

1503801 (Refugee) [2015] AATA 3679 (9 November 2015)

### DECISION RECORD

<b>DIVISION:</b>	Migration & Refugee Division
<b>CASE NUMBER:</b>	1503801
<b>COUNTRY OF REFERENCE:</b>	China
<b>MEMBER:</b>	Amanda Paxton
<b>DATE:</b>	9 November 2015
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Statement made on 09 November 2015 at 10:19am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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 visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China, arrived in Australia [in] September 2013. He applied for the visa [in] October 2013 and the delegate refused to grant the visa [in] March 2015.
3. The applicant appeared before the Tribunal on 5 November 2015 to give evidence and present arguments. The Tribunal also received oral evidence [Ms A], [Mr B], [Ms C] and [Ms D]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

### RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and 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 of the same class.

#### Refugee criterion

6. 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).
7. 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.
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)). 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.
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 '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.

#### **Section 499 Ministerial Direction**

19. 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.

#### **CONSIDERATION OF CLAIMS AND EVIDENCE**

20. Issues to be considered by the Tribunal are:
- Is the applicant a genuine Falun Gong practitioner?
  - Is there a real chance that he will be persecuted if he returns to China for the reason that he is a Falun Gong practitioner?
  - Are there 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?
21. For the following reasons, the Tribunal has concluded that the decision under review should be remitted for reconsideration.

#### **Nationality**

22. The Tribunal finds that the applicant is a national of China. He travelled to Australia as the holder of a passport issued by the authorities of China, a copy of which the applicant provided with his Protection visa application. The applicant made no claim to be a national of any other country. The Tribunal accepts that his claims should be assessed against China for the purposes of the Convention in s.36(2)(a) of the Act and as the "receiving country" for the purposes of the complementary protection obligations in s.36(2)(aa) of the Act. The Tribunal is satisfied that the applicant does not have a right to enter and reside in any other country and, therefore, he is not excluded from Australia's protection obligations under s.36(3) of the Act.

#### **Summary of the applicant's claims**

23. The applicant, aged [age] years old and born in Shaanxi Province, China, is a Falun Gong (also referred to as Falun Dafa) practitioner.

24. As stated in his submission to the Tribunal and at the hearing, the applicant fears persecution upon return to China due to his spiritual belief in Falun Gong. He was introduced to Falun Gong by his mother who has been practising since approximately 1996. His mother had strong belief in Falun Gong and had explained the practices to him over a long period.
25. In his submission to the Tribunal and confirmed at the hearing, the applicant stated that his mother, father and [siblings] reside in Australia. His mother obtained protection in Australia in 2010 as a Falun Gong practitioner. The applicant's first wife died in 2005. He has one [child] from the relationship with his first wife. The applicant remarried in 2008. He has one [child] with his second wife. His wife and [child] continue to reside in China.
26. The applicant believes he would be at risk of serious harm due to his Falun Gong beliefs and practice which were developed in China and commenced formally in 2010 and came to the attention of the authorities in China in 2012. He believes he will be prosecuted, detained and possibly tortured and killed in China because he has continued to be an active follower of Falun Gong in Australia and attended many events in support of the Falun Gong community. The applicant believes the Chinese authorities are aware of his practices in Australia because they monitor the actions of their citizens while abroad. The applicant believes he will be subjected to serious harm in China because he will continue to practice Falun Gong in China.
27. The applicant has provided country information from the 2014 China Human Rights Report concerning treatment of Falun Gong adherents. The applicant also provided country information from various media sources about the practice of "harvesting" the organs of Falun Gong practitioners in support of his claims.

