

060748603 [2006] RRTA 231 (14 December 2006)

DECISION RECORD

RRT CASE NUMBER: 060748603
DIMA REFERENCE(S): CLF2006/49132
COUNTRY OF REFERENCE: China (PRC)
TRIBUNAL MEMBER: David Dobell
DATE DECISION SIGNED: 14 December 2006
PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of China (PRC) arrived in and applied to the Department of Immigration and Multicultural Affairs (“the Department”) for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate’s decision.

The Tribunal finds that the delegate’s decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged, in this case 5 May 2006, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. ‘Refugees Convention’ and ‘Refugees Protocol’ are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997)

191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

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

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

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

The applicant is from Inner Mongolia. He arrived in Australia and lodged his protection visa application some time later.

In his protection visa statement, the applicant claims he was born in a city in Inner Mongolia. He is an ethnic Mongolian and has been a Buddhist since little. He joined 'Huang Jiao', an old Mongolian religion several years prior to arriving in Australia. He states that this belief is totally forbidden by Chinese government.

The applicant stated that he did not let his family know he had joined this religion. A couple of years ago the local community administration found out he had been attending meetings of this religion and he had an interview with one of the community administrators. He states that the administrator told him that if he continued with Huang Jiao he would be reported to the PSB.

The applicant stated that some time later he was again called in to see the community administrator. The administrator knew he had been still attending Huang Jiao and he was detained and asked to sign a confession. He was later let out.

The applicant stated that he was concerned for his safety so he left China, even though his 'personality' tells him to stay with his homeland.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal took a copy of those pages in the applicant's passport which were not blank and placed these on the Tribunal's file.

The Tribunal first asked the applicant whether he had help completing his application. He said that an acquaintance had helped him and read it back to him in Mandarin. He agreed it was true and correct in every respect.

As to what might happen to him should he return to China and continue practising his religion, the applicant said that he thought he might be arrested and jailed or even go missing. He said he would lose his freedom, and may even lose his job if the PSB are involved. He also said he was afraid for his family, as they would be harassed.

The applicant said the local authorities said to him they consider his religion Huang Jiao to be an 'evil cult' and reported him to the PSB, who came to his house looking for him shortly after he left his home. As to how he knew this, he said his wife told him over the phone. He said they consider Huang Jiao as a minority group interested in causing a split or separation for Inner Mongolia from China.

The applicant is not sure whether he is in any trouble at present, but will continue to practice his religion should he return. As to whether there are any other reasons he might fear persecution he said no.

As to the nature of the Buddhist group he was involved with, he said it was known as Huang Jiao – or ‘yellow’, as its followers wear that colour, and is also known as ‘yellow hat’. It is from, or similar to, Tibetan Buddhism. His temple is near his house. As to how often he attends, he said he attends according to the custom of the group. He said that a number of men gather and meet for a period of time daily. There was no leader but there was an organiser. He was not an organiser, as he joined the group late. At their meetings they learnt the history of Huang Jiao and sang songs. There were also written documents and scriptures, which they brought with them to study.

As to whether they were secretive in this process of having their meetings the applicant said they were, and they all promised each other they would not mention the group to their families or outsiders. They would lock the door, and someone would take turns to stand watch. As to how the authorities knew about his group, he said that they must have seen people entering and exiting the meetings. They were not meeting during the day as the normal Buddhist groups did. They would meet in a small room near the temple, not used by the other groups.

As to when he became a Buddhist, he said he did this formally some time ago when he got his Dedication to Buddhism Certificate [which is on file]. This was issued by the temple. He is still a formal registered Buddhist, but is also a follower of Huang Jiao. As to whether Buddhists are persecuted in Inner Mongolia he said no, not unless they follow the Tibetan Buddhism or Huang Jiao. He agreed that this was the type of Buddhism as followed by the Dalai Lama.

