

071306562 [2007] RRTA 193 (21 August 2007)

DECISION RECORD

RRT CASE NUMBER: 071306562

DIAC REFERENCE: CLF2007/27615

COUNTRY OF REFERENCE: People's Republic of China (PRC)

TRIBUNAL MEMBER: Ms Philippa McIntosh

DATE DECISION SIGNED: 21 August 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being 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 Citizenship to refuse to grant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of the People's Republic of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship 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 was not a person to whom Australia had 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 although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection 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 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).

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

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] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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.

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

The applicant provided biographical details on form 866 and a brief typed statement to the Department. He stated that he had not received any assistance in completing the form, although he also wrote that he was only able to speak, read and write in

"Chinese". Of his biographical details he said that he was born in a province in China He had married and before coming to Australia had been a self-employed. His family remained in China. He had lived at a single address throughout his life.. He had completed 12 years of education.

He stated that his PRC passport had been issued in China. He provided a copy of that passport. He stated that he had had no difficulties obtaining it and had left China legally via an airport.

In the typed statement he wrote that he had left China and arrived in Australia on on a visitor visa. He said that he had now decided to apply for a protection visa because he was a "Falungong member in China", having started his practice "well before it was banned in 1999". Falungong was forbidden in China, had been declared an evil cult and its followers were persecuted. He had practised secretly after 1999. The government in his area had sent police to look for Falun Dafa members (he did not state when). He was one of the members in his village. He said that once the police found him he might be sent to a detention centre to be brainwashed and persecuted.

He claimed that the year before he came to Australia he discovered he had been reported to the police by his neighbour after his family had a dispute with him. The police came to his home but he did not confess. He was worried that they would find evidence sooner or later.

He claimed that he had been blacklisted by the local government and "there should be some records in the computer system of custom[s]". He claimed that he had paid a substantial amount to a "felon" to get a passport and Australian tourist visa and run away from China. It claimed that he was lucky he had not been caught on departing China by Customs. If he went back he would be identified on the computer system and would be jailed and persecuted by the police in his area.

He provided no documentary evidence in support of these claims to the Department.

The applicant gave oral evidence to the Tribunal:

He stated that the address he had given on the protection visa application form was his official address listed on his *hukou* but in fact he and his family had moved to a new address, several years previously. This was rented accommodation and he had lived at this address until coming to Australia. His family, continued to live at that address. He explained that he had married his present wife at that time.

As to whether he was required by the local Public Security Bureau (PSB) to register his presence with them, he stated that there were so many migrant workers moving from the countryside to the cities now that the local police did not bother him until the year before he left for Australia.. As to why only the address in his village was listed on the protection visa application form, and not the other address, he said that according to PRC custom one only gave the address listed on the hukou. As to whether anyone had helped him complete that form, he said that a friend, had completed it for him as he did not speak English. He claimed that he knew what was written on the form and in the accompanying statement. He stated that his friend had since returned to China. As to why it was stated on the form that no one had assisted

him in completing it, from which the Tribunal could infer that the person who had assisted him wanted to hide his involvement, the applicant provided no clear explanation.

As to how he was earning an income he said that he owned land in his village and that currently and labour had the use of it. Since moving to the new address he had done only casual jobs.

Of his other family members he said that his siblings still lived in or near the village. His parents were deceased.

He stated that he had had 12 years of education.

Of his family's circumstances he said that his children were going to school and his wife was working. She was still working at the time of the hearing. He said he had sent her money on one occasion from Australia. As to whether she was having any problems, he said that she had to take care of the children so things were very hard for her. Even his child had to find work during the summer holidays.

He stated that he only knew one person when he arrived in Australia, that being the above mentioned friend. They used to be schoolmates. The applicant had his contact details before arriving in Australia, and his friend had been expecting him.

Of his claims relating to Falungong, he said that he took up the practice for health reasons many years ago. Many people did it in his village and across China at that time. He said that he was just one of many people who went to a particular place in the village to do the exercises in the open. He played no special role.