#### **Falun Gong practice in China**

28. At the hearing, the applicant explained that he became a Falun Gong practitioner in August 2010. At that time, the applicant had painful recurring [medical condition] and he was regularly admitted to hospital to have [treatment]. On one occasion he started to practice Falun Gong meditation on the principles of truthfulness, compassion and forbearance and he recovered. This convinced him of the benefits of Falun Gong practice. After that time, he started to practice Falun Gong formally.
29. The applicant started reading "Zhuan Falun" and practising the five Falun Gong exercises at home. Because his mother had been a long term practitioner, he had books and DVDs at his home. He was initially self-taught but he later learnt that practitioners are encouraged to practice with others and in 2011 he started practising with in a fellow believer's home in the neighbourhood. It was difficult to practice openly because of the "disdain" the authorities showed them.
30. The applicant states that as a true believer, he has a responsibility to tell others about the teachings of Falun Gong; they are asked to "tell the truth" about Falun Gong. The applicant stated that he and his fellow practitioners in China would discreetly hand out brochures and information to others in their community. The applicant would also speak to others about his beliefs in an attempt to signify to his community that Falun Gong was not an evil practice as portrayed by the authorities in China.
31. The applicant claimed he was detained in May 2012 by his local police when he was found by two policeman distributing Falun Gong materials, in a neighbourhood building. He was taken to the local police station where they questioned him about where he had obtained the materials. They continuously kicked his back. This treatment lasted a long time, but the applicant kept silent.

32. The applicant was held for 5 – 6 hours. He was released after one of his friends' [relative] who working at the police station realised he was there and negotiated his release. He was required to sign a statement that he had been detained and he was given a warning that if he continued his activities' he would face imprisonment. The incident was recorded and he had to sign to say he would not continue practice.
33. After this event, the applicant continued to practice but more cautiously and he only practised at home. He felt suffocated by the authorities. He was visited a couple of times by the neighbourhood council "social worker" in advance of special dates such as Master Li's birthday to encourage him not to be involved in any activity.
34. The applicant departed China in September 2013 on his passport which was issued [in] 2011. His departure was delayed because he had to make a couple of visa applications before he obtain a [temporary] visa to Australia.

### **Falun Gong practice in Australia**

35. At the hearing, the applicant stated that he arrived in Australia in September 2013 and that he attended his first Falun Gong practice with his mother 3 days after his arrival. He was shocked that people had such freedom. He was in contact with the Falun Dafa Association because his mother participated in their activities. Together they attended practice at various sites, particularly [Location 1] (in the afternoon group) and [a certain suburb]. On Friday and often on Sunday they are in [Suburb 2] to help to "tell the truth about Falun Gong in China". On Friday night he attends a study group at [a] Library.
36. The applicant stated at the hearing that he is a committed participant in activities to "tell the truth about Falun Gong". In addition to photographs provided to the delegate showing the applicant's participation in activities in 2014, the applicant has provided to the Tribunal with photographs of various documents as evidence of his involvement as a Falun Gong practitioner in Australia in 2015. It is submitted that these activities enhance his profile as a Falun Gong practitioner. The photos indicate the applicant participating in the following:
  - [A] conference held in [a certain suburb in] August 2015;
  - [A parade] in [a city] [in] September 2015;
  - [An Australian] Conference held at [a university in a city in] September 2015;
  - [A display in a city in] April 2015, to commemorate the [anniversary] of the crackdown on Falun Gong practitioners in 1999;
  - The grand celebration of World Falun Dafa Day at [a location in a city] to celebrate Master Li's birthday and Falun Dafa's 23<sup>rd</sup> anniversary since introduction to the public; and
  - The Easter parade in [a certain town in] April 2015.
37. The Tribunal notes these photographs support the applicant's claims to involvement in Falun Gong activities

