

071323178 [2007] RRTA 117 (25 June 2007)

DECISION RECORD

RRT CASE NUMBER: 071323178

DIAC REFERENCE(S): CLF2007/36012

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Suseela Durvasula

DATE DECISION SIGNED: 25 June 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 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 the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of China (PRC), arrived in 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 her review rights by letter.

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

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

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

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged 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:

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

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

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

Sections 91R and 91S of the Act 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 Departmental and Tribunal files relating to the applicant.

Protection visa application

The applicant is a Chinese national. She was born in Guangdong, China. On her protection visa application form, it is stated that she is married with children. She completed middle school in Fuoshan, Guangdong. She lived at the same address in Fuoshan, Guangdong until her arrival in Australia. On her protection visa application she states that she worked as an office clerk for a few years. Afterwards, she worked as a sales manager. The applicant arrived in Australia on a Subclass 676 visitor visa, travelling on a passport issued in her own name.

With her protection visa application, the applicant provided a statement in English in which she states that she is a Falun Gong member. She commenced practising after being introduced by a friend. Her friend's mother organised a Falun Gong practice station in Fuoshan. Her friend's mother was arrested after the government banned Falun Gong in 1999.

The applicant's employer told her she was forbidden from practising Falun Gong. She lost her job. She could not find another job. She stayed at home and resumed practice after she felt the government was not targeting Falun Gong any more.

One day, her handbag was stolen. It contained the book 'Zhuan Fa Lun'. A cleaner found her bag in a rubbish bin and handed it to the police. The police found her and she confessed that she was still practising Falun Gong. She was questioned, brain washed, forced to watch fake video tapes humiliating Falun Gong and acknowledge that Falun Gong was a cult. She was released after signing a statement promising that she would not practice Falun Gong anymore. She does not want to return to China as she will not be free to practice Falun Gong.

Tribunal hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese/Mandarin and English languages.

At the hearing, the applicant gave the Tribunal a number of handwritten documents in Chinese. She agreed to get these documents translated and the Tribunal gave her further time to do so.

Applicant's comments about the information in her protection visa application

The applicant told the Tribunal that a lot of the information in her protection visa application was incorrect. The statement in English did not accurately reflect her actual experiences. The agent she went to see did not ask her a lot of questions and told her not to worry as he had done many of these types of applications before. He did not want his name to appear on the application and told her to sign it. She gave him the correct information about her personal details, but she does not know if the agent transposed that information correctly. He did not confirm the information with her.

Applicant's personal details

The applicant told the Tribunal when she was born. The date of birth on her passport and application was incorrect. She gave a false date of birth when she applied for her passport as she did not want the authorities to trace her. She is divorced and has children. The information in the application regarding her schooling was incorrect. She completed high school. She lived at a house owned by a relative. Prior to that, she lived with her husband. She separated from her husband due to disagreements over her Falun Gong practice and they divorced.

Applicant's Falun Gong practice

The applicant told the Tribunal that she started practising Falun Gong after being introduced to it by a friend. She used to practice in a public park in the mornings. After the crackdown in 1999, she only practised at home in the mornings in secret. The applicant described the Falun Gong exercises, demonstrated the exercises to the Tribunal and explained the Falun Gong philosophies and the principles in the *Zhuan Falun* book. The applicant also described the nature of her Falun Gong practice and activities in Australia.

Persecution claims

The applicant stated that the police came to her work unit. She was required to attend at the police station and was questioned about her Falun Gong practice. She was detained for a few weeks for 'law and order' reasons. She was required to write a letter of repentance denouncing Falun Gong. She refused to do so. She was released after a few weeks as she could only be held for that length of time under that particular order. The police also went to her husband's workplace and visited her daughters' school to ask questions.

After her release, she had to attend at the police station every week for 'brain washing' sessions. Due to her Falun Gong practice and questioning by police, she was dismissed from her job. Her work place and the local street committee would not issue her with any certificate or letter of permission and she was unable to find a job. After this, she supported herself by stitching clothes for factories at home. It was casual work only. Her relationship with her husband deteriorated and the applicant moved back to her parents place. She divorced from her husband.

The applicant continued practising Falun Gong after her release from detention. After some time, the police raided her house and found Falun Gong books. They detained her again for a few weeks. After her release, she decided that she could not put up with the constant surveillance and decided to go abroad.

Applicant's passport and departure to Australia

The applicant obtained her passport through a fellow Falun Gong practitioner. She was introduced to an officer of a government department and paid a large bribe to this person to obtain a passport. Her family helped her with the bribe and pooled their money. As she was on a black list, she provided a false date of birth so the authorities could not trace her.

The Tribunal asked why she waited another year to travel to Australia. She stated that she did not have any money after paying for the passport. She had to wait to raise money for the visa.

Her family were only workers and did not have enough money to immediately pay for the visa.

