

**1311936 [2013] RRTA 888 (20 December 2013)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1311936  
**DIBP REFERENCE(S):** CLF2013/20036  
**COUNTRY OF REFERENCE:** China (PRC)  
**TRIBUNAL MEMBER:** Susan Pinto  
**DATE:** 20 December 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

### INTRODUCTION

1. The applicant is a citizen of [China]. He arrived in Australia [in] January 2013 on a Subclass 676 (Visitor) visa. The applicant applied to the Department of Immigration for the Protection (Class XA) visa [in] January 2013. The applicant claimed the Department and the Tribunal, in a statement prior to the hearing, that he is a Falun Gong practitioner who was detained and mistreated on a number of occasions. However, at the Tribunal hearing, the applicant stated that he is not a “genuine Falun Gong practitioner” but he is viewed as such by the Chinese authorities and has been persecuted and mistreated for this reason.
2. The delegate refused to grant the visa [in] July 2013 under s.65 of the *Migration Act 1958* (the Act). The delegate stated that as the applicant failed to attend the interview he was not satisfied on the brief and unsubstantiated claims made on the application form that the applicant was a Falun Gong practitioner or that he feared harm in China for this reason.
3. A summary of the relevant law is set out in an attachment to this decision. The issues in this review are whether the applicant has a well founded fear of persecution in China for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to China, there is a real risk that he will suffer significant harm. The Tribunal must consider, therefore, whether the applicant has a well founded fear of persecution because he is a Falun Gong practitioner, or is viewed as a Falun Gong practitioner, and, if not, whether there are substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia that there is a real risk that he will suffer significant harm because he protested in China.

### CONSIDERATION OF CLAIMS AND EVIDENCE

#### Evidence before the Department

4. The applicant submitted his application for the Protection visa with the assistance of his registered migration agent. The applicant provided a copy of his passport to the Department, indicating that it was issued [in] November 2009.
5. The applicant stated on the application form in response to questions as to why he left China; whether he experienced harm in China; who he believes will mistreat him; and why he believes this will happen, that “I am a Falun Gong practitioner”. The applicant referred to his imprisonment on different occasions and stated that he left China because he was at risk of being arrested again. The applicant stated that “details will be provided shortly”.
6. On 19 April 2013, the applicant was sent an invitation to attend an interview with an officer of the Department [in] May 2013. The invitation was sent to the applicant’s registered migration agent and the postal records indicate that it was “delivered”. However, the applicant did not attend the interview and no further evidence was provided to the Department. Accordingly, the delegate made a decision in July 2013 to refuse to grant the visa.

## **Application for review**

7. When lodging the application to the Tribunal in August 2013, the applicant provided a detailed statement of his claims for protection. The applicant also attended a hearing with the Tribunal on 19 December 2013 at which he gave evidence and presented arguments. The relevant aspects of the applicant's claims in the statement and his oral evidence during the hearing are discussed below. During the hearing, the Tribunal advised the applicant of several concerns it had with aspects of his evidence and significant inconsistencies between his written and oral evidence.