### **Knowledge and genuineness of Falun Gong practice**

38. Central to the applicant's claim for protection is that he is a Falun Gong practitioner. In this consideration, the Tribunal noted that the delegate was satisfied that the applicant had a good understanding of the basic principles and practises of the Falun Gong movement.
39. In its consideration, the Tribunal had the advantage of more evidence before it than was before the delegate, including oral evidence from [Ms A], [Mr B], [Ms C] and [Ms D] (the applicant's mother), and numerous additional photographs.
40. During the hearing the applicant was questioned extensively about his claimed Falun Gong beliefs and practices. The applicant demonstrated a detailed and full understanding of Falun Gong. He could easily describe the history of Falun Gong, the role of its founder Master Li Hongzhi, the key principles, the contents of the "Zhuan Falun" and the relationship between the Falun Gong and the practice of daily life (e.g. he does not need to, or take any medication for medical conditions). In view of the applicant's responses, the Tribunal accepts he has a sound level of knowledge of Falun Gong and its practices and principles.
41. The Tribunal also had regard to the testimony of the applicant's witnesses. The Tribunal made enquiry about the understanding of Falun Gong of each witness and was satisfied that each was a long-term, committed practitioner of Falun Gong.
  - [Mr B], Falun Gong practitioner, gave very persuasive and detailed evidence about his own practice of Falun Gong (which commenced in 1997 with a nine day seminar with in his neighbourhood). [Mr B] attested that he met the applicant soon after the applicant's arrival in 2013 at [Location 1]. He stated that the applicant had knowledge of Falun Gong when he met him although his practice did not have the depth of his mother who has a much longer experience. He confirmed the applicant's claims about his practice, stating that they participated together in a monthly group large group practice, Bhuddist study group and numerous Falun Gong marches and rallies in [City 3] and also in [certain cities]. He explained that this year he started practising with a group in [a suburb] which is close to his home and he has taken the applicant and his mother home from the group sometimes. He believes that the applicant is at high risk of prosecution in China because he will attract attention for his Falun Gong practice because he will continue his practice. "The more you practice, the more you feel the Falun Gong gives you so much you can't abandon it. From the surface you can feel physically a big change, but true change is from the heart."
  - [Ms C], [a member] of Falun Dafa Association, gave evidence that in their Falun Dafa association, they have a Bhudidism study group and she has been part of this group for 18 years and this group has a role in Falun Gong's liaison with the public and is involved in organising and participating in different gathering and activities such as the annual Falun Gong meetings and candle light vigils in support of Falun gong practitioners in China. [Ms C] gave evidence that the applicant joined the group in 2013 and they got to know him, especially at their Friday night study group. [Ms C] asked the applicant to help them at [Suburb 2] "tell the truth" activity. She believes he is a genuine practitioner because they have strict moral character cultivation and he is serious in his study, humble, kind and respectful to everyone, even when they are not. [Ms C] gave examples of his respectful behaviour in response to passers-by in [Suburb 2] who sometimes have a bad attitude towards them. She believes he will be prosecuted in China and hopes he can stay to continue his cultivation practice.
  - [Ms A], Falun Gong practitioner, started practice in 1999 due to her health but later she found that Zhen Shan Ren (truthfulness, compassion and forbearance) was good for everybody, for the self, society and families. Through studying "Zhuan Falun", she realised more about moral character and the natural goodness of man. She practices daily at home with DVDs from Master Li and attends monthly practice in [Location 1] and

special meetings/gatherings where she sees the applicant. When the applicant arrived, she met him at different activities and study groups as well as the “tell the truth’ group. While they normally don’t talk a lot about people’s personal activities, she could see he understood the principles through his conduct. [Ms A] believes that the Chinese authority’s prosecution towards Falun Dafa is a catastrophe and hundreds and thousands of families being torn apart. She believes that when they distribute Falun Dafa material and hold activities, they have been recorded by Chinese intelligence and that this information is sent to the authorities.

- [Ms D], the applicant’s mother, stated she had been practising Falun Gong since 1996. She confirmed her belief that the applicant has been practising Falun Gong since 2010. She stated that she and the applicant performs Falun Gong exercises and meditation every morning and study “Zhuan Falun” at night.

42. The Tribunal found these witnesses to be of assistance in the assessment of the applicant’s Falun Gong claims, in particular in supporting a finding that the applicant had experience in Falun Gong on arrival in Australia and that he has been an active and genuine participant in Falun Gong activities in Australia.

### **Independent Country Information**

43. The Tribunal must be guided by Ministerial Direction No. 56 as set out above.
44. In relation to monitoring of Falun Gong practitioners/ protestors in Australia or organ harvesting in China of Falun Gong practitioner, the Tribunal notes there is limited verified information. In 2001, Dr Benjamin Penny of the ANU, Canberra made the comment, still considered relevant in today’s circumstances:

*There are two main sources of information on Falun gong which still hold today: Falun gong itself and the Chinese government. Currently, as I’m sure you are aware, these two entities are not well disposed towards each other and their information services are resolute in their respective condemnations. In these circumstances, one has to be reasonably careful in taking any claim from either source at face value.<sup>1</sup>*

