

**AT AUCKLAND**

<b>Appellant:</b>	<b>AD (China)</b>
<b>Before:</b>	B Dingle (Member)
<b>Representative for the appellant:</b>	The appellant represented himself
<b>Counsel/representative for the respondent:</b>	No Appearance
<b>Date of hearing:</b>	3 June 2011
<b>Date of decision:</b>	21 June 2011

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**DECISION**

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**INTRODUCTION**

[1] This is an appeal under section 194(1)(c) of the Immigration Act 2009 (“the Act”) against a decision of a refugee and protection officer of the Refugee Status Branch (“RSB”) of the Department of Labour declining to grant either refugee status or protection to the appellant, a citizen of the People’s Republic of China.

[2] Pursuant to section 198(1)(b) of the Act, the Tribunal must determine whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and/or
- (b) as a protected person under the Convention Against Torture (section 130); and/or

- (c) as a protected person under the International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[3] The appellant claims to be at risk of serious harm in China at the hands of the Chinese authorities because Chinese nationals in New Zealand will use their links with authorities in China to harm him and because the Chinese Embassy here knows of his unlawful status in New Zealand. Further he says his Christian faith will exacerbate his adverse situation. The essential issue to be determined in this appeal is whether or not the appellant’s claim is credible.

[4] Given that the same account is relied upon in respect of all three limbs of the appeal, it is appropriate to record it first.

#### **THE APPELLANT’S CASE**

[5] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

[6] The appellant arrived in New Zealand in 2000 and was issued with a limited purpose permit on the grounds that he was undertaking short-term business in New Zealand for his Chinese employer. He was intending to stay only for a week but due to circumstances unrelated to this appeal he remained in New Zealand unlawfully. Between 2000 and late 2010 the appellant worked in a number of different hospitality businesses throughout New Zealand.

[7] The difficulties which have led to this appeal began in late 2009. At that time the appellant was working at ABC company in Z town. After he read an article in a Chinese language newspaper saying that New Zealand authorities wanted help locating illegal migrants, the appellant reported two men with whom he had worked previously to the police. One of the men had travelled to New Zealand illegally on a boat. It was the appellant’s view that people who entered New Zealand illegally were harmful to others because when the authorities searched for them, other unlawful migrants are also detected. He informed on the second man because he thought that the police would think it odd if he did not give the names of both men who worked together. In his interactions with the New Zealand police in this matter, the appellant used his English name

and did not reveal his true identity. He communicated with a New Zealand police officer who spoke Mandarin.

[8] Approximately two weeks after the two men were arrested the appellant received a call on his mobile telephone. The caller spoke in Mandarin and said "Where are you? The two people are in custody in Wellington." The caller did not identify himself by name or with reference to any organisation and before anything further was said, the appellant terminated the call. Two days later, the appellant received a text message on the same telephone which said "You should be careful of the Fu Qing gang. Everyone knows you did it." The appellant believes the Fu Qing gang consists of 4000 to 5000 individuals in New Zealand and that if a gang member encounters difficulties, other people in the gang will provide assistance.

[9] After receiving the text message, the appellant disposed of his mobile telephone. He has not been contacted by anyone from that gang since late 2009 and he believes that this is because they cannot locate him in New Zealand. If he returned to China however, the gang associates there would locate and harm him.

[10] Throughout 2010 the appellant continued to work at ABC company in Z town. He worked there with AA and BB, a Chinese couple who knew various individuals whom the appellant had previously worked for including the employer of the two men who were arrested and another business owner ("CC") who lived in a nearby town.

[11] The relationship between the appellant and AA and BB deteriorated as time went on. There were several reasons for this, including that: BB believed that the appellant had informed CC of his (BB's) whereabouts which enabled CC to visit him and pursue a \$20,000 debt; the appellant indicated to AA that he knew she had provided a false document to assist a migrant in New Zealand gain a work visa and AA became angry about this; and, the appellant and BB argued about who should give the appellant work orders. For all these reasons AA was angry with the appellant and she told him that her father held a position in the State Security Bureau in Beijing, impliedly threatening the appellant that she could cause difficulties for him should he ever go back to China. The appellant was frightened by this veiled threat which he thinks occurred in about mid 2010.

[12] In November 2010 the appellant telephoned his mother in China. However she appeared to be unhappy and so the appellant terminated the conversation.

He believed his mother may have been influenced or somehow controlled by AA's father.

