

1405804 [2014] RRTA 658 (27 August 2014)

DECISION RECORD

RRT CASE NUMBER: 1405804
COUNTRY OF REFERENCE: China
TRIBUNAL MEMBER: Luke Hardy
DATE: 27 August 2014
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Statement made on 27 August 2014 at 1:03pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. [Applicant 1 and Applicant 2] are a married couple from a village in the vicinity of [Town 3], a town in Heilongjian province in the People's Republic of China. [Applicant 1], who ran a small transport business in [Town 3], claims to have been introduced to Falun Gong, a banned spiritual cultivation movement in China. He claims to have been arrested and detained twice for reasons of his involvement in Falun Gong. He and [Applicant 2] applied [in] October 2013 to the Department of Immigration for Protection (Class XA) visas under s.65 of the *Migration Act 1958*. [Applicant 2] was included in the application as a person making no claims of her own, meaning that the outcome in her case was dependent on the outcome of the case of [Applicant 1].
2. The applicants were invited to attend an interview with a delegate of the Immigration Minister scheduled [in] February 2014. They did not respond to the invitation and did not attend the interview. The delegate refused to grant the visas [in] March 2014.
3. The applicants appeared before me on 13 August 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin-English medium.
4. The main issue on the applicants' case is whether or not they face a real chance of Convention-related persecution in China (s.36(2)(a) of the Act). If not, I must consider if there are substantial grounds for believing that, as a necessary and foreseeable consequence of their removal from Australia to China, there is a real risk the applicants will suffer significant harm (s.36(2)(aa) of the Act).

CONSIDERATION OF CLAIMS AND EVIDENCE

5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Are the claims in this case Convention-related?

6. A fairly comprehensive body of information about the decade-long purging of the Falun Gong spiritual cultivation movement, its members and their families in China is assembled at Chapter 19 of the UK Home Office's, *China: Country of Origin Information Report*, 12 October 2012, <http://www.refworld.org/docid/508e71f12.html> (accessed 19 August 2014). In particular, it provides details of re-education classes and even lengthy detention in labour camps for persons who are found to have been involved in practicing and/or proselytising Falun Gong. Falun Gong adherents who defy the ban are evidently regarded as persons acting in defiance of the state and treated as political prisoners. Sentences of 12 years are evidently quite common.
7. As the preaching and practice of Falun Gong is banned and severely punished, the claims in this case relate to Convention factors of "religion", "membership of a particular social group" and imputed "political opinion".

Do the applicants face a real chance of Convention-related persecution in China?

Are the applicants are genuine adherents of Falun Gong?

8. In a signed and translated Chinese-language statement attached to his primary application, [Applicant 1] said he started practicing Falun Gong in China in around 2011 to help cure his “old disease”. He said that when he started practicing he found it also improved his “mental state”. He said it helped him quit cigarettes and alcohol. He cited the three central tenets of Falun Gong: Truth, Compassion and Forbearance. He said he met three other Falun Gong practitioners in China, one of them his cousin, the other two former classmates from his local area, one a businessman and the other a primary school headmaster. He claimed he “joined practicing” with the headmaster in 2011 and said that one night they distributed Falun Gong CDs on their way home. He said he arrived home safe that night but was arrested the next day. He said he was detained [and] told he was suspected of distributing Falun Gong *leaflets*. He claimed he denied the accusation. He said his family sought help from a security policeman to have him released, whereas the headmaster continued to be investigated by a higher authority. He went on to say that he and his co-practitioners were lucky to be released and attributed this a lack of substantial evidence against them at the time.
9. [Applicant 1] said in his statement that after this incident he thought his trouble was over and that he could return to a normal life. He said he was, however, arrested again, in October of the following year, 2012, whilst buying produce at a local market. He claimed he was interrogated afresh over alleged pamphlet distribution. He claimed he denied any involvement in such matters, only to be told that the headmaster had been arrested after pamphlets had been found in his house. He claimed he was shocked to hear of this. He claimed he was tortured to confess and that his wife was called in to persuade him to admit involvement. He claimed he eventually signed a confession, paid a “penalty” and was released. He claimed the headmaster’s family advised him to flee China. He claimed he needed to bring [Applicant 2] because she was being questioned by police too. He claimed that a business contact helped them leave for Australia. He claimed his and [Applicant 2]’s families have been harassed by local government officials in relation to the Falun Gong issue.
10. At the RRT hearing, [Applicant 1] referred to [an adult child] who had moved away from home to study [closer] to the city. He said [that child] had graduated but was not yet employed. Later in the hearing, [Applicant 1] told me that the authorities have pressured his and [Applicant 2’s] families, asking them why and how he and [Applicant 2] left China.
11. I asked [Applicant 1] to describe his history of involvement with Falun Gong and he said he first gravitated towards it in August 2010, in spite of knowing it was banned and its adherents severely punished if caught. He said he did this because he had drinking, gambling and smoking problems and because he remembered people saying Falun Gong was beneficial back in the time before it was banned. He said he also had [a medical condition] for which regular medical treatment was too expensive. He said that “someone” suggested Falun Gong and that as long as he practiced in secret, no-one would find out. He described this “someone” as a locally resident retired official who gave him a Falun Dafa book. He said he learned by himself to perform the exercises and meditation entirely from the book and that in time he felt the benefits of Falun Gong practice. I asked [Applicant 1] to describe in detail how he weighed the