As to the distinction between Huang Jiao and Buddhism generally, the applicant said that, under Huang Jiao, they worshiped the King Lun Zhuan meaning “rotating”. They also worship the Emperor Chen Ji Si Han of the Yuan dynasty of the 15th Century, who they believed was sent to the earth by Buddha and they follow their own scripture called ‘sidi’. Their ideology is also to promote the Mongolian ethnic group and become independent of China. As to whether he was suffering religious or political persecution he said both, because as a minority group they are suppressed. As to whether this group was also known as ‘geluk’ or ‘gelug’ he said yes.

As to how the applicant practices Huang Jiao in everyday life, he said they must follow five rules – not to kill, not to steal, no adultery, no lying and no drinking.

The applicant said he has been restricted in his practice of Huang Jiao in Australia. He attended a temple in Sydney but did not like it because it was full of businessmen wanting to pray to Buddha just to get rich. He has attended another temple a number of times, and found it suitable for him but it is too far away to get to all the time. As to whether there was anywhere suitable closer to home he said he has not found anywhere yet. He has few friends here and there is a language barrier, so he cannot get more information. He said that he has only been able to practice at home, by singings songs and reading books on Huang Jiao and Mongolian history. He said he brought these books out of China, wrapped up in his luggage.

As to whether he considered himself knowledgeable of Huang Jiao, he said that it was traditionally practised by the intellectuals in Mongolia. His father is considered an

intellectual and he considers himself of the intellectual class, as he has read relevant books since childhood. He said he knows something of Huang Jiao, but as he is a new member he does not know very much yet.

As to whether he had practised his Huang Jiao here, just to improve his chances of getting refugee status, the applicant said no, he is not that sort of person.

As to his family, he lived with his wife and child before he came to Australia. The Tribunal noted that he had failed to mention them on his protection visa application forms. He said he was afraid to mention them, as he did not want to get them involved and get them in trouble and that Huang Jiao was his own personal thinking, not his family's thinking.

The Tribunal pointed out that the forms asked a question and he had failed to answer it correctly. Further, he had earlier told the Tribunal that the forms were true and correct and signed a sworn statement to that effect. He had no response to this. The Tribunal then asked for his family's details. [Information about applicant's family deleted in accordance with s.43 as it may identify the applicant.]

As to what he told his wife about his plans to leave, the applicant said she knew he was leaving, but thought he was only going on holidays for a short while. He didn't discuss the truth as people become targets if they know too much. He has talked over the phone to her but has not given her any details of his refugee application. They speak at intervals and they last spoke half a month ago. As to whether he hoped to have his wife join him, he said he really wanted her to, but was afraid. As to why he did not try to get his whole family out of China, he said he considered this but did not have enough money.

The applicant also speaks to his parents at intervals. He said his family are not strong Buddhists and are not followers of Huang Jiao.

As to the PSB visit, the applicant said that they came to his house asking of his whereabouts. He told his wife to say that he had just 'left' and not to tell any more. As to who else knew of his travel plans, his wife was the only one who knew he was going anywhere.

The applicant said that he only made the decision to apply for refugee status after he arrived in Australia. He did not tell his wife of this, but she has since said to him not to come back, as she is afraid for him. He is not worried about her and his child unless he has to go back to China. She has not been harassed by the PSB.

As to the incidents with the Chinese authorities, the first was when the applicant was visited by a community administrator, who wanted him to come in and have an interview. He went to the administrator's office and was told they knew he was attending some sort of secret organisation. The administrator did not know the details but heard it was promoting the independence of ethnic groups. The administrator said this was not allowed and had to stop. He signed a promise to not attend the activity any more. If he did not do this the administrator was going to refer him to the PSB. He tried to justify his attendance. The administrator said if they want to do things they must do them in public, not in secret.