[13] In mid-November 2010, the appellant was arrested and detained after Immigration New Zealand visited his accommodation and ascertained that he did not appear to be lawfully in New Zealand. The appellant was transferred to a prison where he was detained along with another of his work colleagues. That work colleague told a third inmate that AA had indirectly informed Immigration New Zealand ("INZ") of the appellant's unlawful status thereby causing his arrest.

[14] Five days after his arrest the appellant was interviewed by an INZ compliance officer. He was issued with a Removal Order and was interviewed so that a Record of Personal Circumstances form could be completed.

[15] Approximately two weeks later INZ arranged for the appellant to meet with an official from the Chinese Consulate in Auckland. The purpose of the meeting was to discuss the appellant's application for a Chinese travel document. His passport expired earlier in 2010. The appellant was very concerned after the meeting because the consulate official spoke aggressively and made veiled threats to the appellant. The Chinese official asked the appellant if he was still Chinese and what identity documents he had. He also asked the appellant who told him to apply for refugee status and made enquiries about his family and their whereabouts. The appellant denied ever applying for refugee status. The appellant felt very threatened by the official and believed that the aggressive behaviour was because the appellant has an adverse profile with the Chinese authorities because of the influence of AA's father.

[16] Approximately two or three weeks after the interview with the Chinese official, the appellant indicated that he wished to seek refugee and protected person status in New Zealand. The RSB received his confirmation of claim form ten days later. The appellant was interviewed on 9 February 2011 and a decision declining his application for refugee and protected person status was issued on 1 April 2011. It is from that decision that the appellant appeals.

[17] Since being detained in prison in New Zealand, the appellant has been attending Chapel every Sunday. He says he started believing in Christianity before he left China because his mother was a Christian. He sometimes attended Church there and did not have any problems doing so. He also attended an

unnamed Church in Auckland between 2002 and 2005. Although he states that he could attend an established church in Shanghai without difficulty, he says his Christianity will heighten the other risks he now faces in China.

[18] The appellant believes that if he now returns to China he will be arrested, detained indefinitely and tortured. He says this will be facilitated by AA's father, to gain revenge on the appellant on behalf of AA, and because the Chinese government are aware of his predicament in New Zealand. The appellant also believes that the Fu Qing gang will harm him through its members in China because he informed on the two unlawful migrants in 2009. And, as already noted, the appellant believes that his Christian belief will exacerbate his risk and the level of harm to which he will be subject in China.

## **ASSESSMENT OF THE APPELLANT'S EVIDENCE**

[19] The appellant's evidence that he would be at risk of serious harm should he now return to China on account of AA and the Fu Qing gang is not credible. He was generally an evasive witness, failing to answer questions. His account, when finally given, was undermined by inconsistencies, implausibility and vagueness to the extent that none of it can be relied upon. The specific reasons for this finding are given below.

### **Evasive evidence generally**

[20] The appellant was an evasive witness. He often avoided addressing questions by responding with irrelevant information or by giving answers which touched on the question asked but did not provide a direct answer. There were numerous points during the hearing (for example when the appellant was being asked about AA's father and when he was asked about his Christian practice) at which the Tribunal had to repeat questions up to five times, before the appellant would provide a relevant response.

[21] In assessing the evidence, the Tribunal has therefore considered whether the appellant had difficulty understanding the questions generally or was labouring under some other impediment to comprehension of the questions being put to him. However, the Tribunal notes that when asked questions about non-contentious

matters, there was no discernible difficulty or hesitation on the part of the appellant to answer the questions directly. This leads the Tribunal to conclude that the evasiveness of the appellant was a concerted effort to avoid answering questions when he perceived them to challenge the credibility of his claim and was not due to any inherent communication difficulties.

### **Inconsistent and implausible evidence**

*As to the interview with INZ in November 2010*

[22] The account the appellant ultimately gave to the Tribunal was fundamentally inconsistent with what he said to the compliance officer who interviewed him in late November 2010, barely a month or so prior to the lodging of his refugee claim. At this interview a *Record of Personal Circumstances* form (“the form”) was completed. The form states its purpose as being: “to obtain information regarding [the appellant’s] personal circumstances. This information may be used to inform a decision regarding [the appellant’s] potential removal from New Zealand.”

[23] Surprisingly, during that interview the appellant made no reference to any difficulties, either in New Zealand or in China, which would cause him to be at risk of harm should he return to China. The following excerpted questions and answers, relevant to the appellant’s circumstances on return to China, are reproduced as they appear in the form:

B12: Why have you not left New Zealand and returned to your home country?

Answer: I wanted to stay in NZ – I lost all my money

....

B17: What would be the effect on you if you return to your home country or country where you have right of residence?