anticipated benefits of practicing Falun Gong against the known risk, and his evidence in reply was vague.

12. [Applicant 1] said he introduced his wife [Applicant 2] to Falun Gong. He said she tried it a few times but gave up on it. He said she was having [medical] problems at the time and told her Chinese medicine practitioner she was practicing “*qigong*” (an uncontroversial practice in China) to address them. He said the Chinese medicine practitioner told his wife that *qigong* could not help her because there would be side effects. He said this was why she gave it up. I asked him if he did not believe that Falun Gong could help heal all manner of ailments; he said he was scared of the health risks for his wife continuing with Falun Gong and told her to stop. [Applicant 1] said his wife’s [medical] problems eventually resolved themselves. I asked him if he ever tried to resume his teaching of Falun Gong to her and he said he did not because, as he put it, Falun Gong is not for everyone.
13. Later I interviewed [Applicant 2] and her version of events was very similar. [Applicant 2] was reluctant to give evidence in this matter, but I needed to clarify her standing in the matter: she was included in the original application as a “Part D” applicant, meaning that the outcome in this matter for her depended entirely on the claims of [Applicant 1]. I noted, though, that when asked to declare her religion in “Part D” of the 2013 application, she said “Falun Gong”. [Applicant 2] initially told me she *is* a Falun Gong practitioner but explained that what she really meant was that she supports [Applicant 1]’s devotion to Falun Gong and that she just wants to stay in Australia. I ascertained that [Applicant 2] does not regard herself as a Falun Gong adherent. She claims to have had no contact with the practice since trying it briefly in private in China. She does not claim to have developed any interest in it for her own part. She does not claim to have come to the attention of the authorities in China as a Falun Gong practitioner in her own right.
14. [Applicant 1] told me that the retired official who gave him the book lived about 500 metres away but never practiced Falun Gong with him, as this person had previously been suspected of Falun Gong involvement, had been persecuted and continued to be monitored by the authorities. He said the retired official nevertheless used to meet him in secret and ask him how his practice was going. He said that the retired official was averse to contacting other practitioners. [Applicant 1] then said the retired official introduced him to three other practitioners and recommended that the four of them, the retired official excluded, practice Falun Gong together. When I put to [Applicant 1] that there seemed to be an inconsistency in his description of the behaviour of the retired official, he said the latter had told him and the other three that they were faithful and should practice together. His evidence seemed to become more confused when he said that the retired official did not want to contact the four to save them from being detected by the authorities monitoring him, but encouraged them to practice together.
15. [Applicant 1] said the four all lived in the same village and practiced together twice a month. He said that the group endeavoured to maintain secrecy. He said the group therefore never discussed Falun Gong on the telephone and organised meetings through a process of one practitioner going to another and suggesting a meeting the next day, whereupon the second practitioner would pass the message on to one more, the latter then contacting the last of the four. He stressed that secrecy was still paramount and always remained so. In this light, I asked how the nocturnal dissemination activity could have occurred, and [Applicant 1] said that the headmaster in the group had the