Evidence of witnesses

The Tribunal took evidence from people claiming to be Falun Gong practitioners. They stated that they had seen the applicant practice Falun Gong on a regular basis and participate in Falun Gong activities.

One witness, Mr X, stated that he had known the applicant in China and had seen her practice Falun Gong in a public park while he practised Thai Chi. After that, he visited her about once a month at her home and was aware that she practised the exercises in the morning. On one occasion, he went to her house and she was not there. He heard from her family that she had been detained. He was about to travel overseas when she was detained the second time.

Further submissions

After the hearing, the applicant provided translated copies of the statements she had presented at the Tribunal hearing. A detailed statement by the applicant confirms her evidence at the hearing. Written statements by the three witnesses who gave evidence at the hearing corroborated the applicant's Falun Gong practice in China and Australia. Also provided were photographs of the applicant participating in Falun Gong activities in Australia.

Independent country information

The Tribunal has had regard to the following country information regarding the treatment of Falun Gong practitioners in China from the United States Department of State 2006, *Freedom of International Religious Freedom Report 2006: China*:

The 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...Falun Gong practitioners continued to face arrest, detention, and imprisonment, 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, while some who recanted returned from detention. Reports of abuse were difficult to confirm within the country and the group engaged in almost no public activity within the country. Overseas Falun Gong practitioners claimed this was a result of the harsh government campaign, which began with the 1999 crackdown against the group. There were continuing revelations about the extra-legal activities of the Government's "610 office" including torture and forced confessions, a state security agency implicated in most alleged abuses of Falun Gong practitioners.

...

After the revised criminal law came into effect in 1997, offenses related to membership in unapproved cults and religious groups were classified as crimes of disturbing the social order. A ban on cults, including the Falun Gong spiritual movement, was enacted in 1999. Under Article 300 of the criminal law, "cult" members who "disrupt public order" or distribute publications may be sentenced to three to seven years in prison, while "cult" leaders and recruiters may be sentenced to seven years or more in prison. Under the new Public Security Administrative Punishment Law, which took effect March 1, 2006. Falun Gong adherents could face five to fifteen days of administrative detention and fines of up to \$125 (1,000 RMB)

for using superstitious cults or qigong activities to disrupt public order or harm public health. Public security officials said the law would be used against Falun Gong.

...

During the period covered by this report, government repression of the Falun Gong spiritual movement continued. Membership in the Falun Gong and other groups considered cults was illegal. Distributing Falun Gong literature or encouraging others to join the spiritual movement was punishable by criminal and administrative sanctions, including reeducation....

...

According to Falun Gong practitioners in the United States, since 1999 more than 100,000 practitioners have been detained for engaging in Falun Gong practices, admitting that they adhere to the teachings of Falun Gong, or refusing to criticize the organization or its founder. The organization reported that its members have been subject to excessive force, abuse, rape, detention, and torture, and that some of its members, including children, have died in custody. NGOs not affiliated with the Falun Gong documented nearly 500 cases of Falun Gong members detained, prosecuted, or sentenced to reeducation during the period covered by this report. Credible estimates suggested the actual number was much higher...Some foreign observers estimated that at least half of the 250,000 officially recorded inmates in the country's reeducation-through-labor camps were Falun Gong adherents. Falun Gong sources overseas placed the number even higher. Hundreds of Falun Gong adherents were also incarcerated in legal education centers, a form of administrative detention, upon completion of their reeducation-through-labor sentences. Government officials denied the existence of such "legal education" centers. According to the Falun Gong, hundreds of its practitioners have been confined to psychiatric institutions and forced to take medications or undergo electric shock treatment against their will.

FINDINGS AND REASONS

On the basis of the applicant's passport, the Tribunal finds that she is a national of the People's Republic of China. The applicant states that the date of birth on her passport is incorrect and stated her actual date of birth. As the Tribunal has no other identity documents to verify the applicant's date of birth, the Tribunal is unable to make a finding on this matter. The Tribunal accepts her evidence as to her name and has assessed her claims on the basis that she is a national of the People's Republic of China.

The Tribunal has some concerns that the applicant provided a different account of her personal details and circumstances to the Tribunal, to the information outlined in her protection visa application and statement. These differences concerned basic personal information about her marital status, children and schooling, as well as her actual protection visa claims. The Tribunal is prepared to give the applicant the benefit of the doubt and accept that her agent incorrectly filled out this information and did not accurately record her claims and personal details. The applicant volunteered this explanation without any prompting by the Tribunal. As the applicant was new to Australia and did not speak English, it was reasonable for her to rely on the agent to complete the application form for her. In any case, the applicant's interests would not be served by fabricating basic information about her schooling, marital status and children that were unrelated to her protection visa claims. The subsequent statement the applicant provided to the Tribunal is far more detailed and was

consistent with her evidence at the hearing. Therefore, the Tribunal does not draw any adverse conclusions about the applicant's protection visa claims on the basis of these inconsistencies.

