that in order to work out what social compensation fee was payable then it needed to think about where she would theoretically return to if she returned to China because the Tribunal need to think about how much social compensation fee she would have to pay. The applicant's mother agreed she would go back to Shenzhen. The Tribunal put to her that the social compensation fee was \$40 000.00. She said she would be unable to pay it.

51. The Tribunal put to her that it had to think about whether the applicant would suffer harm if the social compensation fee was not paid and whether it was Convention related. The applicant stated there was no way for her daughter to survive as there was no education, no access to medical services and there may be no way for her to survive. She stated they had no money so how could her daughter survive.

52. The Tribunal put to the adviser that the previous Tribunal found that the applicant's mother was not a Falun Gong practitioner and this Tribunal was also looking at whether she was telling the truth in relation to a previous practice in China. The Tribunal put to her she had previously applied to come to Australia before she put in the application for a tourist visa, her husband may have provided inconsistent information in relation to when they started thinking about leaving China, the Tribunal may find she had given inconsistent information in relation to how often she distributed the pamphlets, that she and husband may have given inconsistent information in relation to when they saw each other after she was detained, that is he said it was a month but she stated it was a week, and it may be that she also lacked interest in what happened to her uncle who introduced her to Falun Gong in the first place. The Tribunal put to her all of that may lead the Tribunal to conclude she was not a genuine Falun Gong practitioner in China. The Tribunal put to her that it still had to consider about when she came to Australia and engaged in Falun Gong what would be the ramifications for the applicant but that there may only be ramifications if the Chinese authorities knew. The Tribunal also indicated that if the applicant's mother went to [detention] then the applicant's father may still be able to look after her.

53. The Tribunal also needed to think about family planning legislation and what harm the applicant would face and whether that would be serious enough to warrant to protection.

54. The adviser stated the applicant was stateless, that the applicant had no registration and was a black child. The Tribunal put to the applicant's mother that the applicant would have the same nationality as her parents. She stated the applicant was a member of the family unit of a Falun Gong practitioner and would be discriminated against and her father would not be able to work and she would lose access to health and education.

55. The applicant's mother stated she had continued to practice Falun Gong in Australia and had been exposed to the Chinese government because they had a lot of spies.

56. The Tribunal looked at the social compensation fee and whether non-payment would result in serious harm. The Tribunal noted that her school fees wouldn't be paid and should be discriminated against and her health fees may not be paid. The Tribunal also put to her that I would need to consider whether it was the law that applied to everyone.

57. Also provided at hearing was the following statutory declaration from [name deleted] dated 29 September 2012:

I am an assistant Falun Gong practice at [location deleted]. I met [the applicant's mother in] March 2010 when she came to our [practising site] and joined the group exercises.

After coming to [the suburb], [the applicant's mother] participated in our group activities in the early morning from Monday to Saturday regularly for almost 2 years until she joined to another new practising site at [another location] started around half a year ago.

She also took part in our group book study sessions on Wednesday night and Sunday night (the Sunday night study session is now suspended due to the availability of venue and will resume later).

[In] March 2010, she took part in an event organised by selling Gong practitioners in Chinatown Sydney to support 70,000,000 Chinese people quitting the Chinese Communist party membership. [In] May 2010, she joined upgrade to celebrate the world Falun Dafa Day in Sydney CBD.

Through our conversation, I learned that [the applicant's mother] started practising Falun Gong in 1998 in China. In 2009, she was detained by the Chinese Communist regime and put in labour camps are brainwashing. From a certificate she showed, I learnt that her [detention] is [a certain number of] years from [dates deleted]. To their health condition, she was bailed out for treatment [in] 2010 and supposed returned labour camp after year later. She escaped from [China].

Above is complete and true account of what I know about [the applicant's mother].

58. Also provided was another statutory declaration from [Mr A] dated 8 October 2012 stating the following:

I have been practising Falun Gong since [year deleted], and I am currently the Coordinator of the group studying group practice of Falun Gong in [a certain] area.

I met [the applicant's mother] in March 2010 in [suburb deleted]. [The applicant's mother] is a very good Falun Gong practitioner. I found her often participating Falun Gong activities actively, such as morning group practice [and weekly group practice] and other Falun Gong activities.

Country Information

Relatives of Falun Gong

59. According to the US Department of State's *2008 Human Rights Report: China*, "During the year human rights activists, journalists, unregistered religious figures, and former political prisoners and their family members were among those targeted for arbitrary detention or arrest." The US Department of State continues:

The government continued to use house arrest as a nonjudicial punishment and control measure against dissidents, former political prisoners, family members of political prisoners, petitioners, underground religious figures, and others it deemed politically sensitive. House arrest encompassed varying degrees of stringency but sometimes included complete isolation in one's own home or another location under lock and guard. In some cases house arrest involved constant monitoring, but the target of house arrest was occasionally permitted to leave the home to work or run errands. Sometimes those under house arrest were required to ride in the vehicles of their police monitors when venturing outside. When outside the home, the subject of house arrest was usually, but not always, under surveillance. In some instances security officials assumed invasive positions within the family home, rather than monitoring from the outside.

...Family members of activists and rights defenders, Falun Gong practitioners, journalists, unregistered religious figures, and former political prisoners were targeted for arbitrary arrest, detention, and harassment. Some were required to leave Beijing during the Olympics. Rights activist Zeng Jinyan, the wife of Hu Jia, reportedly was held at a hotel in Dalian during the Olympics. After returning Zeng Jinyan to her Beijing apartment, authorities kept her under close surveillance. Yuan Weijing, the wife of legal advisor Chen Guangcheng, continued to be subjected to ongoing harassment, including strict surveillance, confinement to her home, and denial of prison visits (US Department of State 2009, *2008 Human Rights Report: China*, 25 February, Section 1d & 1f).

60. The Falun Dafa Information Center is based in New York and maintained by Falun Gong. The Falun Dafa Information Center receives reports of human rights abuses, allegedly perpetrated by the Chinese Government against Falun Gong practitioners. According to the Falun Dafa Information Center's *Annual Report on Falun Gong in 2008*, "In some cases, family members or co-workers who do not practice Falun Gong have been

taken into custody as well” (Falun Dafa Information Center 2009, *Annual Report on Falun Gong in 2008*, February, p.6).