Answer: I would not face any problem

B18: Is there anything else you wish to tell me?

Answer: I am a good worker – I want to stay and [be] granted a legal permit.

[24] Again, at the end of the interview the appellant was asked whether he had anything else to raise as regards being removed back to China. In response he

made reference to his desire to stay in New Zealand because he is a good cook and because “I have no family in China, no job no housing...”. No mention whatsoever was made of any risk of harm the appellant might face in China.

[25] When the Tribunal asked the appellant to explain why he failed to tell the officer of the circumstances which he now claims put him at risk of serious harm in China, the appellant repeatedly failed to answer the question. The appellant then gave a number of explanations, none of which satisfactorily explained his non-disclosure to the compliance officer what he now asserts are his true circumstances. At one point he told the Tribunal that he thought the interpreter being used in that interview was also interpreting for his work associate who had also been arrested. However, at no time did he ever raise any objection to this interpreter being used and neither did he explain to the Tribunal why this caused him concern. The Tribunal has no doubt this is, like his other explanations, something of an invention.

[26] As noted above, the express purpose of the INZ interview was to collect information about his possible removal from New Zealand and specific questions about the effect of the removal on the appellant were asked and answered (see [23] above). The Tribunal finds that had the appellant genuinely been fearful for his safety on return to China in late November 2010 (as he now claims), he would have outlined his fears, and the reasons for them, to the INZ officer. He did not. The appellant’s unequivocal statement to the officer that he would not face any problems if returned to China indicates that he did not fear for his safety in China for any reason in late November 2010.

*As to AA’s father*

[27] The appellant’s evidence as to the position of AA’s father (“the father”) in the State Security Bureau (“SSB”) in Beijing was inconsistent and vague to the extent that it cannot be relied upon.

[28] Asked what the father’s name was, the appellant was only able to give his surname which he believed was the same as AA’s surname. The appellant did not know what position he held. When reminded he had previously given evidence that AA’s father held a particular position, the appellant was evasive and gave

answers which did not address the question. Eventually he stated that he did not know what position the father held.

[29] In contrast, in his Confirmation of Claim form the appellant stated three times (at pages 17, 18 and 20 of the form) that the father was the Head of the SSB in Beijing. The Tribunal asked the appellant to explain the apparent inconsistency as to whether or not he knew what the father's position was. In response the appellant initially said that he did not have any information about this but that the father was definitely working for the SSB. Asked to explain why the claim form referred to the father being the "Head" of the SSB, the appellant said that "according to my experience I can tell that he is no ordinary person", although no further explanation was offered.

[30] Further, in the letter written on the appellant's behalf in response to the RSB Interview Report (dated 25 March 2011), it states: "[AA] told [the appellant] personally that her father was a branch head of the [state security bureau] in China." When the Tribunal pointed out this previous inconsistent statement the appellant said he could not guarantee what the father's position was. He went on to say that AA had told him the father worked for the SSB but did not state what his specific position was.

[31] The Tribunal finds that the inconsistencies as to the evidence of AA's father's position, further point to the untrue nature of this claim. The Tribunal does not accept that AA's father holds a position in the SSB or that he seeks to harm the appellant in New Zealand or in China.

*As to Chinese gang threats*

[32] The appellant told the RSB that after he informed the New Zealand police of the two unlawful migrants in late 2009, he received threats from a Chinese gang. The first threat occurred a week after the arrests and was a text specifically indicating that it was from the gang. A week later the appellant received a telephone call also referring to the gang and stating that they knew the appellant had been the informant. In contrast, the appellant told the Tribunal that he received the first threat by telephone two weeks after the men were arrested and the caller did not mention the gang. He said he received a text message two days later and it was only then that he knew the threats were from the gang because it

was referred to in the text message. When the inconsistent evidence was put to him, the appellant said that there might be a problem with his memory of events.

[33] As to the threat of harm from the gang, the appellant told the Tribunal that the gang would still seek to do him harm if they knew of his whereabouts in New Zealand. He said that there were up to 5000 members of the gang in New Zealand. Asked why the gang had not sought to contact or harm him since 2009, the appellant said that they were unable to locate him. When reminded that AA had close connections with one of the people seeking the appellant's whereabouts and therefore he would have been easy to locate, the appellant stated that he changed his name so it was impossible for people to find him. Asked to provide some evidence of a name change, the appellant could not although he claimed to have used another name when he worked in Y town. However, the period of time he spent in Y town pre-dates his employment and residence in Z town – the town where he lived from the time he informed police about the illegal migrants (late 2009) until he himself was arrested (late 2010). If the appellant's assertion that the gang wanted to locate him and do him harm were true, it is implausible that they did not locate him when he worked at a single location in Z town for a year, with AA who had close connections to the people that were looking for him.