### **Does the applicant have a well founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention?**

8. As stated above, the Tribunal must consider whether the applicant has a well founded fear of persecution in China for one or more of the five Convention reasons. In this matter, the Convention reasons raised by the applicant are his actual or imputed political opinion and/or his membership of a particular social group of Falun Gong practitioners. Having considered all the evidence, the Tribunal is not satisfied that the applicant is a truthful witness. The Tribunal considers that several aspects of the applicant's claims were confused and inconsistent. The Tribunal considers that the applicant has manufactured the totality of his claims to fear harm in China and does not accept that he left China or has sought protection in Australia for the reasons he has claimed. The Tribunal's assessment of the evidence and its reasons for reaching these conclusions follow.
9. The Tribunal firstly considers that the applicant's written claims on the application form and in his statement to the Department differ considerably from his oral evidence to the Tribunal. As indicated above, in his Protection visa application, the applicant stated in response to several questions relating to his fear of harm in China and his reasons for leaving China that he is a Falun Gong practitioner. The applicant also stated in his statement to the Tribunal that he applied for a Protection visa because he is a Falun Gong practitioner. The applicant states that in early 1997 he learned about Falun Gong. He claims that he found out that it originated from Buddhism so he accepted it without hesitation and he and the staff from their [work place] practised it together. The applicant stated that he practised every month until September 1999 until he was detained for 2 years. The applicant states that he recommenced his practise of Falun Gong in 2005 after he suffered business losses as he thought that "only Falun Gong can let me release my anger and grievance". The applicant stated that he practised Falun Gong again secretly "according to my memory" and that Falun Gong "opened my mind" and he became calm and outgoing again.
10. During the Tribunal hearing, the applicant was asked at the commencement of the hearing to remove several notes in the Chinese language which contained dates and other details. When he continued to look at the notes, the Tribunal requested that he provide them and they were given back to the applicant near the conclusion of the hearing. The applicant was asked at the beginning of the hearing when he became a Falun Gong practitioner. The applicant had some difficulty responding to this question, but eventually stated that it was in 1998 or 1999. The applicant was then asked a number of questions about why he was interested in Falun Gong, what attracted to him to Falun Gong and why it was important to him. The applicant responded that he was young and did not think much about it and he followed the others. After some time, the applicant then stated that "to be honest" he does not think Falun Gong is important. The applicant stated at that point that he does not have a deep understanding of Falun Gong because he was involved with it for such a short time and it was prohibited in

1999. When asked questions about important principles relating to Falun Gong, the applicant then stated that he did not get very involved in Falun Gong. When advised that he appears to know very little about Falun Gong, the applicant stated that he did not go to any lectures and he is “very innocent”. The applicant later indicated that he was detained from 1999 to 2001 because he was practising with others at the [work place] where he worked and it was subsequently forced to close and sealed. The applicant claimed that he was, after that time, regarded as a practitioner and detained and harshly treated by the authorities. When asked about this again at a later point during the hearing, the applicant stated that he is not a genuine Falun Gong practitioner and he has “no idea” about Falun Gong and he has had no involvement with it in Australia.

11. As discussed during the hearing, the Tribunal considers that the applicant has significantly altered the nature of his claims. The applicant’s written evidence indicates that he is a Falun Gong practitioner and he was detained and mistreated for that reason. By contrast, the applicant’s oral evidence to the Tribunal, after several questions in relation to the importance of Falun Gong to him and the principles of Falun Gong, was that he is not a practitioner and he was only involved for a very short time and then ceased his involvement but continued to be regarded as a practitioner. The Tribunal accepts that it is plausible, given the serious mistreatment of Falun Gong practitioners in China,<sup>1</sup> that minimal involvement by a person with Falun Gong even several years ago may lead to continuing harassment by the authorities. However, the Tribunal is not satisfied that this was the applicant’s experience. The Tribunal considers it evident that the applicant, when deprived of his detailed notes, which he confirmed contained dates and other details of his claims, had considerable difficulty responding to questions about his practise of Falun Gong and, at that point, altered his claims such that he no longer claimed to be a genuine practitioner, and instead claimed to be someone who had a short term interest in Falun Gong some 15 years ago and was regarded as a practitioner since that time. The Tribunal considers that it is clear that the claims on the application form and in the statement to the Tribunal were that the applicant is a Falun Gong practitioner and it was for that reason that he was detained and harmed in China, whilst his evidence at the hearing was, after he was unable to adequately respond to questions about Falun Gong, that he is not a “genuine” Falun Gong practitioner, but he has been regarded as such from 1999. The Tribunal considers that the evidence in relation to this issue is indicative of the fact that the applicant’s claims have been manufactured.
12. In addition to the above, the Tribunal considers that the dates and length of the applicant’s detentions differ between his written and oral evidence. The applicant stated on the application form that he was detained for various periods, including between September 1999 and November 2001; August 2005 and November 2005; September 2007 and December 2007; July 2008 and November 2008; and September 2010 and November 2010. In his written statement to the Tribunal, the applicant also stated that he was detained in September 1999 and released in November 2001, but that he was arrested again in September 2007,