The next incident was when the applicant was required to meet the community administrator again, but this time, not in the administrator's office but in another room. He said the administrator wanted him to tell everything that he had done otherwise the administrator would report him. They knew that he was still attending the group and knew it was Huang

Jiao. He was locked in a small room without food or water for some time. The Tribunal asked whether he told everything and he then said the administrator did not ask very detailed questions; the administrator's purpose was to stop attendance.

His family came to sponsor him out. He said they had to sign a document to promise they would watch him carefully and then sign a promise that he would not do Huang Jiao. He did not have to pay any money to be released.

As to what happened to other members, he said that it was not clear as he had lost contact with them. He supposed they had the same consequences. The Tribunal asked whether he had heard of other Huang Jiao followers being brought in around the time as his second meeting with the community administrator. He said some had got an oral warning, but were not treated as badly as he was. As to the consequences of the first meeting, he said others were told not to attend and a few did stop going to Huang Jiao. He said a lesser number attended the Huang Jiao meetings after this date.

As to the other meeting he talked of in his Statement concerning the Chinese authorities' crackdown on underground religious activity, he said this was in the papers and on TV and he was very concerned about it.

As to how he obtained his passport, he said he had one before and this one had been renewed. He had gone overseas to Mongolia and needed a passport, which had now expired. He said it was quite easy to get his passport renewed and there were no problems getting the passport from his local town.

As to what happened after the second incident, he said he considered what to do for a few days. He was scared of being detained or of going missing. He then said that he had already applied for an Australian visa. He had asked his sibling to get it for him. As to why he did this, he said he was planning to take a holiday to Australia; he had no thoughts of a refugee application at that time.

The Tribunal asked the applicant why he had decided to take a holiday in Australia, of all the places in the world he had not been to. He said he likes it here, and he has a sibling here, who came here a number of years ago. His sibling is an Australia Citizen. The Tribunal asked whether he had applied for a visa for his wife and child, if he was thinking of taking a holiday. He said his child was too young to travel. The Tribunal asked whether he often went on holidays by himself. He said he sometimes went with friends, but that he did not travel very often anyway.

The Tribunal asked whether the applicant took his wife to Mongolia for a holiday. He said he did not, but that it was not just a holiday, it was a business trip.

As to how he actually left China, the applicant said he went by himself by train to Beijing and flew to Australia.

As to his employment, he said he worked in a company as an administrative worker and had done so for many years. He told his employer he was going on a holiday. He confirmed he had studied for a number of years and his highest educational attainment. He did not think it would be easy to get work elsewhere in China as there is high unemployment. [Information about applicant's family deleted in accordance with s.43 as it may identify the applicant].

The applicant has not worked elsewhere in China. He has been to one major city a few times in his life and has not been to other major cities in China.

As to whether he could live and work elsewhere in China, the applicant said he did not think so, as Mongolians like to live together and he would get homesick elsewhere in China. As to whether he could practise his Huang Jiao religion safely elsewhere in China, he did not think that he could. He thought there would be the same consequences –he would be persecuted and suppressed as a Huang Jiao practitioner. He also did not think there would be anywhere else to practice in other areas of China although Huang Jiao is very popular in Inner Mongolia.

The applicant did not believe he would be discriminated against as an ethnic Mongolian in other parts of China, only as a Huang Jiao follower.

The Tribunal wrote to the applicant, asking him to provide further information concerning his sibling, who he said lives in Australia. The Tribunal received his response, in which he provided the name of his sibling, date of birth, and address as requested.

COUNTRY INFORMATION

As a starting point, the Tribunal referred to Wikipedia, which provides the following information on Tibetan Buddhism:

Schools of Tibetan Buddhism

Tibetan Buddhism has four main traditions (the suffix pa is comparable to "er" in English):

Nyingma(pa), The Ancient Ones, the oldest and original order founded by Padmasambhava himself

Kagyü(pa), Oral Lineage, has one major subsect and one minor subsect. The first, the Dagpo Kagyü, encompasses those Kagyü schools that trace back to Gampopa. In turn, the Dagpo Kagyü consists of four major sub-sects: the Karma Kagyü, headed by the Karmapa, the Tsalpa Kagyü, the Barom Kagyü, and Pagtru Kagyü; as well as eight minor sub-sects, all of which trace their root to Pagtru Kagyü. Among the eight sub-sects the most notable of are the Drikung Kagyü and the Drukpa Kagyü. The once-obscure Shangpa Kagyü, which was famously represented by the 20th century teacher Kalu Rinpoche, traces its history back to the Indian master Niguma, sister of Kagyü lineage holder Naropa.