*As to his interview with Chinese Consulate official*

[34] The appellant said that he was threatened by the Chinese official. However, when pressed to detail the nature of the threat, the appellant stated that the official talked to him "in a domineering manner", asked him whether he had family members in China and what Chinese identity documents he had. More fundamentally, the appellant's assertion that the official asked him who had told him to apply for refugee status is inconsistent with the documentary record. While the appellant claims to have been asked about his refugee application and says that this is because an INZ officer had revealed his personal information to the Chinese Consulate, the appellant was interviewed by the Consulate official in December 2010 but did not lodge his refugee claim until January 2011. That there was no extant refugee application for the Consular official to refer to is further demonstrative of the fundamentally untrue nature of this claim.

### **No credible evidence of genuine Christian practise**

[35] The appellant asserts that he adopted Christianity when he was still living in China and that his faith will exacerbate his risk of serious harm at the hands of the Chinese authorities on return. He says that he now attends Chapel in the prison. Asked which church he attended in Z town he said he did not attend church there. Neither did he attend church in Y town before that. He finally conceded that, apart from the Chapel services in prison, he had not attended church since 2005. Asked why he had not attended for the last five years he said it was because he was not in Auckland. This explanation is trite and unconvincing.

[36] Furthermore, when asked to name which church he attended between 2002- 2005 he became evasive and vague and would not answer the question except to say that it was a Christian church. Neither could he name a favourite passage or story from the Bible although he did name the first four books of the New Testament – books he had been asked about at the RSB interview at which time he had no knowledge of them. His recitation of the four books, in answer to an unrelated question, gave the clear impression that he was trying to mend the perceived flaw in his evidence at the RSB. He was unable to give any other evidence of Christian practise or worship in recent years.

[37] The Tribunal finds that the appellant's claim to be Christian is yet another element in his fabricated account, intended to bolster his claim for protection. Although he may now be attending Chapel in the prison environment, his marked lack of commitment to church attendance or other Christian practise for the five years preceding detention indicates that his claimed Christianity is simply a convenient assertion to bolster his claim. In the context of the other impugned evidence in his account, the Tribunal does not accept that he is a genuine Christian or that he would seek to practise as one on return to China.

### **Summary of Credibility Findings**

[38] For all the detailed reasons given above, the Tribunal rejects the appellant's claim to have been threatened or exposed to a risk of serious harm by AA (or her father), the Fu Qing gang or the Chinese Consulate official. He is not and never has been a genuine practising Christian. Except for his biographical details,

the INZ history of his immigration status in New Zealand and the fact that he was interviewed by a Consulate official, no other part of his account is believed.

[39] On that basis, the Tribunal finds that the appellant is a single, male Chinese national who has been living in New Zealand for over a decade. The Chinese Consulate in New Zealand is aware of his unlawful status as a consequence of his application for an emergency travel document in late 2010. It is on this basis that the appellant's claim for refugee and protected person status will proceed.

## **THE REFUGEE CONVENTION – THE ISSUES**

[40] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

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

[41] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to China?**

[42] "Being persecuted" comprises two elements – serious harm and the failure of state protection; see *Refugee Appeal No 71427* (16 August 2000) at [67]. Further, the appropriate standard for persecution is a sustained or systemic violation of core human rights. See in this regard J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1993) at p108 and *Refugee Appeal No 2039* (12 February 1996).

[43] The facts as established do not support a finding that the appellant has a well-founded fear of being persecuted should he now return to China.

[44] It will be recalled that the appellant's claim to be at risk from AA, her father and the named Chinese gang is wholly rejected, as is his claim to be a Christian.

[45] As to his claim to be at risk because the Consulate has become aware of his unlawful status in New Zealand, the appellant has produced no evidence or country information to support the contention. Specifically, he has produced no information that a Chinese national who has had contact with Chinese Embassy officials in New Zealand (or any other Western nation), has applied for an emergency travel document, and is known by the Chinese officials to have been unlawfully in New Zealand (or another nation), would be at risk of harm to the real chance threshold on return to China. Nor is the Tribunal aware of any such information.

[46] While it is acknowledged that Chinese nationals who are known dissidents, political activists or other individuals with an adverse profile with the Chinese authorities (such as those with criminal charges outstanding) may be subject to mistreatment on return, there is no information before the Tribunal to suggest that an individual with no adverse profile and who left China legally would face such a risk on return to the real chance threshold.