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<sup>1</sup> See for example, DIAC Country Information Service 2011, *Country Information Report No.11/15 – CHN11513 Falun Gong Update* (sourced from DFAT advice of 6 April 2011), 8 April <[CISNET China CX262422](#)> US Department of State 2011, *July – December, 2010 International Religious Freedom Report: China (includes Tibet, Hong Kong, Macau)*, 13 September <http://www.state.gov/documents/organization/171651.pdf> Accessed 15 September 2011 <[\\ntssyd\REFER\Research\2011\USDOS\IRF\168351.htm](#)>; and Human Rights Watch (undated), *Reeducation through Labor in China*, <<http://www.hrw.org/legacy/campaigns/china-98/laojiao.htm>> Accessed 14 November 2011.

September 2008, September 2009 and September 2010. When asked about these arrests and detentions at the hearing, the applicant stated that many things happened and that is why he wrote the dates down on a piece of paper. The applicant had difficulty responding to the question as to when he was first arrested and initially stated that it was at the end of the year in 1999 but he cannot remember. He then stated that it was probably October, but then stated that it was September or October. When asked when he was arrested again, the applicant stated that after 1999 he was arrested again in 2006 and 2009 for 1 week at a time and in September 2007 he was arrested for half a month. When advised of the inconsistencies in his written and oral evidence, the applicant stated that he could not remember clearly and the first detention was for the longest time and the others were only for “custody” and were for shorter periods.

13. The Tribunal does not accept the applicant’s explanation for the inconsistencies in relation to his detentions. The Tribunal considers that had the applicant genuinely been detained in China on several occasions that he would recall at least the length of the detentions, if not the exact dates of each of the detentions. The Tribunal does not accept that the applicant would need notes in order to remember how long he was detained and considers that his written claims as to the length of his detentions indicate that he was detained for 2 years and subsequently for 2 to 4 months on the other 4 occasions, whereas his oral evidence indicates that he was detained once for a lengthy period and for the other periods it was only for 1 to 2 weeks. The Tribunal considers that the inconsistent evidence in relation to this issue is further indicative of the fact that the applicant was not detained in China because he was, or was imputed as, a Falun Gong practitioner.
14. In addition, the Tribunal considers that the applicant’s evidence as to when he ceased employment in China is inconsistent between his written and oral claims. The applicant indicated on the application form that from 1980 to 2011 he had operated small business, and had been a [occupation] and a [occupation] at various times until September 2011 and that he was unemployed from October 2011 until January 2013. In his statement, the applicant stated that he sold his [deleted] in September 2011. However, when asked at the hearing when he ceased his employment in China, the applicant stated that he had been a [occupation] and had owned his own company and ceased work about a month before he left China when he sold his [deleted]. When asked about the inconsistencies in relation to this issue, the applicant stated that it was his own business so it was not really working. The Tribunal does not accept the applicant’s explanation for the inconsistencies in relation to whether or not he was working prior to his departure from China. The Tribunal considers it evident that the applicant had forgotten claims he made regarding his employment on the application form and in the statement provided to the Tribunal. In the Tribunal’s view, this is further indicative of the fact that the applicant has manufactured his claims in China.
15. In relation to his employment, at the Tribunal hearing, the Tribunal discussed evidence on the Department’s file indicating that the applicant was not a [occupation] in China and was instead a manager in a company. The applicant indicated that the information provided for the visitor visa was false. The Tribunal has no further evidence in relation to these issues and in reaching the findings about the applicant’s employment in the previous paragraph, has not had any regard to this evidence.
16. As discussed above, the Tribunal sought to ask the applicant at the hearing about the importance of Falun Gong to him and the principles of Falun Gong, to which he indicated that he did not know. Apart from correctly stating that it was banned in 1999, the applicant was unable to articulate any knowledge of Falun Gong at the hearing. The Tribunal