means of bypassing government filters and of illegally downloading Falun Gong material, which he was then able to print and copy. I put to [Applicant 1] that Chinese authorities closely monitor illegal Internet traffic and asked him how this all sat with his claims about secrecy (as discussed in several independent reports collated at Chapter 15 of the UK Home Office's, *China: Country of Origin Information Report*). [Applicant 1] did not dispute that the authorities closely monitor such activity. He said he and his group took the risk because of lies the government was telling about Falun Gong. [Applicant 1] said his group distributed the material to households in his village, placing pamphlets under front doors and leaving them on front gates or fences. I asked [Applicant 1] to describe how his group expected to measure the success of this venture and he said the group did not think about it; he said they were happy to hope that one person out there might understand Falun Gong better. He said that the retired official took no part in this venture. He said the authorities did not take any action against the retired official when they discovered the pamphlets. In spite of the retired official having been a suspect of some long standing, and in spite of the pamphlets having been distributed in the same official's residential locality, [Applicant 1] said the authorities did not trouble the retired official in the matter as they did not have enough evidence against him. However, [Applicant 1] also said he himself was released a day after his own arrest because there was not enough evidence against him. I put to him that the retired official's history along with the pamphlets being disseminated in the latter's home locality appeared very capable in the circumstances of contributing to a body of evidence against him, and [Applicant 1] said, "They ... suspected towards me." I then asked [Applicant 1] if he and his group had factored in the possibility that their pamphleteering venture could endanger the very man who introduced them and stressed the need for absolute secrecy in their observance of Falun Gong, and he said that the group felt confident that because their pamphlet drop was conducted secretly, the retired official would not be suspected. [Applicant 1] said all this happened in early 2011.

16. [Applicant 1] said the second time he was arrested was in October 2012 when he was at the market. Then I asked him why he was arrested he said he did not know why; then he said he was arrested after having continued, with his fellow group members, to distribute pamphlets in their local area. He said the authorities pressed him to confess, telling him that they were holding the headmaster and that the latter had doxed him in. I asked [Applicant 1] how he was able to walk free on this second occasion, and he said he signed another letter of regret and paid another fine. I put to [Applicant 1] that the authorities in China reportedly punish known Falun Gong practitioners with long sentences in labour camps and, in reply, he said this was correct. I asked him how, in the circumstances he was able to walk free after being arrested the second time in connection with Falun Gong, his evidently having written a confession on the prior occasion, and he said that the system in China is corrupt. He went on to refer vaguely to "someone (having) helped behind the scenes." [Applicant 1] said the retired official was still not implicated. He said that the retired official passed away in 2013.
17. I asked [Applicant 1] why he and the headmaster continued to distribute pamphlets continuously after the initial arrest in 2011, and he said he and the headmaster had not regarded that instance with the authorities as anything serious. He said they felt lucky when they were released. I put to him that according to his signed statement to the Department he had gone back to normal life after his first arrest, rather than having continued seemingly regardless. In response he said that the text of his statement might

have been the result of inadequate preparation. He said he had meant to indicate that he and his group returned to their normal activities which included pamphleteering. I note from [Applicant 1]'s evidence that there were several alleged pamphlet drops between the first and the last and yet the authorities appeared not have acted in response to any of the intervening distributions.