He said that in July 1999 Falungong practice became illegal and the government took action against practitioners. The county level PSB were looking for practitioners in the village. Because he feared being caught by them he decided to move to another area. I asked him if he had given up his Falungong practice, as many other practitioners had done at the time. He responded that he had continued because his health had benefited from it. It was good for both his physical condition and his mental health. He said that he did not tell his wife he was doing Falungong practice, and that she had become aware that he was doing Falungong practice about two months after their marriage. She had not taken it up herself over the time because of the crackdown on practitioners and she was a timid person. I put to him that at the time she found out about Falungong practice was still legal, to which he responded that in 1996 daily newspaper g had published an article attacking Falungong and in April 1996 had said that practitioners had protested. I told him that was my understanding that this article was published in 1999, not 1996. He disagreed with this. He added that in 1997 survey was conducted and Falungong was deemed an illegal organisation so by 1997 people were becoming afraid to practice it.

As to the form his Falungong practice took between that time and his departure from China, he said that he only did the exercises in his bedroom by himself, in silence. He also read two Falungong publications, being Zhuan Falun and Da Yuan Man Fa, both having been written by Master Li. The former focused on cultivating people's minds and spirits, while the latter explained the details of the practice. He said that he had

taken these books with him when he left the village. As to why he had risks keeping the books after Falungong was banned, he said that he needed to read them in order to practice. He had kept them in a hidden drawer in a cabinet. He subsequently gave evidence that he had misunderstood the question and that he was referring to where he hid them after moving house, and that while in the village he had hidden them under a mattress. On this point I put to him that this seemed to be an obvious place for the police to look, and he indicated that he did not agree. He stated that apart from the above activities, he had done nothing else relating to Falungong in China.

As to whether there was any particular event that made him decide he wanted to leave China, he said that he had a dispute with his neighbours. Somehow his neighbour knew that he was a Falungong practitioner and reported him to the PSB. The police came to his home and took him to the local police station. He was questioned there and denied being a Falungong practitioner. He told them that his neighbour was making up a story about him, but they said there must surely be some reason for the allegation. They told him they had contacted the PSB in his village, but he did not know if that was true. He told the Tribunal that the law required that he be released if there was no evidence found against him within 24 hours, and that he was released after 24 hours. He claimed that they also searched his home but found nothing there because he kept the books in the cabinet.

I asked him to comment on evidence available to the Tribunal that a genuine Falungong practitioner would not deny being a practitioner if asked directly. He disagreed, saying that it depended on the character of the person and that he had denied being a practitioner because he wanted to avoid the police brainwashing and persecuting him. I asked him what he understood Master Li to say on this subject, and he responded that Master said one should be truthful, but in this case he had to avoid persecution and had no choice.

I asked him if he had had any problems after his release by the PSB. He responded that a relative had speculated that the local PSB might make enquiries about him at his PSB in the village, and this had worried him. He had then borrowed a large sum of money which he paid to a travel agent to help him apply for an Australian visa. He said that he then left China. I asked him why, given that he had had no further problems with the police in the preceding several months, he had considered himself still to be at any risk. He did not explain this succinctly. However he indicated that he believed his assessment of the risk had been correct because he had rung his wife from Australia and she had told him that police had come to the house asking where he was and saying that he was a Falungong practitioner. She had told them he was in Australia. I told him that it seemed remarkably coincidental and indeed was difficult to believe that, having shown no interest in him during the previous several months, they had done this. He responded that the Tribunal could ask his wife in China. I told him that I did not propose to do this, in part because she may simply say what he wanted her to say, and in part because the Chinese authorities were known to monitor international calls and the Tribunal would not wish to put her at any risk by referring to Falungong in any context. He then stated that there was a person in Australia, Mr X, who knew the story. The two had first met when they travelled to Australia on the same flight. Mr X was also a Falungong practitioner. He said that Mr X did not know his history but knew that the applicant's wife had said the police were looking for

him. He then agreed that Mr X had only heard this via the applicant, and had no independent knowledge of it.