61. An article dated 30 October 2008 in *The Epoch Times*, which has links with the Falun Gong, reports that “Family members and relatives of Falun Gong practitioners also face the threat of dismissal from work, of having their children expelled from school, and of being evicted from their residences. All these measures serve the same purpose: cutting off all possible sources of income for Falun Gong practitioners in order to force them to give up their belief” (“Nine Commentaries on the Communist Party’ 2008, *Epoch Times*, 30 October –).

62. According to the Falun Dafa Information Center, “Spouses, parents, children, and siblings of those who practice Falun Gong have suffered various degrees of persecution, ranging from loss of employment to torture.” The Center continues:

When tens of millions of Chinese who practice Falun Gong began being targeted in 1999, even their relatives who did not follow the spiritual discipline were implicated at once. Immediately, the number of people directly hit by the campaign rose into the hundreds of millions.

Relatives were given a painful choice between supporting their loved ones at great risk or following the Party and thus wrecking their families and betraying their kin. The comprehensive campaign left little room for ambiguities.

The Party had three main reasons for targeting the Falun Gong’s relatives.

- First, it sought to deter Chinese people from supporting their family members by opposing the campaign; at minimum the Party demanded quiet acquiescence, though it preferred the kind of proactive support described below.
- Second, the Party feared family members would publicly expose the torture and other abuses their loved ones faced.
- Third, police and jail wardens learned that one way of breaking the determination of jailed Falun Gong is by showing them how miserable their children, spouses, or elderly parents are.

Persecution of relatives has taken many forms, including:

- Spouses are pressured to divorce and threatened with repercussions such as an end to their careers if they do not.
- Relatives are dismissed from their workplaces after their family members petition the government to end the persecution or distribute informational material.
- Sons and daughters are expelled from schools if one of their parents remains an active Falun Gong practitioner.
- Young children have become orphaned or parentless because their mother and father have been killed, arrested, or forced to run from place to place to avoid arrest and torture...Some children live with their grandparents or

other relatives, while others have been left to fend for themselves ('Family and Loved Ones' 2008, Falun Dafa Information Center website, 17 May <http://www.faluninfo.net/topic/34/> – Accessed 21 August 2009).

63. A report by the Falun Dafa Information Center dated 20 May 2009 provides information on the death in custody of a Falun Gong practitioner in Fujian whose parents were reportedly arrested in his hometown in Hubei:

Security forces in Fujian and Hubei province are seeking to cover-up the death of a Falun Gong practitioner who was killed in custody last month two days after being detained while on a field trip with his workplace. They have reportedly arrested his family members, whose whereabouts are currently unknown.

Mr. Fu Ziming (付自明) died in custody on April 19, two days after being detained by police in the vicinity of Wuyi Mountain Scenic Area of Fujian Province, a popular tourist destination in southeast China and a UNESCO World Heritage Site. Fu had traveled to the area as part of a group from the post office where he worked in his hometown of Jianli County in Hubei Province.

On April 17, while visiting the Mt. Wuyi area, Fu wrote in crayon on a rock "Falun Dafa is good; Truthfulness-Compassion-Forbearance is good." With Falun Gong being a permanent taboo in China's tightly controlled media environment, it is a common phenomenon for adherents to counter dehumanizing party propaganda by writing such expressions on a wall, banner, or homemade poster.

Fu's actions were apparently recorded by a nearby surveillance camera and that evening, he was taken from his hotel by agents from the management department of the local police station operating under Wuyi Police Department. Two days later, he had died, reportedly from torture.

...In a further effort to limit publicity, authorities in Jianli county also recently arrested his father and other family members. Fu's father was reportedly taken into custody on April 23 and the remainder of his family the following day. They have since lost contact with the outside world and their exact whereabouts remain unknown ('Police Covering Up Falun Gong Death in Custody at Top Tourist Attraction' 2009, Falun Dafa Information Center website, 20 May <http://www.faluninfo.net/article/883/?cid=84> – Accessed 21 August 2009).

Social Compensation Fee for Shenzhen

64. If a child is born outside family planning quotas, however, the parents may be required to pay a family planning fee before authorities will register a hukou for the child.^[1]

65. According to a 25 March 2013 All China Women's Federation article, the Population and Family Planning Regulation of the Shenzhen Special Economic Zone stipulates that urban residents who have one more child must pay a minimum social compensation fee of three times the average annual per capita disposable personal income of urban residents in the year prior to the

birth.[2] Both the mother and the father of the child are required to pay the social compensation fee and so the minimum fine for a couple would be 219,030 yuan (approximately AUD39,379) for a child born in 2012.[3]

Departure from China

66. In relation to whether people who have been charged with, or convicted of, criminal offences would be able to leave the country, Article 13 of the *Passport Law of the People's Republic of China 2006*, which came into effect on 1 January 2007, indicates that a person who is defending a criminal case or is a criminal suspect, or is serving a criminal sentence shall be refused a passport. The provision does not specifically refer to whether a person with a previous criminal conviction would be refused a passport although a passport can be refused to a person who it is believed will undermine national security or cause major losses to the State's interests. Article 8 of the *Law of the People's Republic of China on the Control of the Exit and Entry of Citizens* also indicates that defendants in criminal cases or criminal suspects, convicted persons serving sentences, persons undergoing rehabilitation through labour, and persons whose departure in the opinion of the relevant authority would be harmful to state security or cause a major loss to national interests are in the categories of persons who shall not be granted approval to leave the country. DFAT has previously advised of reports of Chinese citizens with legally-obtained passports being prevented from leaving China because they were believed to be involved in a sensitive case or would undermine national security, and of cases where dissidents who had received criminal punishment including imprisonment had subsequently been able to obtain passports and leave the country.