45. However, the Tribunal notes independent country information confirms that the Chinese Government has cracked down on and regularly detained suspected Falun Gong practitioners since Falun Gong was banned as an illegal cult in 1999<sup>2</sup>. In this respect the Tribunal notes that on May 2011, Department of Foreign Affairs and Trade (DFAT) advised that Chinese authorities no longer focus primarily on Falun Gong Leaders, but are increasingly targeting common practitioners. DFAT advised:

*We are aware of people who only practice Falun Gong in private and do not proselytize in any way, who have been punished severely after their practice has been uncovered or if they are accused of being practitioners.<sup>3</sup>*

46. The DFAT 2015 thematic report on unregistered religious organisations in China notes the following information in relation to Falun Gong practice in China:

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<sup>1</sup> (Penny, Benjamin 2001, *The Past, Present and Future of Falun gong*, Paper presented to a seminar at the Refugee Review Tribunal in Sydney, Australia, 4 May, p.1).

<sup>2</sup> Human Rights Watch 2012, World Report 2012: China, January

<sup>3</sup> DIAC Country Information Services, Country Information Report No 11/28 CX265241 Falun Gong Update Clarifications



3.25 Credible sources have told DFAT that Falun Gong practitioners are generally able to practice privately in their homes relatively free from interference by authorities. However, Falun Gong members regularly face widespread official and societal discrimination if they become known to authorities, colleagues or neighbours. Generally speaking, the possession of banned materials (books, CDs, or information about Falun Gong) would likely attract a fine or short-term period of administrative detention. However, punishments can vary according to location, the profile of the individual and local political circumstances.<sup>4</sup>

47. In a report dated 3 March 2015, DFAT notes that an extrajudicial security apparatus known as the 6-10 Office was established to eradicate Falun Gong activities. The office has reportedly created specialised facilities known as “transformation through re-education centres” to force practitioners to relinquish their faith. Falun Gong practitioners have reportedly been sent to black gaols, sentenced to other forms of administrative punishment or have been released after receiving propaganda training. Further, DFAT assesses that Falun Gong practitioners, and the lawyers who defend them, can be at risk of official discrimination and violence. The report also notes methods reportedly used against Falun Gong practitioners include sleep deprivation, enforced standing and kneeling for extended hours, nasal feeding, being forced to drink dirty or salty water, shackling and beatings.<sup>5</sup>
48. In 2015, US Department of State 2015, *2014 Report on International Religious Freedom – China*, stated that the CCP continues to maintain a Leading Small Group for Preventing and Dealing with the Problem of Heretical Cults as well as “610” offices (named for the date of its creation on June 10, 1999) to eliminate the Falun Gong movement and to address “evil cults.”<sup>6</sup> The following sums up the current situation:

*According to Legal Daily, a newspaper published under the supervision of the Ministry of Justice, the MPS directly administered 23 high-security psychiatric hospitals for the criminally insane (also known as ankang facilities). Unregistered religious believers and Falun Gong adherents were among those reported to be held solely for their religious associations in these institutions. Despite October 2012 legislation banning involuntary inpatient treatment (except in cases in which patients expressed an intent to harm themselves or others), critics stated the law did not provide meaningful legal protection for persons sent to psychiatric facilities. Patients in these hospitals reportedly were given medicine against their will and sometimes subjected to electric shock treatment.*

*International Falun Gong-affiliated NGOs and international media reported detentions of Falun Gong practitioners continued to increase around sensitive dates. Authorities reportedly instructed neighborhood communities to report Falun Gong members to officials and offered monetary rewards to citizens who informed on Falun Gong practitioners. Detained practitioners were reportedly subjected to various methods of physical and psychological coercion in attempts to force them to renounce their beliefs. It remained difficult to confirm some aspects of reported abuses of Falun Gong adherents. Reports from overseas Falun Gong-affiliated advocacy groups estimated thousands of adherents in the country had been sentenced to terms of up to three years in administrative detention. According to the human*

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<sup>4</sup> Department of Foreign Affairs and Trade (DFAT) 2015, *DFAT Thematic Report: Unregistered religious organisations and other groups in the People’s Republic of China*, 3 March, pp.9-10

<sup>5</sup> DFAT Thematic Report, *Unregistered religious organisations and other groups in the People’s Republic of China*, 3 March 2015

<sup>6</sup> US Department of State 2015, *International Religious Freedom Report for 2014*, 14 October, section II <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2013&dliid=222123>>

rights monitoring NGO Dui Hua Foundation, there were 2,201 Falun Gong prisoners as of June 30.<sup>7</sup>