I asked him why, on the protection visa application form, his employment history was listed as self-employed until his departure for Australia. He responded that he still regarded that as his occupation. In China the household *hukou* was divided into two categories: "one village, one city". People like him owned land. They could not be defined as casual city workers in any official document.

As to his annual income in recent years, he said that the total family income was a small sum of RMB per annum. As to where he had found the substantial sum of RMB for his visa, he said that he had borrowed it through relatives from "someone who asked for high interest". He said that none of the money had yet been repaid but agreed that it would not be good for his family if he did not repay it. He denied that he had come to Australia just to earn money. He said that it was true his income was low but he was able to sustain his life in China. He would not have left if it had not been for his Falungong-related problems.

The applicant had submitted his passport in evidence to the Tribunal. He also brought with him a further written statement, in which he stated that he had got that passport in the year previous to his arrival in Australia so that he could visit Country A and Country B with "other tourists". I asked him why, given that his income was so low, he had been considering a holiday abroad. He responded that he had not actually been planning to go to those countries and that the visas were necessary to get the passport. I put to him that it was not normally necessary to have any visas in order to be issued with a passport in China. He agreed that he had got the passport first, and then the visas, but explained that if one wanted to get a passport through a travel agent one had to say one was planning to travel. It was difficult for him because the authorities in his *hukou* area probably knew of his Falungong background, having questioned many of his fellow practitioners in 1999, and it might be difficult for him to get a passport through them unless he did it through a travel agent. A travel agent would not help him unless he said he wanted a visa. As to why he wanted a passport at all, he said that he had been thinking of leaving China and that he had feared persecution because he had been a Falungong practitioner. He did not deny that he had not been persecuted at all at that time, but said that he feared the PSB would come sooner or later. I asked him if in truth he had left China because he wanted to earn a better income, and he reiterated that the only reason he had left was because he feared the police would come sooner or later.

He stated that he knew the Falungong "tutor" for the area where he currently resides, Mr Y. Mr Y knew him as a practitioner, as did some other practitioners, who he named. All these people were in a single group in his area, which studied Falungong principles at Mr Y's house one night a week. The applicant also stated that he did Falungong practice in a park in the area every day, at a given time. He had been doing so since a month after his arrival in Australia. As to why the website of Falun Dafa in Australia listed the area's session time differently (see <http://www.falunau.org/> , accessed date), he stated that people arrived beforehand but the practice actually started and finished at the times he had given.

In evidence he submitted a letter in Chinese which he stated was from Mr Z. He read it aloud and it was interpreted as follows:

...the honourable Member, I came to know [the applicant] at the practice site in [town]. Ever since we met we have practiced 2-3 times each week, and every [one day per week] studied together. We have participated in demonstrations together several times. It has been eight years since the Chinese Communist Party took action against Falungong on 20 July 1999. The whole world is appealing for the persecution of Falungong practitioners to end. The reason I write today is because I believe Falun Dafa really helps people. Please give him a chance for personal freedom and freedom of belief. Sincere regards, [Mr Z date].

The author provided his home address and mobile telephone number.

The applicant stated that he had tried to get some information about Falungong after arriving in Australia, and had found the Falungong site in his area when he met Mr Z by chance.

The Tribunal asked him a number of questions about Falungong practice and theory, all of which he answered readily, in detail and without any apparent difficulty.

As to his protest activities in Australia, he responded that he had been in the Chinese Communist League in China (a youth organisation) in Australia and had participated in a large protest in which he and many other publicly quit their membership of all CCP organisations. He had also participated in other similar protests. As to why he had not participated in similar activities until recently, he said that he was working at the times of the regular protests in his area and that the time he participated in the protests was a significant month for practitioners, so much protest activity occurred in that month. He said that he had participated this year because the government persecuted practitioners. I asked him why, given that this had been occurring since 1999, he had become politically active only after his arrival in Australia. He responded that he had dared not do so in China. Here no one would persecute him for doing the Falungong practice. He did not dispute that there were informers working for the Chinese authorities in Australia, but said that he did not consider his family would be at risk in China because of his activities as that was not "how it worked" in China.