Chinese law relating to a child born in Australia to Chinese nationals

67. Nationality in China is governed by the *Nationality Law of the People's Republic of China 1980*. According to this legislation, nationality is acquired primarily through one's parents, and a child can acquire Chinese nationality at birth even if only one of its parents is Chinese.[4] Article 5 states:

Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.[5]

[1] Department of Foreign Affairs and Trade 2011, *DFAT Report No. 1261 – China: RRT Information Request: CHN38360*, 30 March <Attachment>; 'The Brutal Truth' 2012, *The Economist*, 23 June <<http://www.economist.com/node/21557369/print>> Accessed 20 August 2012

[2] All China Women's Federation 2013, *Shenzhen Issues New Family Planning Regulation*, 25 March

<<http://www.womenofchina.cn/html/womenofchina/report/150898-1.htm>> Accessed 29 July 2013

[3] All China Women's Federation 2013, *Shenzhen Issues New Family Planning Regulation*, 25 March

<<http://www.womenofchina.cn/html/womenofchina/report/150898-1.htm>> Accessed 29 July 2013

[4] The Embassy of the People's Republic of China, *Note to Department of Foreign Affairs and Trade 2004 Note No. 088/2004*, 21 September – Community Legal Information Centre (undated), *Chinese Nationality*

http://www.hkcllc.org/en/topics/immigration/chinese_nationality/index.shtml - Accessed 5 August 2011 –

[5] *Nationality Law of the People's Republic of China 1980*, China.org website, 10 September <http://www.china.org.cn/english/livinginchina/184710.htm#> – Accessed 3 April 2007

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Refugee Review Tribunal of Australia

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1304354 [2013] RRTA 645 (24 September 2013)

Last Updated: 11 October 2013

1304354 [2013] RRTA 645 (24 September 2013)

DECISION RECORD

RRT CASE NUMBER: 1304354

DIAC REFERENCE(S): CLF2012/141400

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Kay Ransome

DATE: 24 September 2013

PLACE OF DECISION: Sydney

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. The [applicant] is a [age] year old citizen of China (PRC), born in Fuqing in Fujian Province. He claims that if he returns to China he will be harmed because of his religious beliefs and because he fathered a child out of wedlock before the marriageable age.

2. The applicant arrived in Australia in August 2007 as the holder of a student visa which was valid until [March] 2010. [In] July 2012 he applied to the Department of Immigration for a protection visa. The delegate refused to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act) on 6 February 2013. The applicant applied to the tribunal for review of that decision on 20 March 2013.

Jurisdiction

3. There is threshold question in this case of the tribunal's jurisdiction. Pursuant to s.412(1)(b) of the Act and r.4.31 of the *Migration Regulations 1994* (the Regulations), an application for review of this decision had to be made within 28 days after the applicant was notified of the decision in accordance with the statutory requirements.

4. The material before the Tribunal indicates that the applicant was notified of the decision by letter dated 6 February 2013 and the decision was dispatched by registered post. As the review application was not received until 20 March 2013, the Tribunal formed the preliminary view that the review application was not valid as it was lodged outside the statutory time limit. On 5 April 2013 the Tribunal wrote to the applicant inviting him to comment in writing on whether a valid application had been made. The Tribunal noted that the decision was posted to the applicant on 6 February 2013 and, on the basis that 15 February 2013 was the date on which he was taken to have been notified, the last day for lodging the application for review was 15 March 2013.

5. In his response the applicant said that he had not received the decision notification from the Department. He stated that he had received previous notifications from the Department but not the final decision.

6. In his application for a protection visa [the applicant] gave his address as [an avenue]. Departmental records show the address was entered as [a street]. The letter notifying the applicant of the decision to refuse the protection visa was posted to [the street] and not [the avenue]. The letter was returned to the department by Australia Post "unclaimed".

7. The Act requires that the notification will, unless it is being handed directly to the recipient, need to be delivered, dispatched or transmitted to an address, fax number or email address provided to the Minister for the purpose of receiving documents. In this case the address provided by [the applicant] for the purpose of receiving documents from the department was the [avenue] address. That he had in fact received other correspondence which was addressed to [the street] does not subvert the Minister's obligation to send the notification to the correct address.

8. In this matter the letter was sent to an incorrect address and notification was therefore ineffective. A failure to properly notify an applicant does not affect the validity of the primary decision (s.66(4)) but is relevant to the determination of whether a valid review application has been made.

9. The Tribunal accepts the applicant's statement that he was handed a copy of the decision when he attended the Department's offices around 20 March 2013. The Tribunal finds that he was notified of the decision at this time and that the application for review was lodged within time.

Appearance before the Tribunal

10. The applicant appeared before the Tribunal on 29 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Material before the Tribunal

11. The Tribunal has taken into account the applicant's protection visa application, his statement to the Department, his evidence in his interview with the delegate and at the Tribunal hearing, as well as relevant country information. The Tribunal has also had regard to a statement (a copy of which was provided by [the applicant] in support of his protection visa application) made by the applicant's partner, [Ms A], in support of her own application for a protection visa. The Tribunal also has before it the decision by the Tribunal differently constituted which on review affirmed the decision of the delegate to refuse [Ms A]'s protection visa application.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

13. 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 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). Article 1A(2) of the Convention sets out a definition of who is a refugee.

14. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

15. 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)). Examples of 'serious harm' are set out in 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.

16. 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.

17. 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.

18. 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 '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.

19. 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.

20. 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.

21. 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').

22. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

23. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in China and, if not, whether there are substantial

grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China, there is a real risk that he will suffer significant harm.

Under the Refugees Convention

The applicant's religious beliefs

24. The applicant advances his claim in relation to religious beliefs on two bases – his own Christian beliefs and his relationship with his partner, [Ms A], who is a Christian.

25. Based on his lack of knowledge of the Christian religion, the delegate did not accept that [the applicant] is Christian. At the hearing before the Tribunal [the applicant] was questioned about his religion. He said that he was not a Christian before he came to Australia and that his partner introduced him to the church. He stated that he had been baptised and attends a church in [a suburb].

26. [The applicant] said that he believes in God and believes God exists. He conceded, however, that he is not very devout, describing himself as “sort of Christian”. He said that he rarely reads the Bible and does not often attend church. His partner goes often but he does not have much time to go and has not been for two months. He said that he stays at home and looks after their child while his partner attends church. He said that he got baptised because his girlfriend asked him to. When asked to describe his Christian beliefs [the applicant] was unable to answer.

27. [The applicant] said that, if he was alone he would not be harmed if he returned to China. However, he now has a partner and child and, if returned to China, he would go to a house church with his partner and then he would have trouble with the police and would be arrested and beaten. He said that Christian churches are not allowed in the area he comes from in Fujian Province, namely Fuqing. He said that [Ms A], who is also from Fujian, had been arrested in China before because of her involvement with a house church and described the events set out in [Ms A]'s statement made in support of her protection visa application.