Sakya(pa), Grey Earth, headed by the Sakya Trizin, founded by Khon Konchog Gyalpo, a disciple of the great translator Drokmi Lotsawa. Sakya Pandita 1182–1251CE was the great grand-son of Khon Konchog Gyalpo.

Geluk(pa), Way of Virtue, also known as Yellow Hats, whose spiritual head is the Ganden Tripa and whose temporal head is the Dalai Lama, who was ruler of Tibet from the mid-17th to mid-20th centuries. It was founded in the 14th to 15th century by Je Tsongkhapa, based on the foundations of the Kadampa tradition.

...

Red Hat & Yellow Hat Sects, Ka'ma and Sarma traditions

The schools sometimes divided into the "Old Translation", or Nyingma, and "New Translation" (Sarma) traditions, with the Kagyu, Nyingma and Kadam/Geluk among the latter. They are also sometimes classified as "Red Hat" and "Yellow Hat" schools, with the Nyingma, Kagyu and Sakya among the former and the Geluk comprising the latter.

Wikipedia 2006, 'Tibetan Buddhism', 14 November, http://en.wikipedia.org/wiki/Tibetan_Buddhism, Accessed 15 November 2006. The Tribunal notes that Wikipedia is a Web-based free-content encyclopaedia which is written collaboratively by volunteers.

The US Congressional-Executive Commission on China's *Annual Report 2006* reports that "Chinese government enforcement of Party policy on religion creates a repressive environment for the practice of Tibetan Buddhism":

The Party tolerates religious activity only within the strict requirements of the Chinese Constitution, laws, regulations, and policies. The government interprets and enforces these requirements in a manner that interferes with the Tibetan Buddhist monastic education system and discourages devotion to the Dalai Lama and the other important Tibetan Buddhist teachers who live in exile.

Party policies toward the Dalai Lama and Panchen Lama, the second-ranking Tibetan spiritual leaders, seek to control the fundamental religious convictions of Tibetan Buddhists. Government actions to implement Party policies caused further deterioration in some aspects of religious freedom for Tibetan Buddhists during the past year.

US Congressional-Executive Commission on China 2006, *Annual Report 2006*, 20 September, pp.83

According to the US Department of State's *International Religious Freedom Report 2006*, followers of Tibetan Buddhism including those in the Inner Mongolia "faced more restrictions on their religious practice and ability to organize than Buddhists in other parts of the country" (US Department of State 2006, *International Religious Freedom Report 2006 – China*, 15 September, Introduction.)

A statement by the Southern Mongolian Human Rights Information Centre dated 27-28 July 2006 provides extensive information on the ability of Buddhists to practice their religion in Inner Mongolia. The statement concludes by saying that regional autonomy has not guaranteed the rights of Mongols to practice Buddhism without interference and that the "future looks bleak" for Mongols in China:

Regarding the state of religion in Southern Mongolia, I will focus mainly on Buddhism which is the traditional religion of the Mongolian people. Buddhism has been the predominant religion of Mongols and an integral part of Mongol cultural identity since the late 16th century. Buddhist temples served as centers of Mongolian

intellectual life. Until the takeover of Southern Mongolia by the Chinese Communist Party in 1947, Buddhist traditions and practices remained largely intact.