49. In 2010, the Congressional Executive Commission on China noted that since the 1999 crackdown on Falun Dafa, large numbers of practitioners have experienced harassment and mental and physical abuse in official custody, which in some cases has resulted in torture and death.<sup>8</sup>
50. In 2015, Freedom House reported that religious freedom in China is sharply curtailed by the formally atheist CCP. All religious groups must register with the government, which regulates their activities, oversees clergy, and guides theology. Some groups, including certain Buddhist and Christian sects, are forbidden, and their members face harassment, imprisonment, and torture. The largest among them is the Falun Gong spiritual group, whose adherents continued to suffer large-scale detention in extralegal centers for forced conversion or sentencing to long prison terms during 2014, despite the dismantling of the “reeducation through labor” camp system that began in 2013.<sup>9</sup>

51. In respect to identity documentation and departure, in 2008 DFAT stated:

*“In regard to members of Falun Gong, we have been advised by sources within the Ministry of Public Security that only those considered to be Falun Gong leaders are refused passports and hence would be prevented from leaving China legally. However, there is anecdotal evidence to suggest that the Chinese Government does act to prevent identified Falun Gong followers from leaving China. In many cases, Chinese citizens 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 that have not been identified by the Government as Falun Gong followers can obtain passports and leave the country legally.”<sup>10</sup>*

52. Reports indicate that Chinese officials have monitored Falun Gong practitioners off-shore. Australian media articles reported Falun Gong practitioners claiming to being monitored by Chinese authorities or having been asked to act as informants for the state. According to a *Sydney Morning Herald* 12 October 2015 report, former Chinese national, Michael Li, claims he refused to spy on the Falun Gong movement in Sydney. As a result, Mr Li claims, Chinese authorities have closed down his [factory] in China and arrested his brother who oversaw the business. Furthermore, he claims that he is being monitored and that his Chinese citizen parents in Australia are at risk of harm should they return to China. The report reads:

*On Four Corners on Monday, the Australian Federal police confirmed in a statement that they were aware of Chinese operatives travelling to Australia without informing Australian officials. A year ago Fairfax Media reported that Chinese students have been recruited to spy on fellow students at Australia’s top universities. In April this year Fairfax media reported that Chinese police had quietly travelled to the eastern suburbs of Melbourne to “persuade” a Chinese-born tour bus driver, Dong Feng, aged 49, to return and face bribery charges in China. The approach to Mr Dong was believed to be part of Chinese President Xi Jinping’s*

<sup>7</sup> US Department of State 2015, *2014 Report on International Religious Freedom – China*, 14 October, section II <<http://www.refworld.org/country,,,CHN,,562105c011,0.html>>

<sup>8</sup> Congressional-Executive Commission on China 2010, *Annual Report 2010*, 10 October

<sup>9</sup> Freedom House 2015, *Freedom in the World 2015 – China*, 28 January, p.5 <<http://www.refworld.org/publisher,FREEHOU,ANNUALREPORT,CHN,54d0d7b68,0.html>>

<sup>10</sup> DFAT 2008 No 943 – RRT Information Request CHN34077, 16 December 2008

*'Operation Fox Hunt' aimed at repatriating corrupt officials and seizing their hidden assets overseas. A dozen suspects have been identified as having fled to Australia.*<sup>11</sup>.

53. With respect to reports of organ harvesting however, no reports were located that confirm organ harvesting occurs or occurred in China. The Department of Foreign Affairs and Trade thematic report on unregistered religious organisation in China of March 2015 states the following:

*3.27 Falun Gong practitioners who are sentenced to criminal punishment most commonly receive verdicts of three years' imprisonment or less. Once in detention, Falun Gong practitioners are under pressure to denounce their faith in Falun Gong. Methods reportedly used against Falun Gong practitioners include sleep deprivation, enforced standing and kneeling for extended hours, nasal feeding (forced feeding through a tube inserted into the nostril), being forced to drink dirty or salty water, shackling and beatings. Reports of psychological treatment used against practitioners have also been documented in international human rights reports. Reports of psychiatric experimentation and organ harvesting being imposed on Falun Gong practitioners in detention could not be independently verified.*<sup>12</sup>