28. [Ms A] did not attend the Tribunal to give evidence in [the applicant]'s application. [The applicant] said that she had to stay at home and look after their son who was sick and so could not come to the hearing. When asked whether he was aware of the Tribunal's decision in relation to [Ms A]'s application for a protection visa, [the applicant] said he was. The Tribunal pointed out that her application had been refused because the Tribunal was not satisfied that there was a real chance she would suffer harm if returned to China on account of her Christian beliefs. He said that the information relied upon by the Tribunal in considering [Ms A]'s application was wrong.

29. The Tribunal discussed with [the applicant] a number of issues, based on available country information, which indicate that Christians who attend house churches in China, particularly in Fujian province face a very small risk of being harmed or arrested because of their religious beliefs. The information specifically put to [the applicant] was that:

- large numbers of Christians exist in Fujian and a significant proportion of them worship in unregistered groups or house churches;[1]
- there are few reports of repression of house church Christians in Fujian in general and in Fuqing in particular;[2]
- the authorities in Fujian are one of the most lenient on unregistered Christians in China;[3]
- small groups meeting in private dwellings are not of particular concern to authorities in Fujian; [4]and
- few arrests have been reported[5]

30. In response [the applicant] said that the information the Tribunal has may not be correct. He said that before he came to Australia he knew that people who attended gatherings held at someone's house got arrested because of their Christian beliefs. He said his partner had been arrested before she came to Australia because she was a Christian. He also said that the Chinese media does not report bad news so there would be no reports of people being arrested or imprisoned.

31. The Tribunal accepts that [the applicant] has been baptised and does attend a Christian church in [a suburb] from time to time. As he acknowledged at the hearing, however, his own Christian beliefs are not strong. I find, based on [the applicant]'s characterisation of his own beliefs, that it is very unlikely [the applicant] would engage in active promotion of his own Christian beliefs should he return to China. He also claims, however, in relation to his religion that he will be harmed because he will attend church with his partner if they return to China.

32. I, like the member who determined [Ms A]'s application for review, accept that she regards herself as a Christian and, if she were to return to China, would regularly attend house church gatherings. I also accept that [the applicant] would accompany her on occasions as he has done in Australia. However, I find that the available country information shows that the Chinese authorities exhibit a liberal and tolerant approach to worship at unregistered or house churches in their place of residence. I find that there is not a real chance that the applicant will suffer serious harm or persecution in the foreseeable future by the Chinese authorities due to his own religious activities or because he may be associated with the religious activities of his partner. I therefore find that his fear on account of his and his partner's religion is not well-founded.

Fathering a child out of wedlock

33. [The applicant] said that he met his partner, [Ms A], in Australia and they formed a relationship. [Ms A] accidentally became pregnant and gave birth to a son on [date deleted]. [The applicant] was [age deleted] when their son was born and [Ms A] was about to turn [age deleted]. As noted above, [Ms A] did not attend the hearing. [The applicant] told the Tribunal that he and [Ms A] are still in a relationship and hope to marry one day but they do not have enough money to do so at the present time. He also said that they need the blessing of their parents to get married.

34. [The applicant] did not bring any evidence of his relationship with [Ms A] to the hearing and nor did he provide a copy of his son's birth certificate,

despite the veracity of the relationship being an issue in the delegate's decision. I note, however, that [the applicant] gave evidence to the Tribunal at the hearing of [Ms A]'s application and I accept that they are in a relationship, are not married and have a child together.

35. [The applicant] said that because he was under the marriageable age and he and [Ms A] were not married when they had their son, they will be fined a large amount if they return to China. He said that he had heard that the fine would be at least 20,000 RMB.

36. In Fujian it is forbidden to give birth 'before the stipulated time'[6] Article 14(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* states that 'a child is regarded as born before the stipulated time' in the case where 'those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age)'[7] The legal marrying age is 20 years for women and 22 years for men.[8] I accept that [the applicant] was under the marriageable age in China when his son was born and that he and [Ms A] were not married. The penalty for having a child 'before the stipulated time' is outlined in Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province*. The standard penalty is a fine, often referred to as a social compensation fee. Chinese nationals who breach the family planning regulations while outside the country, and who are not eligible for an exemption, must pay a compensation fee calculated using the average income of the district in which they have household registration.[9]

37. I accept based on the available country information that the birth of [the applicant]'s child was in breach of the family planning laws and he would most likely be required to pay a social compensation fee should he return to Fujian. At the hearing [the applicant] said that he did not live in a city in Fujian but in a small regional place. Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* calls for a social compensation fee of 60 to 100 per cent of the average local annual income.[10] While local family planning officials have some discretion in determining social compensation fees,[11] the Tribunal put to [the applicant] that in his circumstances the fine would be in the vicinity of 4,456 RMB to 7,427 RMB,[12] not the 20,000 RMB he had claimed.

38. [The applicant] said that, while that may be the amount the law stipulates, in small places the officials take more money than you are required to pay. He said that he and [Ms A] have no savings and would be unable to pay the fine. [The applicant] said that therefore he and his partner and child would not be able to survive in China and would have no place to live or enough to eat.

39. The Tribunal put to [the applicant] that under the relevant laws persons who are unable to pay a fine in a lump sum can apply for approval to pay by instalments and that in Fujian province repayments could be made over three years.[13] [The applicant] responded that he didn't know anything about paying by instalments and, in any event, the official rules don't apply in a small place like the one he comes from.

40. When asked whether he and [Ms A] would be able to work to pay off the fine, [the applicant] stated that only one of them could work as the other would have to stay at home to mind their son. He said it would be hard to find a job as he is not well educated and the pay is low. At another point in the

hearing he did, however, say he would be able to find a job. He said that the price of goods in China is expensive and they need to raise a child and therefore would not have enough money to pay the fine. [The applicant] also said that, while he may be able to get a job, he would not earn enough money. He said that he had worked as a plasterer in Australia but had hurt his back and can't do heavy work anymore. He said that [Ms A] has stomach problems and often gets sick which affects her ability to work.

41. The Tribunal asked [the applicant] about whether he and [Ms A] could obtain some assistance from their families to pay the fee. He said that neither his nor [Ms A]'s family would help them. He said that neither of their families is rich and his girlfriend's father owes money to other people. After having initially said that he speaks with his family by telephone once a month, [the applicant] then said that he does not have regular contact with his family and they wouldn't care if he were alive or dead and therefore wouldn't help him.

42. [The applicant] said that [Ms A]'s father does not approve of him or their relationship. The only contact she has is with her [sibling] and [Ms A]'s family would not help them if they returned to China. He said that both his and [Ms A]'s family are against them because of their relationship.