During the Cultural Revolution, almost all Buddhist temples in Mongol areas were destroyed, and lamas were dispersed, otherwise removed, or forced to give up their vows of monkhood. At present, only a handful of temples are operative; and lamas in Southern Mongolia are few and far between. The exact statistics are not known. One estimate suggests that some 40 percent of the Mongol population acknowledge their Buddhist beliefs. Under the pretext of “disturbing public order,” “organizing an illegal gathering,” or “advocating superstitious beliefs,” individuals may be persecuted for religious practice.

Two bureaucracies, the government’s Religious Affairs Bureau (zong jiao ju) and the Chinese Communist Party’s United Front (tong zhan bu), both with branches at all administrative levels, tightly control all religious activities through the formulation of laws and regulations and through day to day management of Buddhist institutions.

Recruitment of prospective monks previously took place when boys were 8-10 years old. Today, recruiting young people under the age of 18 is strictly prohibited. The regulation has interfered with the traditional teacher-student relationship and with the transmission of teachings and doctrine.

Publication of Buddhism materials is strictly controlled. During the Cultural Revolution (1966-76), it was a crime to publish Buddhist publications. In the 1980s, Buddhist publications were permitted if the authorities were satisfied that a clear connection to a non-religious purpose, such as the promotion of culture or the study of history, existed. Since the 1990s, Buddhist publications are less regulated, but circulation is strictly controlled.

Publications are offered only to temples and monks. Authorities consider all religious activities practiced outside a “designated place” as “illegal and superstitious [activities designed to] dupe the common public.” Government officials regularly go to temples to force lamas to participate in so-called “political study” indoctrination.

Because government authorities view large organized religious gatherings as having the potential to undermine the Party control, Mongolian Buddhist institutions are prohibited from communication with their Tibetan counterparts and laws and regulations forbid “inter-regional religious activities” (kua di qu xing zong jiao huo dong”).

Temples are expected to sustain themselves financially. But private fund raising is generally prohibited. If funds are collected, it is expected that they will be shared with the religious bureaucracy. Religious authorities, recognizing the potential revenues to be realized, have converted many temples into tourist attractions rather than sites for religious study and worship. Lamas are particularly disturbed by tourists and government officials who disrupt religious worship at will.

In addition, all temples must regularly report their activities to the relevant religious authorities. All lamas must sign a contract and pledge loyalty to the Party and government.

It is clear that authorities in Southern Mongolia discourage Buddhist belief and practice, that access to places of worship is limited and that individuals risk persecution for religious practice.

...In sum, the systematic erosion of cultural and religious rights for Mongols in China, suggests that the laws and regulations promising autonomy have not been translated into meaningful state policy. Regional autonomy has not guaranteed the rights of Mongols to freely use their own language, to preserve and promote their traditional culture, to practice their religion without interference, in short, to preserve their cultural identity. The future looks bleak.

Togocho, Enhebatu 2006, *Cultural and Religious State of the Mongols in China*, Statement of the SMHRIC at Human Rights In China – Minority Rights Group Workshop, New York 27-28 July 2006, 27-28 July.

An article dated 22 February 2006 in *The Manila Times* reports that while Mongolians “are allowed to quietly trace their cultural roots”, Chinese authorities “remain watchful for any signs that spiritual emotions could challenge the existing social order”:

It was the weekend in Hohhot, the frozen capital of north China’s Inner Mongolia region, and hundreds had turned up at the Dazhao temple, a center of Tibetan Buddhism for the past more than four centuries.

...As China becomes a freer society, Mongolians and other ethnic minorities are allowed to quietly trace their cultural roots, and usually those with memories of life before Communist times are the first to seize the opportunity.

...But even the dense smoke could not disguise the constant and, it seemed, deliberately visible presence of uniformed police.

While post-reform China boasts of its religious tolerance, the authorities remain watchful for any signs that spiritual emotions could challenge the existing social order.

This is especially the case in areas such as Inner Mongolia, where different ethnic groups mix to an unusual extent, bringing together Mongolians, Han Chinese and Muslim Huis, the descendants of Arab and Persian traders.