I told him that I would have to consider whether he had participated in these activities in Australia solely to enhance his application for the protection visa. He indicated that he understood this.

Two Statutory Declarations and two translated statements were submitted after the hearing. They were written by Mr/Ms A (dated), Mr/Ms B (dated), (the Statutory Declarations), Mr/Ms C (dated) and Mr/Ms D (dated). Each provided their contact details. Each confirmed that they participated in Falungong practice sessions and studied with the applicant on a regular basis. The authors of the statutory declarations each confirmed that they had met him at the local meeting area in a park shortly after the applicant's arrival in Australia, and that they had participated in protest activities with him

Evidence from other sources

The practice/philosophy/religion that is known as Falungong was founded in 1992 in China by Li Hongzhi, who is known to his followers as Master Li. It is based on the traditional Chinese cultivation system known as qigong, but is novel in its blending of qigong with elements of Buddhist and Taoist philosophy. Other terms such as Falun Dafa and Falun Gong are used in relation to the movement. The term Falun Dafa is preferred by practitioners themselves to refer to the overarching philosophy and practice (UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April). There is no question that Falungong promotes salvationist and apocalyptic teachings in addition to its qigong elements. Despite its own protestations to the contrary, it also has a well-organised and technologically sophisticated following and has deliberately chosen a policy of confrontation with authorities (Human Rights Watch 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, pp. 14-24, 91-95).

Falungong first came to the attention of PRC authorities after demonstrations by its adherents in April 1999 in Tianjin, and later that month outside the Zhongnanhai in Beijing. The initial government crackdown against it began in late July 1999, when a number of government departments implemented restrictive measures against the movement, banning it and issuing an arrest order for Li Hongzhi. The movement was declared an "evil cult" and outlawed in October 1999 (Chang, M.H. 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, pp.8-10; UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April ([\\NTSSYD\REFER\Research\INTERNET\UKhome\Bulletins\China-FalunGong-2ndEd-2002Nov.htm](http://NTSSYD\REFER\Research\INTERNET\UKhome\Bulletins\China-FalunGong-2ndEd-2002Nov.htm)).

From July 1999 on, Falungong protests were countered by police roundups in which thousands of practitioners were detained in police lockups and makeshift facilities for short-term "reeducation". The crackdown was accompanied by a coordinated media campaign by China's public institutions, highlighting the alleged dangers of Falungong and attempting to justify the crackdown. From July 1999 until the end of 1999 a "legal infrastructure" to counter Falungong was erected: the banning of CCP members, civil servants and members of the military taking part in Falungong activities; the introduction of restrictions on legal officers representing Falungong practitioners and a circular calling for confiscation and destruction of all publications related to Falungong. Falungong internet sites also came under attack.

By October 2000, a year after the "evil cult" regulations went into effect, the government was demonstrating less and less tolerance for rank-and-file practitioners who continued to defy the government by participating in protest rallies. Instead of sending them back to their hometowns for "transformation," they were immediately detained.

Reports suggest that a series of increasingly restrictive measures was implemented during 2001. Such measures included the utilisation of more severe sentences, allegedly incorporating the use of psychiatric institutions to detain and "re-educate" Falungong practitioners; an increase in systematic and state sanctioned violence against Falungong practitioners; an escalated propaganda campaign against

Falungong, repeatedly reinforcing the government's message that the group was an "evil cult" which posed a threat to Chinese society; and the utilization of state institutions such as the police and universities to combat Falungong. Reports suggest that PRC authorities also attempted to restrict the movement of suspected Falungong practitioners within China; to prevent the international press from covering the activities of the Falungong movement, and launching an offensive against the internet structure underpinning the effectiveness of the Falungong organisation in China.