The Tribunal accepts that the applicant is a genuine and committed Falun Gong practitioner. She provided a detailed and credible account of her Falun Gong practice and of her past experiences in China. She demonstrated to the Tribunal, a sound knowledge of Falun Gong philosophy and practice.

The Tribunal considers that the applicant provided a credible account of her experiences about her Falun Gong practice in China, being dismissed from her employment and her detention in China. Her account was reasonably detailed and is supported by the independent country information referred to above regarding administrative detention. Her evidence was also corroborated by the witness, Mr X, who had observed the applicant practising Falun Gong in a public park and at her home after Falun Gong was banned.

Giving the applicant the benefit of the doubt, the Tribunal is prepared to accept her claims as to what happened to her in China. The Tribunal therefore accepts that she was subject to harassment and monitoring by the Chinese authorities because of her Falun Gong practice, that she was detained and questioned for a few weeks on two occasions, that she was asked to write letters of repentance, that she continued to be monitored by the police after her release from detention and that she was dismissed from her job because of her Falun Gong practice.

The Tribunal draws no adverse conclusion from the fact that the applicant was able to obtain a passport in her own name and was able to depart China without difficulty. There is conflicting information before the Tribunal as to whether or not Falun Gong practitioners can obtain a passport and leave China without difficulty. Some information indicates that it is possible to obtain a passport in one's own name by bribing corrupt officials. There is no national policy of denying passports to Falun Gong members. This appears to occur more in the case of suspected leaders and organisers rather than ordinary members (see Department of Foreign Affairs and Trade, 1999, *Falun Gong aka Falun Dafa in China*, 9 November (CX38557); US Department of State 2001, *Country Reports on Human Rights Practices 2000*, China, Section 2d). In the applicant's case the Tribunal accepts that she was able to obtain a passport in her own name by paying a bribe, organising it through a third-party and providing a false date of birth.

The Tribunal does not draw any adverse conclusion from the fact that the applicant waited for another year after she was issued her passport to come to Australia. The Tribunal accepts that she had to raise further funds to pay for the visa and her family was not well off. She departed soon after she was issued a visa.

The Tribunal accepts that the applicant is not prepared to renounce her beliefs in Falun Gong and she has continued to actively participate in Falun Gong activities in Australia. The Tribunal is satisfied that the applicant has not engaged in these activities purely for strengthening her refugee claims, but because of her genuine commitment to, and belief in Falun Gong. The Tribunal is satisfied, for the purpose of subsection 91R(3) of the Act, that the applicant has participated in Falun Gong activities and protests in Australia, otherwise than for the purpose of strengthening her claim to be a refugee.

The Tribunal has had regard to the independent country information quoted above that the authorities in China use detention and torture in an attempt to make even ordinary

practitioners of Falun Gong renounce their beliefs. As stated by Human Rights Watch (Human Rights Watch, *Dangerous Meditation - China's Campaign Against Falun Gong*, February 2002) and the US Department of State, persecution has not been limited to 'key organisers' but has extended to 'rank and file followers' who have not been prepared to renounce their belief in Falun Gong. While such 'rank and file followers' have not generally been judicially prosecuted, they have been subjected to administrative penalties and there is ample evidence to confirm that administrative penalties in China such as 're-education through labour' or 'transformation' sessions involve physical and mental torture and mistreatment. On the basis of this information, the Tribunal is satisfied that there is a real chance that the applicant's Falun Gong activities in Australia, combined with her previous history, would bring her to the adverse attention of the Chinese authorities if she returned.

For the above reasons, the Tribunal accepts that the applicant is a committed Falun Gong practitioner and will not change her beliefs. The Tribunal accepts that if the applicant was to return to China now or in the reasonably foreseeable future, there is a real chance that she would not be able to freely practise Falun Gong in the manner she would wish to. In particular, she would still need to practise secretly. There is a real chance she would be arrested and detained for reasons of her Falun Gong beliefs. The Tribunal is also satisfied that there is no place within China to which the applicant could reasonably relocate where she would not have a well founded fear of persecution on account of her Falun Gong practice and beliefs.

The Tribunal is satisfied that the persecution which the applicant fears clearly involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act, in that it involves a threat to her liberty or significant physical harassment or ill-treatment. The Tribunal is satisfied the religion of the applicant (her belief in Falun Gong), is the essential and significant reason for the persecution she fears, as required by paragraph 91R(1)(a). The Tribunal is further satisfied that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves her selective harassment for a Convention reason, namely her religion.

CONCLUSION

The Tribunal finds that the applicant is outside her country of nationality, the People's Republic of China. For reasons given above, the Tribunal finds that she has a well-founded fear of being persecuted for reasons of her religion (her Falun Gong beliefs), if she returns to that country now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to her fear of persecution, to avail herself of the protection of the government of the People's Republic of China. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than her country of nationality, the People's Republic of China. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

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

DECISION

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

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

Sealing Officer's I.D. prrt44