43. I am not satisfied that the imposition of a social compensation fee upon [the applicant] constitutes persecution. I am satisfied on the evidence before me that China's family planning laws and policies apply generally to the Chinese population. I am satisfied that the family planning laws are not discriminatory in their intent and are appropriate to achieve a legitimate national objective in the context of China's need to control its overall population growth. Despite [the applicant]'s assertions to the contrary, there is no independent evidence before me that that the relevant laws of Fujian province will be applied to [the applicant] in a discriminatory manner for any reason or that the laws are selectively enforced.

44. Furthermore, there is nothing in the independent country information before me to support [the applicant]'s statement that because he comes from a small place in Fujian he would be required to pay a fee more than twice that stipulated by law. The applicant himself provided no other information to support this statement. I find that he has exaggerated his claims in this regard and that the amount of the fee, being in the vicinity of 4,500 to 7,500 RMB, would not cause undue financial hardship for him.

45. The country information is clear that a person in [the applicant]'s position is able to apply to pay the fee by instalments over three years. While he states that he is unable to do heavy work because of a back injury, there is nothing to indicate that he will not be able to gain employment on his return and thus earn an income. In fact, [the applicant] conceded at the hearing that he would be able to get a job. He would thus have income from his employment and would be most likely to also have support from his family. [The applicant]'s evidence about his contact with his family was contradictory and I do not accept that he would be unable to obtain support from them if necessary. In light of these conclusions the Tribunal finds that there is no basis to his claims that he and his partner and child will not be able to survive or have a place to live or enough to eat.

46. As such, I do not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.

47. [The applicant] also claims that if he returns to China and is unable to pay the fine, his son will not get registration and will not be able to go to school. He further claims that if he and his family return to China, [Ms A] will be sterilised because she has had a boy child.

48. Neither [Ms A] nor their child is included in this application. [The applicant] has not made any claims that he would suffer harm if he returns to China arising out of the claims that [Ms A] will be sterilised or his child, being born out of wedlock, will not be able to be registered. He stated on two occasions during the course of the hearing that he was not concerned for himself but for his partner and child. As [the applicant] has made no claim that he personally fears persecution for reasons associated with the status of his partner and child I find that these issues do not give rise to a claim that [the applicant] is owed protection obligations.

Complementary protection

49. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances.

50. The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines, however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZORB* [2013] FCAFC 33.

51. As discussed above, the Tribunal has found that [the applicant]'s own Christian faith is weak but he is likely to attend church with his partner should they return to China. On the basis of my findings set out above, I am not satisfied that the applicant's claims give rise to substantial grounds for believing that, as a necessary and foreseeable consequence of the his removal from Australia to China, there is a real risk that he would suffer significant harm on account of his own or his partner's Christian beliefs.

52. In relation to the imposition of a social compensation fee as a result of the birth of the applicant's son out of wedlock and that at the time the applicant was under the marriageable age, I have found above that the fee is not excessive and that the applicant will be able to make arrangements to pay the fee. Therefore, I find that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm as a result of the breach of the family planning laws.

53. The applicant has not suggested that he would meet with consequences amounting to significant harm arising out of his claims that his son would not be able to be registered and his partner would be sterilised.

CONCLUSIONS

54. For the reasons given above, 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).

55. The Tribunal is also not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

56. 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).

DECISION

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

Kay Ransome
Principal Member

[1] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

[2] Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.

[3] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Executive Secretary, Hong Kong Christian Council comments reported in Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2005, *CHN100387.E – China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong (2001-2005)*, 7 September; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

[4] Schak, David 2011, 'Protestantism in China: A Dilemma for the Party-State', *Journal of Current Chinese Affairs*, Vol 40, No 2, p.92

[5] Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April; see 2 above

[6] *Population and Family Planning Regulation of Fujian Province*, art 14, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld

[7] *ibid*

[8] *Marriage Law of the People's Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People's Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People's Republic of China

[9] Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

[10] Defined by the Regulations as 'the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the previous year when the child is born'. See: *Population and Family Planning Regulation of Fujian Province*, art 39, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld; Department of Foreign Affairs and Trade 2012, *DFAT Report No. 1354 – RRT Information Request: CHN39817*, 23 January

[11] Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

[12] Based on income levels obtained from the *Fujian Statistical Yearbook 2011* and *China Statistical Yearbook 2012*.

[13] *Measures for Administration of Collection of Social Maintenance Fees* (China), art 6A, Promulgated 2 August 2002, (Effective 1 September 2002), National People's Congress of the People's Republic of China; Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request CHN37505*, 12 November

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Refugee Review Tribunal of Australia

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←1218579 → [2013] RRTA 741 (10 October 2013)

Last Updated: 18 November 2013

←1218579 → [\[2013\] RRTA 741 \(10 October 2013\)](#)

DECISION RECORD

RRT CASE NUMBER: ←1218579 →

DIAC REFERENCE(S): CLF2012/161127

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Andrew Mullin

DATE: 10 October 2013

PLACE OF DECISION: Sydney

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

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 the People's Republic of China, applied to the Department of Immigration for the visa [in] August 2012 and the delegate refused to grant the visa [in] October 2012. The Applicant applied to the Tribunal for review of the delegate's decision [in] November 2012.

RELEVANT LAW

3. 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
4. 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 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).
5. 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').
6. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CLAIMS AND EVIDENCE

7. The Tribunal has before it the Departmental and Tribunal files file relating to the Applicant. The Tribunal also has had regard to the material referred to in the delegate's decision record and other material available to it from a range of sources.
8. In his protection visa application the Applicant claims, in summary, that:

- He was born in Hebei, China, in [a certain year] and lived at an address in [Gucheng County], Hebei Province from 2002 to [2011]. He is a Christian. He received twelve years of formal education in Hebei, [final year given], and was self-employed as a [business] owner from [that time] to [Year 1]. He was married in 1994 and his parents, wife and two [children] live in China.
- He and his wife were in trouble with the authorities in [Year 1] because they had a second child, outside the provisions of China's One Child Policy, despite his having undergone a forced 'tubal ligation' (sic) The local Family Planning Bureau fined them Rmb 50,000 and demanded forfeiture of his[business].
- He appealed the forfeiture to the town government but was unsuccessful. He appealed many times to the Shijiazhuang government, submitting petitions to them. He was caught every time and sent back to the Town Public Security Bureau (PSB) Each time he was detained for several days or a week until he paid a fine.
- His father was unwilling to accept this situation and went to the Shijiazhuang court to seek compensation from the government. The court refused to accept the case and sued his father for disrupting official business. His father was detained and he had to pay Rmb 10,000 for his release.
- From 2008 his father continually appealed to the city government but they only wanted money. His father was detained many times.
- He was eventually fined for the breach of the One Child Policy and his [business] was forfeited. He was impoverished and unable to raise his children.
- A Christian 'sister' named [Ms A] offered him food and took him to her family church, where the brothers and sisters sympathized and prayed for him. They also donated money to him. He felt the warmth of Christianity and through the church gatherings he began to believe in Jesus. He knew that if he believed in Jesus he would live forever. He ceased to suffer despair and the anger in his heart disappeared. 'I believe that there is heaven, hell and purgatory to reward the good and punish the wicked.'
- From 2010 the family church where he and the brothers and sisters worshipped was regarded as a cult (Shouters) by the local government and police. They were no longer permitted to hold gatherings. The police often searched his home and those of the other brothers and sisters to check whether gatherings were being held. They wanted to catch people, fine them and send them to the detention centre. Some of the brothers and sisters died in PSB custody after they were caught.
- He had to leave his home town and find a new place to live. He did not believe the government and feared he would be persecuted once more for participating in the family church. He was very fearful because he knew he would die if caught again.
- In another city he saw an advertisement for Australian visas. He borrowed a large sum of money from his relatives for the visa and,

with God's blessing, arrived in Australia at the end of 2011. He can attend church freely here.

- o After arriving in Australia he telephoned his father and was told that police from the town police station often enquire as to his whereabouts and ask whether he is a traitor.

- o He will die if he returns to China. The police will say that he is bringing superstition from overseas to disrupt social stability. He will definitely be imprisoned, rather than being placed in detention.

9. The Departmental file indicates that the Applicant was invited to discuss his claims at an interview on 29 October 2012. He did not attend the interview and did not provide any reason for his non-attendance.

Tribunal hearing

10. The Applicant appeared before the Tribunal on 22 August and 8 October 2013 to give evidence and present arguments. The hearings were conducted with the assistance of interpreters in the Mandarin and English languages.

11. At the first hearing:

- o Asked what he feared would happen to him if he returned to China he said he would be persecuted by the government and his safety would be at risk because of the One Child Policy. Asked if there was any other reason he said there was not – it was just because of the One Child Policy that he had been persecuted. If he returned to China he would be jailed or fined. He would be jailed if he could not afford to pay the fine.

- o Asked about the circumstances in which he had breached the One Child Policy he said his wife fell pregnant accidentally. Asked when this occurred he said it was in 1995. Asked if he meant it was seventeen or eighteen years ago he then said it was in [Year 2], agreeing he meant it was [a certain number of] years ago. She was told to have an abortion but ran away to another place to give birth. Asked where this was he said it was her [relative]'s home in Shijiazhuang City.

- o Asked the name of this second child he gave it as [name & gender given]. Asked the birth date he gave it as [Year 2] in the lunar calendar. He confirmed he was sure she had given birth in [Year 2]. I put to him that this was inconsistent with his protection visa application in which he claimed the child was born [in Year 1]. He said he did have a second child. I put to him that it did not sound very likely that he would be so uncertain of the date. He said he had many mental pressures in China, leading him to run away to Australia. This was why he had trouble remembering birthdates. I put to him that I found it difficult to believe he we believe his [second child] to have been born in [Year 2] if he was born in [Year 1]. He said he knew his second [child] was [a certain age] and his first [child] was [a certain age].

- o He had to pay a fine of Rmb 50,000 in instalments. His [business] was confiscated. Asked why there would still be any outstanding amount he said that because his [business] was confiscated he could not survive. Asked again he said the fine was too large to pay

at one time. I recalled his evidence that he had paid it in instalments. He said that according to them he had not paid it all. Asked when the [business] was confiscated he said it was after his wife gave birth to their second child. Asked a number of times for a more precise timing he eventually said it was in [Year 3].

- He had no source of income between the loss of his [business] in [Year 3] and his departure for Australia in [2011]. Asked how he had survived he said he did some casual work and also borrowed from his relatives. Asked how much he had borrowed he said he could not remember. In such a situation relatives were not willing to lend him any money. Asked again he said it was a lot, including the money for him to come to Australia. Asked how much 'a lot' was he said it was more than Rmb100,000. Asked again he said it was nearly Rmb 150,000 to 160,000.

- I asked the Applicant why he would not have used this money to pay the fine and avoid being arrested. He said he had already been attacked and he would not want to continue living in China. I recalled his claim that he came to Australia because he feared being arrested. He agreed this was so. I put to him again that he could have avoided arrest by using the money to pay the fine. He said that as a farmer he would not be able to repay his relatives. Asked if he meant he wanted to come to Australia to work so that he could repay his relatives he said he wanted to stay here. Asked if it was preferable to be in debt to his relatives than to go to jail because he could not pay the fine he said a third choice was to go to Australia.

- Asked again if he had feared harm in China for any other reason he said he did not.

- Asked where he was living just before leaving China to come to Australia he said he was not at home – he was staying with relatives or in rented rooms because of his fear. His home in Shijiazhuang City was vacant and his wife and children were living elsewhere with a relative in the City. His first [child] had dropped out of school and his second [child] was studying in a private [school]. He could not attend a public school because the authorities would investigate his household registration. His wife was working to pay for his tuition.

- Asked if the authorities were pursuing his wife he said she had already escaped to another place. I asked if he meant that, although she was working, they could not track her down. He said she was working for a private company. I suggested this would not prevent them from finding her. He said she had not committed any offence but could not stand the pressure and had moved. I noted that under China's family planning laws both parents are held guilty of a breach. He said they did focus on her but as she was breast feeding at the time they were unable to take her away. Asked why they would not have done so after she stopped breast feeding he said it was because she went away. I put to him that it seemed difficult to believe they would be unable to find her in the circumstances he had described. He said he could not care for them very well as he was in Australia – this was why he had applied for a protection visa.