The measures employed by PRC authorities during 2001 were met with some degree of success: by late 2001 many reports were suggesting that Falungong had been effectively suppressed as an active and visible organisation within China. The success of these measures also necessitated a change in the conduct of the Falungong organisation in China itself. While there had been a dramatic abatement in the visibility of Falungong activities within China, there were increasing reports highlighting demonstrations in China by foreign followers of Falungong. These demonstrations had been met with strong resistance from PRC authorities, with the arrest, temporary detention and expulsion of foreign Falungong adherents commonly reported (Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; UK Home Office, 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April; Pomfret, J. and Pan, P. P. 2001, 'Torture is Breaking Falun Gong', *Washington Post*, 5 August).

In 2006 the US State Department said as follows about the treatment of practitioners:

Government continued its repression of groups that it categorized as "cults" in general and of small Christian-based groups and the Falun Gong in particular. Arrest, detention, and imprisonment of Falun Gong practitioners continued, and there have been credible reports of deaths due to torture and abuse. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons, reeducation-through-labor camps, and extra-judicial "legal education" centers. Falun Gong adherents engaged in few public activities within China during the period covered by this report, perhaps due to the strength of the Government's campaign against the group. However, there were continuing revelations about the extra-legal activities of the Government's "610 office," implicated in most alleged abuses of Falun Gong practitioners. (2006, US State Department, International Religious Freedom Report 2005, released by the Bureau of Democracy, Human Rights, and Labor).

Household registration/*hukou*

According to a 2005 issues paper by the Immigration and Refugee Board of Canada (IRB) "the *hukou* is mandatory for all PRC citizens aged one month and over"(IRB 2005, *China: Reforms of the Household Registration System (Hukou) (1998-2004)*, February, Section 7.2.3 & 7.2.4, p.10). The *Regulations of the People's Republic of China on Residence Registration* states that the unit of residence registration is the "household". According to these regulations citizens may only register as a permanent resident in one household and should register at the place of their everyday residence ('Regulations of the People's Republic of China on Residence Registration' 2001, *Chinese Law and Government*, Vol. 34, No.3, Article 5 & 6, p53).

A 2007 report states that a number of individuals live outside their stipulated urban or rural *hukou* region:

most individuals who are classified as rural in this manner hold a rural hukou, and similarly for those from urban areas, there are a number of individuals who hold a rural hukou but live in an urban area and vice versa. (Porter, M. 2007, 'Imbalance in China's Marriage Market & its Effect on Intra-Household Resource Allocation' University of Chicago website, 24 April, p9 http://home.uchicago.edu/~mporter/china_apr2007.pdf – Accessed 20 June 2007).

Another report notes Government estimates that there were at least 120 million migrant workers who had moved to cities in search of work. As China struggled with the social effects of a widening rural-urban divide, there had been growing calls to reform the *hukou* system, owing to the fact that millions of farmers had illegally been moving to towns and cities in order to find work. According to the Research Institute of Population Science at the Chinese Academy of Social Sciences in Beijing, the system denied migrant workers their fundamental right as a Chinese citizen to be treated equally - a Beijing resident earning less than 2,500 Yuan (US\$313) a year could receive monthly subsidies, medical insurance, a pension and even low-cost housing, in contrast to the few benefits given to farmers living on the same income. Education for migrant children was an equally controversial topic, with migrant families often charged discriminatory tuition fees at urban schools - a practice that was officially prohibited. Each migrant worker for example, had to pay between 20,000 and 30,000 Yuan (US\$2,500 to US\$3,750) for a child to enrol in a local primary or middle school (Rong Jiaojiao, 2007, "China: Hukou 'an obstacle to market economy'", China Daily, 21 May, China Daily website, http://www.chinadaily.com.cn/china/2007-05/21/content_876699_2.htm, accessed 23 May 2007).