18. I put to [Applicant 1] that there were inconsistencies and implausible elements in his evidence about his experiences with the retired official and with his the group that might leave me with the impression of his account of Falun Gong activity in China being unreliable. I gave him a further opportunity to address concerns I had raised with him about inconsistencies in his evidence, and he said that when he referred in his statement to "normal life", he had been referring to the harassment of early 2011 having continued, meaning that this for him became his "normal life". I do not agree, on a fair reading of it, that this is what the statement says.
19. I invited [Applicant 1] to describe the fourth Falun Gong exercise and he was able to do so in detail. He said he had been going to [Site 4] since March 2014 and had also been attending some Saturday evening Falun Dafa discussions near [a named suburb] since April 2014. [Applicant 1] presented three photographs at the RRT hearing: one depicting him practicing Falun Gong with other in a park he identified to me as [Site 4]; another depicting him seated in a row with others at what he said was the Saturday Falun Dafa lecture; and another depicting him leaving the office of *The Epoch Times*, the Australian Falun Gong newspaper, carrying a stack of copies of the paper. He told me that all of these photographs were taken a few weeks ago.
20. [Applicant 1] also produced an August 2014 statutory declaration from a self-identifying Falun Gong practitioner declaring that [Applicant 1] had been an acquaintance of the author, though [Site 4], for the last four months (*i.e.*, since around April). I asked [Applicant 1] if he had any other evidence anywhere of his history of involvement with Falun Gong, and he said his only evidence was oral evidence apart from what he had presented at the hearing. I put to him that the evidence in support of his oral claims did not date his involvement with Falun Gong back as far as the primary decision in his case. I explained that in the circumstances, I was required to consider whether his involvement in associating with Falun Gong in Australia might be conduct entered into for the sole purpose of strengthening his claim to refugee status. In response, [Applicant 1] said that he had missed the delegate's interview because of a problem involving registered mail and P.O. boxes. I gave him a further opportunity to discuss the lack of supporting evidence as to Falun Gong activity prior to March 2014 and [Applicant 1] said that prior to then he just practiced Falun Gong at home. He said that he was a long time in Australia before he knew that this country had a generous attitude towards Falun Gong. I considered this claim about the Australian government's attitude to Falun Gong alongside [Applicant 1] having claimed an association with Falun Gong as far back as October 2013: by mentioning it in his protection visa application he had evidently known as far back as then that adherence to Falun Gong was something Australia protects. I questioned how [Applicant 1] could not have known for so long that he could practice Falun Gong freely in Australia and he said he did not.
21. I accept on the evidence before me that [Applicant 1] knows the three basic tenets of Falun Gong, and that he also knows the names and intended benefits of the five Falun Gong exercises. However, how long he has had this knowledge is a separate matter. I

find that [Applicant 1]'s description of Falun Gong is fairly superficial, although one might reasonably expect this even of a genuine adherent who first engaged with it by reading Falun Dafa on his own. However, [Applicant 1] claims to have been absorbed with Falun Gong since four years ago, disseminating material from outside China to increase others' understanding of it. He claims to have gone deeper into Falun Gong the more beneficial it became, and yet I find that his understanding of Falun Gong is quite lacking in insight, limited to describing its health benefits (for him) and his views about government "lies". I acknowledge that [Applicant 1] has been attending Falun Dafa lectures recently, and that this is evidence of some kind of interest in familiarising with the spiritual aspects of Falun Gong. On the evidence before me, however, I find that [Applicant 1]'s knowledge of and spiritual engagement with Falun Gong is not at all consistent with what one would reasonably expect of a person who has remained absorbed in practicing and disseminating it privately and publicly over four years. I give this concern some weight.

22. I also give some weight to the unconvincing nature of [Applicant 1]'s explanation as to why he turned to Falun Gong in circumstances where he knew that it was extremely dangerous to do so. I find inconsistency in [Applicant 1]'s account of the retired official not wanting to contact people and introducing [Applicant 1] to other practitioners, and I give this some weight. I give greater weight to what I consider to be unresolved inconsistency between [Applicant 1]'s involvement in pamphleteering locally and his group's zeal for secrecy. On the evidence before me, I do not believe that a group too afraid to use one-to-one telephone calls to arrange meetings would get involved in illegal downloading. I find the whole account of the illegal downloads unreliable. Since the headmaster purportedly accessed the computer through his work, this would have been a very easy thing for the authorities to detect and stop, and yet [Applicant 1] claims the activity continued over the next year-and-a-half after the first pamphlets were discovered and linked to the headmaster. I consider it far-fetched that the group would have engaged in nocturnal pamphleteering in their own neighbourhood knowing that a local friend of theirs, the retired official, was being monitored due to previous Falun Gong activities and not taking stock of the possibility that they might be implicating him in something very criminal. I find that [Applicant 1]'s discussion of the considerations that went into the first pamphleteering campaign was utterly unconvincing; it also struck me as an explanation that he was improvising in the hearing. I consider it implausible in the circumstances that the retired official would have attracted no attention from the authorities after nocturnal Falun Gong pamphleteering campaigns in his locality. I find [Applicant 1]'s description of how he was twice able to secure release from police captivity implausible, considering what he said about the ongoing interest in suppressing Falun Gong in the locality. I give weight to the inconsistency between [Applicant 1]'s written and oral evidence as to what happened between his first arrest and his second. I believe the claims about further pamphleteering to be an embellishment that puts further into question the reliability of the account of the first pamphlet drop. I have considered [Applicant 1]'s claims about arbitrary local variations in the way the authorities at different levels deal with suspected Falun Gong adherents, but overall I find [Applicant 1]'s account of how he was able to be released inconsistent with independent country information. I do not believe that "someone" worked behind the scenes to get [Applicant 1] out of detention or that anyone pulled strings to get him out of China with [Applicant 2]. I give weight to the evidence of their having left China on valid passports issued by the Chinese government. Whereas [Applicant 1] told the Department that his family was being

harassed in China, I give much greater weight to his unremarkable description of his [adult child] being able to complete [studies] nearby. There is no suggestion in [Applicant 1]'s evidence that his [child]'s current unemployment has anything to do with an unfavourable family profile in the eyes of Chinese authorities.