#### **Assessment of refugee claims**

54. In considering the genuineness of the applicant's claims as a Falun Gong practitioner, the Tribunal considered the applicant's claims to have commenced Falun Gong practice in 2010 and to have come to the attention of the authorities for Falun Gong activities in 2012. In this respect, the Tribunal has taken into consideration the concerns raised by the delegate in the decision record about the applicant's Falun Gong practice in China, in particular that he would not have been able to depart China had he a profile as a Falun Gong practitioner. At the hearing, it was pointed out to the applicant that country information indicates that persons of interest to the authorities, including Falun Gong practitioners, have been known to be refused passports and hence prevented from leaving the country legally. The Tribunal noted that this could lead it to believe that the events he claimed happened in China had not occurred. In reply the applicant stated that he had obtained his passport prior to the detention and that after this time he did not openly practice.
55. The Tribunal has considered the applicant's claims regarding his treatment in China due to being a Falun Gong practitioner and the independent country information above and assessed that the applicant has described a profile as a Falun Gong follower rather than a leader and that his detention and his departure from China as described is credible.
56. The Tribunal also took account of the delegate's consideration that the applicant's mother has returned to China, indicating that the applicant would not face harm in China. The Tribunal notes that her return was prior to the applicant's Falun Gong activity and before her own involvement in Falun Gong activity in Australia. The Tribunal considers that her return is not indicative that the applicant would not now face harm on return.
57. The Tribunal has considered the evidence of the witnesses that the applicant was knowledgeable about Falun Gong practice on arrival in Australia and a genuine practitioner. The Tribunal found their evidence convincing.

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<sup>11</sup> Davies, A 2015, 'Spies in Gordon: how the Chinese government keeps track of Australian citizens', *The Sydney Morning Herald*, 12 October <<http://www.smh.com.au/business/china/spies-in-gordon-how-the-chinese-government-keeps-track-of-australian-citizens-20151012-gk6z8h.html>

<sup>12</sup> Department of Foreign Affairs and Trade (DFAT) 2015, *DFAT Thematic Report: Unregistered religious organisations and other groups in the People's Republic of China*, 3 March, p.9

58. On the evidence before it, the Tribunal accepts that the applicant commenced Falun Gong practice in 2010, was detained by the local police in 2012 for a period of 5 -6 hours for distributing Falun Gong materials, and was released when he signed a statement concerning his detention and an undertaking not to continue Falun Gong practice. The Tribunal accepts that he was monitored by a social worker in the neighbourhood council and counselled to abstain from Falun Gong activity on a couple of occasions.
59. The Tribunal notes that the applicant lodged his application seven weeks after his arrival in Australia and accepts his advisor's submission on his behalf that this delay does not indicate that the applicant's claims are not genuine, but was the result of a reasonable delay in preparation of a Protection visa application.
60. On the evidence, the Tribunal was satisfied the applicant has been, and continues to be, a genuine Falun Gong practitioner since 2010. Given his practices in Australia and the fact that the Chinese authorities monitor their citizens overseas, there is a real risk he would suffer serious harm. Accordingly the fact that he was able to depart is not necessarily indicative of the fact he would face harm upon return to China.
61. In considering the applicant's on-going commitment to the practice of Falun Gong, the Tribunal has considered his strong knowledge of Falun Gong practices and principles. It has also considered the evidence of witnesses and documentation which attest to the applicant's Falun Gong practice in Australia over the past two years, and the evidence of the applicant's mother's involvement over time. Taking into account the totality of the applicant's circumstances, the Tribunal accepts that the applicant is a genuine Falun Gong practitioner and that he has an ongoing commitment to Falun Gong, which includes exposing the truth about Falun Gong and the Chinese government's persecution of its practitioners. The Tribunal is satisfied the applicant would continue to practice and advocate the benefits of Falun Gong if he were to return to China now or in the foreseeable future.
62. On this basis and the independent country information above, the Tribunal accepts that there is a real chance the applicant could come to the attention of the Chinese authorities for his Falun Gong practices if he were to return to China. Further, the Tribunal has had regard to country information which indicates that there is monitoring of Chinese persons residing in Australia. Some of that evidence indicates that the Chinese official surveillance of Chinese Australians has at times been "widespread". The evidence indicates that the "five poisonous groups" which the Chinese authorities monitor in Australia includes the Falun Gong movement.<sup>13</sup> DFAT has also consistently noted that it is likely that persons such as Falun Gong activists who participate in Falun Gong activities in Australia will be monitored and questioned upon their return to China.<sup>14</sup> In view of this information, the Tribunal also accepts there is a real chance the applicant could come to the attention of the Chinese authorities for his involvement in Falun Gong activities in Australia.
63. Referring to the country information outlined earlier in this decision about the treatment of Falun Gong practitioners in China, the Tribunal accepts that Falun Gong practitioners who come to the attention of the authorities in China are at risk of detention, imprisonment and severe punishment including physical and mental abuse in attempts to get them to renounce their beliefs. The Tribunal accepts that such treatment would amount to serious harm and