- Asked if there was an arrest warrant current for him he said there was not. Asked why he would be arrested he said officers from the local family planning bureau wanted to get money from him.
- Asked about the visa for Malaysia in his passport he said it happened a long time ago – he had wanted to take a trip to Malaysia before his second child was born and when his financial situation was good. I put to him that this was not true as the visa was issued [in] May 2008. He said he obtained the visa in order to come to Australia. Noting again that it was issued in 2008 I asked what it had to do with coming to Australia. He said he gave his passport to an agent who helped him obtain the Malaysia visa. I observed that he had given two completely different stories about the visa and that this could cast doubt on the credibility of his claims. He said to obtain an Australian visa it is necessary to get another visa from a small country – this is what local agents do. Asked if he meant it was a way of deceiving the Australian government he said it was not trickery – it was all done by local agents. He had simply wanted to come to Australia, no matter what method the agent employed.
- Noting, from visa stamps in his passport, that he had not left China for more than two weeks after his Australian student visa was granted [in 2011], I asked why he would have delayed in this way if he genuinely feared harm. He said he had to farewell his family and friends.
- I put to him that his delay of eight months in seeking protection after arriving in Australia, only a few days before his visa was due to expire could cast doubt on the truth of his claim to fear harm in China. He said he had a student visa and he was legally in Australia. Asked if he had studied at all with this student visa he said he had not as he could not pay the tuition fee. He could survive only by working. He agreed he known, from the time he entered Australia, that he could not renew his student visa because he was not studying. Asked again why he would not have applied for protection straight away he said that when he arrived he did not know much about protection visas and it was only later, when he consulted a lawyer, that he lodged the application. I put to him that he would have known about the possibility if he had come to Australia to find protection. He agreed this was so.
- He agreed that, in applying for his student visa, he had submitted documents showing that he had access to a large sum sufficient to cover his tuition and living costs. I asked how, if he had been living in poverty in China, he had been able to find this money. He said he borrowed it from his friends and relatives. Recalling his evidence that had already been borrowing from them for five years I asked if they had been prepared to advance him this further large sum. He said he was under a lot of pressure and his life would be threatened if they did not give it to him. I put to him that these must have been very good friends and relatives, and that if they were so willing to keep advancing him money it was difficult to understand why he would have had any problems. He said he had no education and it was difficult for him to manage in China. Asked if this was the reason he

had come to Australia he said he just wanted to be here and did not want to return.

○ Asked if there was anything he wished to add he said there was not.

12. At the second hearing:

○ Asked if he feared harm in China for any reason other than his problems with local officials over his breach of family planning regulations he said he had suffered [an injury] in an [accident] in China which prevented him from undertaking any heavy labour. Asked what he was doing in Australia he said he was working doing odd jobs. Asked the nature of these jobs he said he was working as a [occupation deleted]. He was not earning enough to send money back to China and his family was surviving on casual work obtained by his wife.

○ Asked again if he feared harm in China for any other reason he said he did not. Noting that in his protection visa application he claimed to have been involved with members of a Christian church in China I asked why he would have made no mention of this at the hearing. He said I had not asked him anything about his involvement in a Christian church, so he did not talk about it. I noted that he had been given a number of clear opportunities to explain the reasons why he feared harm in China, at both hearings, and that he had stated just as clearly that he did not fear harm for reasons other than those he had already mentioned. He said he was converted to Christianity in 2010, mainly because he was fined for breaching the One Child Policy.

○ Asked if he did, in fact, fear harm in China because of this involvement he said the authorities think Christianity is an evil cult and they do not permit people to believe in it.

○ Asked again why he had not mentioned this previously he said that, no matter the reasons, he could not stay in China as an 'average person.' Noting that there are many million people living in China who might be described as 'average persons' I asked why he could not stay there. He said the officials continued to fine him over his breach of the One Child Policy. Chinese officials are corrupt. He had converted to Christianity.

○ Asked what Christian denomination he had been involved with he had it was 'just Christianity.' Asked if he knew anything more about it he said he prayed every day. Asked again he said he had not had time to attend a church because of the hours he worked, and there was no church near his home. Instead he read the New Testament at home. Asked if he had ever attended a church service in China he said there were only small family gatherings, every one or two weeks on Sundays. He attended these from 2010 –sometimes they were every three weeks. Asked what happened in these gatherings he said they just prayed and sang hymns. He himself was unable to sing any of them. He was not baptised as he was not 'qualified.'

○ Asked who had founded this church he said he knew only that it was organized by 'big sister' [Ms A], the person who had introduced him to it. He did not know anyone else who had founded it before her. Asked if other people had a name for it he said no individual is allowed to believe in Christianity in China. Asked if people outside the church

called it anything he said they did not. Asked what he knew about the life of Jesus Christ he said He ascended into heaven forty days after the crucifixion. Asked if he could tell me anything else about Jesus he said he had read many books but could not put it in a clear way. Asked if he could tell me any of the Parables he said one can only get eternity by believing in Jesus Christ. Asked again he said he had no idea. Asked how long ago, roughly, Jesus Christ lived he said he could not remember. Asked if he could say anything else about Jesus he said he only knew the ten 'rules' and he prayed every day.

- He had not had time to attend a church in Australia and there was no church nearby. Recalling his claim that he was employed only doing odd jobs in Australia I asked why this would not allow him sufficient time for church. He said his [job] coincidentally required him to work on Sundays.

- I put to him that, based on the evidence he had provided, I had strong doubts as to the truth of his claim to have had any contact with Christianity, either in China or in Australia. He said that in Australia he only read the New Testament, in private. I noted that in his protection visa application he claimed to have been involved with members of the Shouters church (Hu Han Pai) in China but that his responses at the hearing indicated he had no idea about such a church. He said he had nothing else to say. He had a simple belief in Christianity and did not think about it very much.

- I explained to him that if I came to believe he had not, in fact, had anything to do with Christianity this would lead to a conclusion that he would not involve himself with it if he returned to China and would not suffer harm for such a reason. He said he did not want to go to China. Even if Christianity were not a factor, he had had to pay a fine there and the government was corrupt.

- Asked if there was anything he wished to add he said he liked Australia and did not want to return to China. He was stressed psychologically and physically by the authorities in China. He did not want to lie and he hoped the Australian government would allow him to remain.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. On the basis of his passport which he submitted at the Tribunal hearings I accept that the Applicant is a citizen of the People's Republic of China and that his identity is as he claims it to be.