Passports/exit from China

In a 2005 advice on passports for Falungong practitioners DFAT stated:

China's Entry and Exit Law states that the following groups of people shall not be given approval to leave China: (1) defendants in criminal cases or criminal suspects confirmed by a public security organ, a people's procuratorate or a people's court; (2) persons who, as notified by a people's court, shall be denied exit owing to involvement in unresolved civil cases; (3) convicted persons serving their sentences; (4) persons undergoing rehabilitation through labour; and (5) persons whose exit from the country will, in the opinion of the competent department of the State Council, be harmful to state security or cause a major loss to national interests. The Ministry of Public Security (MPS), which administers the law, has advised that these five groups of people are not allowed to obtain passports.

MPS has wide powers to interpret who may be denied a passport. Local public security organs could conceivably deny a known Falun Gong practitioner a passport. If a person was detained and tortured by the Chinese authorities for practising Falun Gong it is conceivable that the local public security authorities would deny him or her a passport should the person apply (DIAC Country Information Service 2005, *Country Information Report No. 05/43 – Chinese passports for Falun Gong practitioners*, (sourced from DFAT advice of 9 August 2005), 10 August).

DFAT has also advised that the Chinese authorities check all outgoing passengers against “alert” lists, which operate at railway stations, airports and border crossings. Although DFAT had not been able to obtain comprehensive information on alert lists it confirmed that Chinese citizens subject to arrest warrants would be on the lists. It would be likely that people under investigation but for whom a formal arrest warrant has not been issued would also be on the lists (DIAC Country Information Service 2006, *Country Information Report No. 06/42 – China: Failed asylum seeker return decision (CISQUEST ref 8639)*, (sourced from DFAT advice of 7 August 2006), 25 August; DIAC Country Information Service 2006, *Country Information Report No. 06/65 – China: Passport and exit arrangements*, (sourced from DFAT advice of 8 November 2006), 10 November).

The Passport Law of the People’s Republic of China effective as of 1 January 2007 states that a passport shall not be issued to an applicant for the following reasons:

He does not have the nationality of the People’s Republic of China;
He is unable to prove his identity;
He cheats during the process of application;
He has been sentenced to any criminal punishment and is serving the sentence at present;
The people’s courts notice that he is not permitted to leave China because he is involved in pending civil case;
He is a defendant or criminal suspect of a criminal case; or
The competent organs of the State Council believe that his leaving China will do harm to the state security or result in serious losses to the benefits of the state (*The Passport Law of the People’s Republic of China*, Promulgated by the 21st Session of the Standing Committee of the 10th National People’s Congress of the People’s Republic of China on 29 April 2006 and effective as of 1 January 2007, Beijing Review website, Article 13 http://www.bjreview.com.cn/document/txt/2006-12/14/content_50706.htm – accessed 16 February 2007).

FINDINGS AND REASONS

The applicant has submitted his PRC passport as evidence of his nationality. On that basis I am satisfied, and find, that he is a national of the PRC.

It is clear from the evidence from the sources above (Human Rights Watch 2002, U.S. State Department 2006 *et al*) that the treatment of some Falungong practitioners in China since its banning in 1999 has involved serious harm and systematic and discriminatory conduct by the PRC authorities. I am satisfied that, if the applicant was a genuine Falungong practitioner in China, he would have faced a real chance of such treatment if he had not hidden his practice from those authorities.

As to his claim to have been Falungong practitioner in China for many years, I have had regard to the following:

I consider plausible his claim to have moved from his village to an urban area. That claim is entirely consistent with the general country information about the huge numbers of rural workers migrating to urban areas and living there illegally. Although the oral claim is not consistent with the brief biographical details on the application

forms, there is nothing to suggest that the applicant had access to professional advice when a third party completed the forms, and I accept that he may have assumed it was the details contained in his household registration record that he should record on the form rather than his illegal residence and casual employment in an urban area.

I have some doubt that he was briefly detained by police in the year before he travelled to Australia because a neighbour doxxed him in as a Falungong practitioner, simply because he gave evidence that he only did the exercises in private, in his home, and in silence. It is therefore unclear how a neighbour could have known of his practice. In any case he claimed that the police released him within the period required by law and that, at least until he left China some months later, they had no further suspicions about him of which he was aware. If this incident did occur, it illustrates no more than that such allegations are readily made for personal reasons in an environment in which a particular group faces discriminatory treatment by the authorities.