23. Summing up the claims made by and on behalf of [Applicant 2], she is not herself a Falun Gong practitioner; she only ever briefly tried the Falun Gong exercises in private and does not suggest she was ever detected doing so except by [Applicant 1]; she did not witness [Applicant 1]'s activities in China but was called to attend a police station when he was arrested; she departed China legally on a valid passport, validly issued but with help from a contact of [Applicant 1]'s. I note that the brief descriptions [Applicant 1 and Applicant 2] gave of his attempt to introduce her to Falun Gong in China are broadly consistent; however, this instance of consistency relates to a vague set of facts about [Applicant 2] trying a health remedy years ago that did not work for her. Overall, this consistency is insufficient to satisfy me that [Applicant 1] is telling the truth about having associated with Falun Gong in China or having tried to teach it to [Applicant 2]. All things considered, [Applicant 2]'s evidence has not helped to overcome serious deficiencies in [Applicant 1]'s evidence. Ultimately I find that [Applicant 2]'s evidence about a brief attempt to practice Falun Gong is unreliable. Whereas I consider it possible that the spouse of a person practicing Falun Gong in China could be a person of interest to the authorities in China, and attract relevant harm as a result, I do not accept that any of the claims about [Applicant 2]'s relevant experiences in China are true.
24. Having considered the evidence before me, I do not accept that [Applicant 1 or Applicant 2] were involved in any way with Falun Gong in China. I find that they departed China legally and I give weight to this. I do not accept on the evidence before me that any significant intercession occurred such that the passports were issued to people from whom passports would have otherwise been denied. I give weight to the evidence in the applicants' passports of authorised departure and no weight to the claims about a contact facilitating the issue of those passports. I do not accept on the evidence that the authorities in China had, have or would have any relevant interest in the applicants. This is because I do not accept that the applicants had any involvement with Falun Gong, direct or indirect, in China, or any other profile that could attract relevant negative interest from the authorities. I do not accept that the applicants left China for the reasons claimed.
25. I am required under the Migration Act to consider [Applicant 1]'s conduct of associating with Falun Gong in Australia in light of s.91R(3).
26. I find [Applicant 1]'s explanation for his lack of involvement with Falun Gong groups in Australia prior to March 2014 unreliable. It is clear that he knew that Australia is disposed to protecting Falun Gong followers, so he did not satisfactorily explain to me why he did not associate with Falun Gong practitioners until after the time of the primary decision in this matter. I note the recent photographs and statutory declaration presented at the RRT hearing. I find that there is no evidence supporting any association by [Applicant 1] with Falun Gong prior to the date of the delegate's decision. I give weight to the unreliability of [Applicant 1]'s claims about having been involved in Falun Gong before he came to Australia. I do not accept [Applicant 1]'s explanations as to why he had no association with Falun Gong practitioners in Australia prior to the date of being notified of the negative decision in his case. I accept that the

evidence of the witness in the statutory declaration is sincere. However, it does not overcome concerns I have as to the good faith of [Applicant 1] in this matter. Whereas I have observed that [Applicant 1] demonstrates an understanding of Falun Gong tenets and practice sufficient for him to participate in Falun Gong activities here, I find on the evidence before me that [Applicant 1] engaged in the conduct of associating with Falun Gong in Australia for the sole purpose of strengthening his claim to be a refugee. I am thus required under s91R(3) to disregard that conduct for the purposes of assessing his own claim to be a refugee. I find that [Applicant 1] has never followed Falun Gong in China, did not come to the attention of Chinese authorities in connection with Falun Gong and is not a genuine Falun Gong practitioner. I do not accept on the evidence before me that he is or would be of relevant interest to authorities in China.