14. The Applicant claims to fear harm in China because of his religion, as a member of the Shouters church. He also claims he will be harmed because he has been unable to pay a fine, or fines, imposed on him and his wife for breaching China's family planning regulations by having a second child. He does not identify a Convention nexus for this harm but I accept that an imputed political opinion adverse to the government may be inferred as the reason for it.

Political opinion

15. I have strong doubts as to the credibility of the Applicant's unsubstantiated claim to fear harm in China for breaching family planning regulations.

16. The Applicant's account at the hearing of the reason for his alleged difficulties with the authorities over the regulations was notably vague, confused and inconsistent. His claim that his second child was born in [Year 2] is inconsistent with the [Year 1] date given in the protection visa application and I am not satisfied that he offered any convincing explanation for it. His evidence concerning the payments he had allegedly made toward settling a fine imposed on him for this reason cast no light on why it was that any of it would remain outstanding. He provided no clear information as to how much of it remained to be paid. He appeared to have little or no idea as to when it was that his [business] was allegedly confiscated. His claim that he was living in poverty after losing his [business] appears inconsistent with his evidence that he had relatives and friends who were willing and able to continue to support him to meet his day-to-day living costs, to the amount of Rmb 150,000 to 160,000, and also to provide him with the large sum required to obtain a student visa and travel to Australia. These are not minor or marginal matters but instead lie at the heart of his claim to fear harm in China for breaching the One Child Policy. I am not satisfied that his evidence at the hearing reflected any genuine, authentic experience of such circumstances and I find that this casts doubt on the credibility of his claims.

17. The Applicant's evidence at the hearing that his friends and relatives in China were able to provide him with these large sums appears inconsistent with the claim that he faceharm because he was unable to pay a fine which amounted to no more than Rmb 50,000. Had such a fine ever been imposed on him I am not satisfied he could not have paid it promptly if he had had the means to raise the much larger sums he mentioned. When this was put to him at the hearing he suggested that even if he had paid the initial fine, corrupt officials would continue to fine him. He offered no explanation as to why he would be targeted for extortion in this way and I am not satisfied that this claim, which was raised for the first time at the hearing, was more than an improvisation.

18. Taking these matters together I am not satisfied as to the credibility of the Applicant's claim that he was punished by the authorities for a breach of the family planning regulations with a fine and the confiscation of his [business]. Nor am I satisfied that he is at any risk of harm on return to China for such a reason or because he faces other fines imposed on him by corrupt officials.

Religion

19. When he was asked at the Tribunal hearings why it was that he feared harm in China the Applicant raised the matter of his alleged unpaid fine for breaching the family planning regulations and, later, [an injury] which he said prevented him from engaging in heavy labour. He was asked a number of times, at both hearings, if he feared harm for any other reason and his clear response was that he did not. He did not volunteer at any point that he had been involved with the Shouter church in China, that he and his father had suffered harm there as a consequence, that he had been forced to live in hiding

and had later had to flee to Australia or that he feared arrest and imprisonment on return for such a reason. It was only when he was asked, toward the end of the second hearing, why he had not mentioned his religious involvement that he confirmed that he had been involved with a church. He attributed his failure to mention it to the fact that he was not asked about it. Having considered this response, however, I am not satisfied it explains why he would not have volunteered details of a faith which is said in his protection visa application to have been highly important for him and which caused him to suffer serious harm over an extended period. I find that this casts strong doubt on the credibility of his claims of religious involvement and suffering in China.

20. The Applicant does not claim to have attended religious gatherings of any kind in Australia, although he said at the hearing that he reads the New Testament in private. His account of his alleged involvement with the Shouters sect in China was, like his account of his alleged problems with local officials, vague and largely devoid of circumstantial detail despite the importance this activity is said in his protection visa application to have had for him. Having considered these responses carefully I am unable to be satisfied that he was ever involved with a branch of the Shouters, or with any other Christian denomination, while he was in China, or that he embraced Christianity there. This being the case, I do not accept that he or his father were subjected to the various forms of harm he claims they suffered as a result of such an involvement, or that these forced him to flee to Australia.

21. I am reinforced in this conclusion by the Applicant's two-week delay in leaving China after his student visa was granted. I am not satisfied that such a delay is consistent with his claimed fear of imminent harm at the hands of the authorities. I have considered his response when this matter was put to him at the hearing – to the effect that he had wanted to farewell his family and friends - but I am not satisfied that it resolves my concerns about the delay.

22. Finally, I am not satisfied that the Applicant's delay of some eight months in applying for protection in Australia is consistent with his claimed fear of harm in China. At the hearing he claimed he did not need to apply for protection as his student visa was still valid. However, he acknowledged that he had not studied at all in Australia, and that he had known it would not be possible to renew his student visa. I do not accept that he can have been ignorant of the possibility of claiming protection until he had been in Australia for some time if, as he claims, his reason in coming to Australia was to seek protection.

Summary – refugee claims

23. In the light of all the information before the Tribunal I am not satisfied that the Applicant was a member of the Shouters sect or any other Christian church in China, or that he was ever harmed for such a reason. Nor am I satisfied that he was ever harmed for a breach of the One Child Policy, that he has an unpaid fine in China or that an adverse political opinion was imputed to him in such circumstances. I am not satisfied there is a real chance that he would suffer serious harm for these reasons if he were to return to China. He does not claim to fear harm there for any other Convention-related reason and no other reason is apparent on the face of the information before the Tribunal.

24. I am not satisfied that the Applicant has a well-founded fear of persecution because of his religion, his political opinion or any other Convention reason should he return to China, now or in the reasonably foreseeable future, and I am not satisfied that he is a refugee.

Complementary protection

25. For the reasons given above I am 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).)

26. I have also considered the alternative criterion in s.36(2)(aa) of the Act. However, having considered the Applicant's claims individually and cumulatively, and having found that he does not face harm of any kind for the reasons he has claimed, I am not satisfied there are substantial grounds to believe that as a necessary and foreseeable consequence of his being removed from Australia to China, there would be a real risk that he would suffer harm which would amount to significant harm in terms of s.36(2)(aa). For the sake of completeness I note in this context his claim at the hearing to have suffered an [injury] which would prevent him from engaging in heavy labour. However, as this injury has clearly not prevented him from working as a [occupation deleted] I am not satisfied that it would, in fact, have any impact on his ability to subsist in China.

27. 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).

DECISION

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

Andrew Mullin
Member

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