However, other factors enable the Tribunal to be satisfied, albeit with the reservations referred to below, that the applicant took up Falungong practice while in China. The most important is that his level of knowledge about Falungong practice and theory illustrated a genuine and comfortable familiarity with it. With prolonged and intense study that knowledge could have been gained, of course, in the several months since he commenced Falungong practice in Australia. However in my view it would be unreasonable to find that that is what has occurred, and I propose to give him the benefit of the doubt and accept that he gained that knowledge while in China.

Secondly, I also have regard to his generally modest claims about his level of activity in China. He described himself as no more than an ordinary practitioner doing group practice, for health reasons, along with many other villagers before 1999. He did not claim to have had any contact with the PSB in his village after the crackdown on Falungong commenced, and did not claim to have been involved in any Falungong-related activities after that apart from doing the exercises, in silence and in private, at his home.

I accept that he was an ordinary Falungong practitioner in China and that, as he has claimed, he continued to do the practice in private in the years after Falungong was banned.

As to how he was perceived by the PRC authorities when he was issued with a passport and left China, I note the evidence above from DIAC (2005) that “local public security organs could conceivably deny a known Falun Gong practitioner a passport”. I infer from the applicant’s ability to obtain a passport in the year prior to his arrival in Australia that the local PSB in his *hukou* area did not regard him as a “known Falun Gong practitioner”. He also left the country legally and without difficulty. That is consistent with the evidence indicating (DIAC Country Information Service 2006, *Country Information Report No. 06/*; DIAC Country Information Service 2006, *Country Information Report No. 06/65*) that he did not fall into the category of person who might have been on an “alert” list at international departure points.

Of his claims to have participated in regular Falungong practice and some protest activities since his arrival in Australia, I note that s.91R(3) of the Act provides that

any conduct engaged in by an applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention.

Given that I have accepted that the applicant was a Falungong practitioner in China, I am satisfied that he engaged in Falungong practice in Australia for reasons “otherwise than for the purpose of strengthening his ... claim to be a refugee within the meaning of the Convention”.

The Tribunal therefore accepts that the applicant is a genuine Falungong practitioner and, as I am satisfied for the following reasons that as an ordinary practitioner he would face a real chance of persecution in China, I do not propose to consider in detail his claims to have been detained briefly, or his reasons for participating in a small number of anti-CCP protest activities in Australia.

Given the consistency of his practice over many years, I am satisfied that he would continue to do the Falungong practice if he were to return to China and, as he did before departure, would do so in private for the reason of avoiding persecution. In those circumstances, as the High Court has stated, ‘persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action’ (*Appellant S395/2002 v MIMA [2003] HCA 71; (2003) 216 CLR 473 per McHugh and Kirby JJ at [40], and per Gummow and Hayne JJ at [80]*). Where an applicant has acted in the way he or she did only because of the threat of harm, as in the present case, the well-founded fear of persecution held by the applicant is the fear that unless he or she acts to avoid harmful conduct, he or she will suffer harm. In these cases, it is the threat of serious harm with its implications that constitutes the persecutory conduct. I have found that the applicant modified his conduct because of the threat of harm if he did not modify it. I am also satisfied that he adopted the basic philosophy underpinning the practice of Falungong. I consider that if he were to return to China and continue to practice Falungong, his right to freedom of thought, and freedom to manifest his belief in the philosophy of Falungong, either alone or in community with others, in practice and observance (see Article 18 of the Universal Declaration of Human Rights) would be denied.

I am satisfied that Falungong practitioners are targeted by the PRC authorities because of a combination of a political opinion attributed to them and their membership of the particular social group, Falungong practitioners. I consider reliable the evidence in the US State Department report (2006) about the very harsh treatment of practitioners, and find that in many cases it amounts to persecution.

For the above reasons I am satisfied, and find, that the applicant has a well-founded fear of being persecuted for a combination of the above Convention reasons.

CONCLUSIONS

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

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.