Further complicating the situation, the Mongolians have adhered to the unique Tibetan style of Buddhism since the late 16th century.

Recognizing the power of religion, the Chinese government is unlikely to ever allow the monks to regain the sway they had in society before the Communist revolution of 1949

Harmsen, Peter 2006, ‘Revival of Tibetan Buddhism in China’, *Manila Times*, 22 February.

A report dated 14 October 2004 by the NGO, Tibetan Youth Congress, reports that religious controls “remain particularly tight” in Inner Mongolia:

However, there is a little respect in China for religious freedom, though it is recognized in the constitution. All religious groups and spiritual movements must register with the government, which judges the legitimacy of religious activity. The government also monitors the activities of the official religions (Buddhism, Taoism, Islam, Protestantism, and Catholicism). It targets leaders and the adherents of various religious groups for harassment, interrogation, detention, abuse, and prosecution and destroys or seizes unregistered places of worship. The extent to which such actions are taken or rules are enforced, though, varies widely by region. Religious controls remain particularly tight in Tibet, Xinjiang, Inner Mongolia and other areas.

Tibetan Youth Congress 2005, *“In Paper, In Practice” – A response to the China’s ‘White Paper’ on Human Rights*, 14 October.

The US Congressional-Executive Commission on China’s *Annual Report 2005* reports that the Chinese government “tightly restricts religious practices and expressions of cultural identity” in Inner Mongolia:

The religious environment for Tibetan Buddhism has not improved in the past year. The Party demands that Tibetan Buddhists promote patriotism toward China and repudiate the Dalai Lama, the religion’s spiritual leader. The intensity of religious repression against Tibetans varied across regions, with officials in Sichuan province and the Tibet Autonomous Region currently implementing Party policy in a more aggressive manner than officials elsewhere.

...The environment for the practice of Tibetan Buddhism has not improved in the past year. The Party does not allow Tibetan Buddhists the freedom to practice their religion in a meaningful way, and instead tolerates religious activity only within the strict limitation imposed under the Chinese government’s interpretation of the Constitution, laws, regulations, and policies. The Chinese leadership refuses to acknowledge the Dalai Lama’s role as spiritual leader of Tibetan Buddhists

US Congressional-Executive Commission on China 2005, *Annual Report 2005*, 11 October, pp.14-15, 43 & 46-47.

Testimony by Human Rights Watch before the US House Committee on International Relations on 21 July 2005 reports that the Chinese government imposes “the same strict limits on religious observance in Inner Mongolia” as it does in Tibet and Xinjiang (Human Rights Watch 2005, *Freedom of Thought, Conscience, Religion, and Belief*, Testimony before the House Committee on International Relations, 21 July.)

According to Nicolas Becquelin of Human Rights in China, reported in *The Standard* on 18 February 2005, religious affairs in Inner Mongolia “are perceived as matters concerning national security, the fight against separatism and anti-state activity”:

In fact, the vagueness of much of this document is such that anybody could find oneself on the wrong side of the law. Even though China’s legal reform efforts are rightly being applauded, its laws and regulations are still riddled with clauses that guarantee that the Communist Party has ample scope for arbitrary interpretation. In this case, the new regulations broad definitions make it easy to ban, close down, or

hinder any religious group that has arisen the suspicion of the authorities. In the case of China's ethnic minorities, for example, little or no protection is guaranteed.

Even under the new provisions, religious affairs in Xinjiang, Inner Mongolia or Tibet are perceived as matters concerning national security, the fight against separatism and anti-state activity, thus confirming that religious policies in these areas go hand in hand with the states overall goals of assimilation of all minorities.

Here, the least expression of dissent, whether spurred by religious devotion or by the attempt of asserting ones identity, is met with the full spectrum of the repressive apparatus of a police state

Becquelin, Nicolas 2005, 'Reins tight on religious affairs', *The Standard*, 18 February.