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<sup>13</sup> See <http://www.theage.com.au/articles/2007/11/10/1194329562764.html>

<sup>14</sup> See DIAC Country Information Service 2006, Country Information Report No.06/053: *China: Return of failed asylum seekers*, (sourced from DFAT advice of 14 September 2006), 15 September. See also Amnesty International Canada 2005, *Amnesty International concerns on Uighur asylum seekers and refugees*, June, which also refers to Falun Gong dissident groups and their monitoring by the Chinese authorities in different countries.

that the applicant's fears in this respect are genuine and well-founded. The Tribunal also considers that the serious harm which the applicant faces involves systematic and discriminatory conduct as required by s.91R(1)(c) of the Act, in that it is deliberate or intentional and involves selective harassment.

64. In order to be found a refugee the harm which is directed at the applicant must be for a Convention reason. The Tribunal has noted that the applicant has submitted that as a Falun Gong practitioner he is a member of a particular social group<sup>15</sup>. The Tribunal has considered the applicant's claims in this respect and notes also that there is some debate as to whether Falun Gong is a religion. An RRT Background Paper on China – Falun Dafa, dated December 2012 provides the following:

*“There are differing interpretations as to whether Falun Dafa is a religious movement. During the Tenth European Country of Origin Information Seminar in 2005, it was stated Falun Dafa is a spiritual group, not a religion”.*<sup>16</sup>

*“By contrast, in 2002 Ter Harr reported that although Falun Dafa claims to be founded in scientific truth, not religion, the movement shares many of the same characteristics as religious movements”.*<sup>17</sup>

65. The Macquarie Dictionary defines Religion as *“The quest for the values of the ideal life, involving three phases: the ideal, the practices for attaining the values of the ideal, and the theology or world view relating the quest to the envioning universe.”*
66. The Oxford Dictionary defines Religion as *“The belief in and worship of a superhuman controlling power, especially a personal God or gods”.*
67. The Tribunal is satisfied that the belief system and the practice of Falun Gong falls within these definitions and thus Falun Gong is a religion for the purpose of the Convention. Further, the Tribunal finds that the applicant's religion is the essential and significant reason for the persecution.
68. The Tribunal does not consider on the evidence before it that the applicant would escape problems from authorities by moving to other parts of China. The crackdown on Falun Gong practitioners is not restricted to any one location and the Tribunal finds that the applicant would face the same difficulties wherever he was living.
69. The harm feared in this case is a product of the policy of the State and therefore the Tribunal finds that the applicant is unable to avail himself of the protection of the Chinese government.
70. The Tribunal finds that given the applicant is a genuine Falun Gong practitioner who had a minor Falun Gong profile in China before departure, and has maintained a noticeable Falun Gong profile while in Australia, he faces a real chance of being monitored closely or imprisoned for months and this may include an *ankang* facility.
71. In view of the above, the Tribunal finds that the applicant has a well-founded fear of persecution in China due to his religious beliefs and practices.

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<sup>15</sup> AAT, f. 34.

<sup>16</sup> European Country of Origin Information Network 2005, 10<sup>th</sup> European Country of Origin Information Seminar China, 1-2 December

<sup>17</sup> Ter Harr, B.J. 2002, 'Falun Gong: Assessing its Origins and Present Situation', UNHCR Emergency & Security Service: WriteNet, July

## CONCLUSIONS

72. For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) of the Act.

## DECISION

73. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Amanda Paxton  
Member