acknowledges that the applicant has since essentially retracted his claims to be a genuine Falun Gong practitioner and instead claimed that he was interested for a brief period only, but considered a practitioner after that time. The Tribunal considers that the applicant's extremely limited knowledge of Falun Gong and his inability to provide any details of the principles of Falun Gong do not indicate that he is or ever has had any involvement with Falun Gong. The applicant's own evidence at the hearing that he has had no involvement with Falun Gong in Australia. The applicant stated that he is very busy and it has been difficult to find work in Australia. The Tribunal accepts that the applicant has had no involvement with Falun Gong in Australia. However, the Tribunal considers that this is because he has no interest in Falun Gong, not because of any work or other commitments.

17. The Tribunal does not, therefore, accept the applicant's claims as set out in his protection visa application where he essentially claimed to be a Falun Gong practitioner who has been detained and mistreated on a number of occasions since that time. Nor does the Tribunal accept the applicant's elaboration on his claims in his statement to the Tribunal, whereby in addition to claiming to have been detained and arrested on a number of occasions, he also claimed that he was harassed and a [business] that he had opened was forced to close due to harassment and corruption from the police and other government departments who sought money from him on a constant basis. Nor does the Tribunal accept that the applicant was again harassed and his [next business] forced to close due to the police continually taking money from him. Nor does the Tribunal accept that the applicant had to pay someone in order to help him to obtain a passport to leave China or that he went to [another location] because he feared harm in China. The Tribunal also does not accept the altered nature of the applicant's claims as told to the Tribunal during the hearing. The Tribunal does not accept that the applicant had any association with Falun Gong in 1999 and that this association led to him being imputed or regarded as a Falun Gong practitioner and detained and mistreated as a result. As stated above, the Tribunal considers that the applicant has manufactured the entirety of his claims to fear harm in China. The Tribunal does not accept that the applicant is a Falun Gong practitioner or is or was imputed as a Falun Gong practitioner. It follows that the Tribunal does not accept that the applicant would seek to be involved in Falun Gong upon his return to China or that there is a real chance that he would be harmed for this reason upon his return to China.
18. Accordingly, the Tribunal is not satisfied that there is a real chance that the applicant will be harmed for reasons of his political opinion, imputed political opinion, particular social group, or for any other Convention reason if he returns to China now or in the reasonably foreseeable future. Therefore, the Tribunal finds that the applicant does not have a well founded fear of persecution if he returns to China now or in the reasonably foreseeable future.

**Are there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, that there is a real risk that she will suffer significant harm?**

19. The Tribunal has not accepted that the applicant fears harm in China for the reasons he has claimed. The applicant has not advanced any other reasons for fearing to return to China. Therefore, the Tribunal is not satisfied that there is any evidence that the applicant will suffer significant harm, which includes arbitrary deprivation of their life, the death penalty torture, cruel or inhuman treatment or punishment, and degrading treatment of punishment, for any reason upon his return to China. The Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to China, that there is a real risk that he will suffer significant harm.

## **CONCLUSIONS**

20. 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).
21. 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).
22. 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**

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

Susan Pinto  
Member

## ATTACHMENT - RELEVANT LAW

24. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

- ‘(2) A criterion for a protection visa is that the applicant for the visa is:
- (a) a non-citizen in Australia in respect of 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)) 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 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.’

### Refugee criterion

25. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.
26. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’

27. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
- (a) a threat to the person's life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person's capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

### **Complementary protection criterion**

28. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

### **Ministerial direction**

29. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - '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.