FINDINGS AND REASONS

The applicant claims to fear persecution in China because he is a follower of 'Huang Jiao', a type of Tibetan Buddhism.

The Departmental delegate stated at point 5 on page 7 of his *Decision Record*, attached to his letter to the applicant, that he had found no mention of Huang Jiao on the Southern Mongolia Human Rights website over a number of years, which he took to indicate that it is not a newsworthy movement.

The Tribunal does not consider that this is a reasonable conclusion to draw from apparently limited information. The applicant stated Huang Jiao had a few names, 'yellow' or 'yellow hat' being two. The independent country information shows that Huang Jiao is also known as 'geluk' and that it is a type of Tibetan Buddhism, which along with other types of Tibetan Buddhism is subject to repression in China, especially in Inner Mongolia.

The independent country information suggests that Chinese authorities in Inner Mongolia discourage Buddhist belief and practice generally, and that access to places of worship is limited and that individuals risk serious persecution for religious practice. Religious affairs in Inner Mongolia are seen to be matters concerning Chinese national security and are part of the Chinese authorities fight against separatism and anti-state activity there.

The independent country information also suggests that followers of Tibetan Buddhism in China generally would be subject to systematic and discriminatory persecution wherever they should live in that country. The Tribunal considers that followers of Buddhism may well be able to practice their religion elsewhere in China, it being one of the five recognised religions, but not followers of Tibetan Buddhism and in particular, Huang Jiao, because of its special connection with Tibet and Inner Mongolia.

Based on the available country information, the Tribunal finds that Huang Jiao, or Geluk, is a school of Tibetan Buddhism. The Tribunal further finds that a Huang Jiao follower could be subject to arbitrary arrest and detention, imprisonment and interference with employment and civil rights, and as such this could amount to serious harm to a practitioner of Huang Jiao.

The Tribunal is being asked to accept that the applicant is a follower of Huang Jiao, and that he has attended and participated in the activities of this religion, and that because of this he fears persecution should he be required to return to China.

When determining whether a particular applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal should recognise the difficulties often faced by asylum seekers in providing supporting evidence and should give the benefit of the doubt to an applicant who is generally credible but unable to substantiate all of his or her claims.

However, the Tribunal is not required to accept uncritically each and every assertion made by an applicant. Further, the Tribunal need not have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. Nor is it 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) 52 FCR 437 at 451, per Beaumont J: *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1990)86 FCR 547.

On the basis of the passport which was submitted at the hearing and his oral evidence, the Tribunal finds that the applicant is a citizen of the People's Republic of China from the Inner Mongolia autonomous region.

The applicant gave a plausible account of how he came to practice Huang Jiao and of how he was interviewed and detained by the Chinese authorities for his continued participation with Huang Jiao once discovered. The applicant gave convincing evidence as to his commitment to Huang Jiao and as to its continued practice here while in Australia, although somewhat restricted by appropriate local temples to practice at. His evidence that, should he return to Inner Mongolia, he would continue to practice this religion was also convincing.

The Tribunal had some doubts, however, concerning the applicant's evidence as to how he came to leave for Australia. His evidence was that he had already planned to have a holiday and come to Australia, and this accounted for why his passport was renewed, prior to the first meeting with the community administrator. An Australian Visa was then obtained, well before the meeting with the community administrator where he was detained. The applicant's evidence was that he had no intention of applying for refugee status at that earlier time – that only came as a result of him being detained.

The Tribunal also had some doubts as to the truthfulness of his evidence as to why he chose to come to Australia in particular and whether it was just for a visit, and why he did not plan to bring his family along with him if it was for a visit. The applicant stated that he has a sibling living here in Australia. As to why the family were not going to be holidaying together here, he stated that he and his wife did not want their child to fly at such a young age and his wife was happy for him to go on his own.