27. It is not suggested that [Applicant 2] ever associated with any Falun Gong activities in Australia, and accordingly I find that she did not. However, there is in this case an implicit claim to the effect that [Applicant 2] could be affected by [Applicant 1]'s Falun Gong practice in Australia coming to the attention of Chinese spies and being reported back to the authorities in China. [Applicant 1] has explicitly claimed that [Applicant 2] was questioned about [Applicant 1]'s involvement with Falun Gong back in China and, even though I do not accept that this happened, it is implied that she might be interrogated or otherwise relevantly affected by the authorities' views or action against [Applicant 1] in the event of her return to China. I have disregarded, under s.91R(3) of the Act, all of [Applicant 1]'s conduct in associating with Falun Gong in Australia for the purposes of assessing his refugee claims but, recalling that [Applicant 2] is a member of [Applicant 1]'s family unit, and noting that [Applicant 1]'s conduct is not [Applicant 2]'s conduct, the impact of s.91R(3) on [Applicant 1]'s case in this instance does not extend to [Applicant 2]. It is appropriate for me to consider any possible relevant impact upon *her* of [Applicant 1]'s conduct in Australia.
28. [Applicant 1] claims that spies may have seen him practicing with the Falun Gong group at [Site 4]. No supporting evidence has been presented in this case to suggest that [Applicant 1] or the [Site 4] group or the [other suburban] lecture group have been spied upon on the occasions when he attended, or that he has been spied upon in his *Epoch Times* handout rounds, or that his identity might have been recorded by agents of or informers for the Chinese government in connection with any of his Falun Gong activities in Australia. For her own part, [Applicant 2] was very reluctant to give any evidence in support of this application and did not even wish to sit in the hearing room, agreeing to do so only when I asked her to clarify, for the record, some confusing indications as to her overall standing in this matter. Having considered all of the evidence before me, I am not satisfied that [Applicant 1]'s Falun Gong activities in Australia have come or would come to the attention of Chinese authorities. I am not satisfied on the evidence before me that [Applicant 2] faces a real chance of persecution in China arising from [Applicant 1]'s having associated with Falun Gong in Australia.
29. Having considered the evidence overall, I am not satisfied that the applicants face a real chance of Convention-related persecution in China. They are not refugees. They do not satisfy the criterion set out in s.36(2)(a) for protection visas.

Are the applicants entitled to complementary protection?

30. The applicants' claims to complementary protection rely on the same facts as their claims to refugee status, although for the purposes of considering [Applicant 1]'s

claims to protection under s.36(2)(aa), in addition to those of [Applicant 2], I must have regard to the evidence of [Applicant 1]'s association with Falun Gong in Australia.

31. [Applicant 1] claimed that the authorities are waiting to arrest him back in China, the evidence of this being the police having asked his family members how and why he and [Applicant 2] left China.
32. I have already found on the facts that I do not accept that the authorities had any relevant interest in the applicants prior to their coming to Australia; accordingly I do not accept that the applicants will be significantly harmed by the authorities in relation to any awareness on the part of the latter that existed before the applicants left China.
33. [Applicant 1] also claimed at the hearing that spies infiltrate Falun Gong groups in Australia and report practitioners to the authorities in China. He seemed here to be broadly suggesting that he himself might have been detected by spies at the Falun Gong gatherings and might be imprisoned and tortured on return to China as a result. However, [Applicant 1] has provided no evidence to support the claim that his group might be monitored or that he as an individual has been detected. As noted, he did say that the authorities asked his and his wife's families in China how and why he and his wife left for Australia, but for reasons given I don't accept that this claim is true. I asked [Applicant 1] at some length to speak about his [child]'s situation in China and he said little more than that [the child] moved out of home to live near [the child's] school, then graduated and is now looking for a job. On the evidence before me I do not accept that the authorities are aware of any aspect of [Applicant 1]'s brief association with Falun Gong in Australia. I find on the evidence before me that there are no substantial grounds for believing that the applicants would face a real risk of significant harm as a necessary and foreseeable consequence of being removed from Australia to China.

Conclusions

34. For the reasons given above the Tribunal is not satisfied that either of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

35. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Luke Hardy
Member

ATTACHMENT A

RELEVANT LAW

The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 91R(3) states that for the purposes of the application of the Act and the regulations to a particular person, in determining whether the person has a well-founded fear of being persecuted for one or more Convention-related reasons, the Minister must disregard any conduct engaged in by the person in Australia unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.