[47] The Refugee Documentation Centre in Ireland cites a COI seminar report published by the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) which, in a section titled Return to the PRC (Section 5), quotes country expert Thomas Weyrauch on the treatment of returnees as follows:

“One has to be cautious when assessing whether there is a risk of persecution upon return or not: basically, if the returnee (a rejected asylum seeker or a repatriated migrant) is unknown to the authorities, then persecution is not likely. There are legal regulations prohibiting illegal border crossing in the criminal law. But Chinese authorities didn't care so much in the past years, even if they know that this person asked for political asylum in foreign countries, because the authorities expect that they left China for economic reasons. Diplomats from Western countries monitored the situation of repatriated people, and they found out that in most of the cases there was no political persecution, nor criminal prosecution.”

(See: Ireland Refugee Documentation Centre, *China: Information regarding any problems faced by failed asylum seekers upon their return to China. Is there an increased risk for members of the Uighur ethnic group?* (9 December 2010)).

[48] A 2009 research response of the Refugee Review Tribunal of Australia documented available country information as to the situation for people who had departed China illegally on forged exit permits (which this appellant did not) and, after outlining that information makes the following statement which applies to returnees:

“A substantial search on the fate of returnees to China who had left the People’s Republic of China without valid exit permits and passports was conducted with the major non-government organisations concerned with human rights. No sources were located that stated or suggested that returnees were severely or arbitrarily punished for having left China without exit permits.”

[49] The same research response also cited a 2007 US Department of State report in which it was stated that China allows the return of citizens who had entered other countries illegally and that “[f]ines are rare”:

“[116] The Chinese government accepts the repatriation of citizens who have entered other countries or territories illegally. In the past several years, hundreds of Chinese illegal immigrants have been returned from the United States, and U.S. Embassy officials have been in contact with scores of them. In most cases, returnees are detained long enough once reaching China for relatives to arrange their travel home. Fines are rare. U.S. officials in China have not confirmed any cases of abuse of persons returned to China from the United States for illegal entry. Persons identified as organizers or enforcers of illegal migrant trafficking are liable to face criminal prosecution in China

(See: United States Department of State, *China Profile of Asylum Claims and Country Conditions*, (May 2007)).

[50] Based on the country information cited, and in the absence of any other evidence to establish the contrary, the Tribunal finds that the appellant does not have a well-founded fear of being persecuted should he return to China because he is known by the Chinese consulate in New Zealand to have been living in New Zealand unlawfully. It follows that the second issue outlined above – that of the Refugee Convention reason – does not arise.

[51] For the foregoing reasons, the Tribunal finds the appellant is not a refugee within the meaning of Article 1A(2) of the Convention. Refugee status is declined.

## **THE CONVENTION AGAINST TORTURE – THE ISSUES**

[52] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

### **Assessment of the Claim under the Convention Against Torture**

[53] Section 130(5) of the Act provides that torture has the same meaning as in the Convention against Torture, Article 1(1) of which states that torture is:

“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

[54] The appellant relies on the same evidence in support of his claim under the Torture Convention as he did to support his claim under the Refugee Convention. The Tribunal has already rejected that evidence as not credible. It has also found there to be no risk to him by reason of his unlawful immigration status in New Zealand. For the same reasons, the Tribunal is satisfied that the appellant has not established that there are substantial grounds for believing that he would be in danger of being subjected to torture if he now returns to China.

[55] The appellant is not entitled to be recognised as a protected person under section 130(1) of the Act.

## **THE ICCPR – THE ISSUES**

[56] Section 131(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

### **Assessment of the Claim under the ICCPR**

[57] Pursuant to section 131(6) of the Act, “cruel treatment” means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards; and
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

[58] Pursuant to section 131(6) of the Act “cruel treatment” means cruel, inhuman or degrading treatment or punishment.

[59] Again, the appellant relies on the same evidence in support his claim under the ICCPR as he did to support his claim under the Refugee Convention and that evidence is not credible. It has also found there to be no risk to him by reason of his unlawful immigration status in New Zealand. For the same reasons therefore, the Tribunal finds that the appellant has not established substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if returned to China.

[60] The appellant is not, therefore, a person requiring protection under the ICCPR and it follows that he is not a protected person within the meaning of section 131(1) of the Act.

### **CONCLUSION**

[61] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and

(c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[62] The appeal is dismissed.

"B Dingle"  
B Dingle  
Member

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B Dingle  
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