If the applicant's evidence on this is not accepted as the truth, it might mean that his evidence as to being a follower of Huang Jiao and experiencing persecution by the Chinese authorities in this regard was fabricated and that he had always planned to come to Australia to seek refugee status.

However, the fact that the applicant has a sibling living here in Australia might support his evidence that he initially chose to come to Australia for a holiday and it may be true that, in the context of planning a holiday, he and his wife did not want their child to fly at such a young age and that his wife was happy for him to go on his own.

In an attempt to obtain something objective which might support the applicant's evidence that he was coming here to visit his sibling, the Tribunal asked him for his sibling's details. While he did not provide his siblings full address as requested and the Tribunal is unable to establish that the sibling is indeed his sibling, Departmental Movement Records do show that someone of this name and date of birth has come to, and is presently in, Australia.

The Tribunal is therefore unable to make a finding with any confidence that this particular evidence of the applicant is not true.

If the Tribunal is considering making an adverse finding in relation to a material claim made by the applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis the claim might possibly be true (see *MIMA v Rajalingam* (1999) FCR 220). This is part of the Tribunal applying correctly principles for determining whether an applicant has a well-founded fear of persecution or not.

The other issue of some concern to the Tribunal was the omission on the protection visa application form of details of his wife and child, who remain in Inner Mongolia. The applicant's explanation was that this was *his* application because of *his* beliefs and he did not want to mention them as he did not want to get them in any trouble. He then went on to give details of his wife and child as requested by the Tribunal.

The Tribunal takes apparent false or misleading statements on the forms as a serious issue for credibility. However, in the circumstances of this case the Tribunal accepted his oral evidence that his wife and his child do exist and the false and misleading statement on his form was done with the intention of protecting them. It was not done as part of a plan to mislead the Department by providing untrue answers and hence the Tribunal does not consider this affects his credibility generally.

Accordingly, the Tribunal finds that the applicant is a follower of Huang Jiao. The Tribunal finds that the applicant was detained by the Chinese authorities because of his practice of Huang Jiao. The Tribunal finds that the applicant has continued to practice Huang Jiao in Australia and will continue to practice it should he return to China. The Tribunal also finds that even though the applicant sought his Chinese passport renewal and Australian Visa before the detention incident, this was because he was planning a holiday to Australia without his wife and child, partly in order to visit his sibling and partly to see Australia.

Based on the above findings, there is a real chance that on return to China, as a follower and practitioner of Huang Jiao the applicant will face persecution such as arbitrary arrest and detention, imprisonment and interference with employment and civil rights, and as such this could amount to serious harm. These matters are so serious and systematic that they would be persecution for the purposes of the Act [see ss.91R(1)(b) and (c)].

The Tribunal accepts that his involvement with Huang Jiao in Australia was and is motivated by a genuine commitment to that philosophy and not as some attempt to support his claims to refugee status. Thus s.91R(3) does not apply here.

This would therefore amount to a “well-founded” fear of persecution under the Convention for religious grounds. This persecution could also possibly fall under the Convention ground of political opinion, as separatism and religion appear to be strongly linked in Inner Mongolia, or are perceived to be so, by the Chinese authorities.

As to whether the applicant could live safely elsewhere in China, in the Tribunal’s view the real risk of serious of harm extends to the entire country of China, because the Chinese Government has highly centralised elements and the security authorities have a national structure, although there is considerable local autonomy. The Tribunal is satisfied there is a real chance the applicant will come to the attention of the authorities and thereby suffer persecution for his practice of Huang Jiao where-ever he attempted to reside in China.

There is no material which indicates that the applicant has any right of residence in any third country, being only a citizen of China and being currently physically in Australia.

The applicant, having a well founded fear of persecution for a Convention reason, is therefore a person owed protection obligations by Australia and this matter should be remitted to the Department with a relevant direction for the consideration of outstanding criteria for the visa sought.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant satisfies the criterion set out in s.36(2) of the Act for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. JBARWI</p>
