

**0808438 [2009] RRTA 119 (5 March 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0808438

**DIAC REFERENCE(S):** CLF2008/121865

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Ann O'Toole

**DATE:** 5 March 2009

**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**

1. 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).
2. 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 his review rights by letter.
3. 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.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. 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**

6. 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.
7. 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 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).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

### **Definition of 'refugee'**

9. 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.

10. 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.
11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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**

19. 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.
20. 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 applicant's language and the English language. The applicant was represented in relation to the review by his registered migration agent.
21. The applicant was born in Sichuan. His passport was issued at Sichuan. He was granted a temporary visa to travel to Australia. A month later, he arrived in Australia. His passport also indicates that, about a year before he came to Australia, he entered Country A and returned to China after a few days. He provided with his protection visa application three documents, two in Chinese characters, and one in Chinese characters and English which is headed Birth Certificate. One of the documents appears to be a Marriage Certificate and the other document is referred to as a Detention Notice (Folio 11). The applicant lists his religion as Tibetan Buddhist. He states his current employment title and his tertiary education history. In his protection visa application he made the following claims:
  - "I left the country because of fear of persecution for reason of my religion as a Tibetan Buddhist follower. The authority had forced me to change my religion by violence and repression. As I will not abandon or give up my faith and religious belief, I will face the risk of persecution because of my religion in that country.
  - ..... The Chinese authorities will search for and arrest me for breaking the undertaking not to leave the country and not to practice as a Tibetan Buddhist. My faith and devotion in Tibetan Buddhism will render me subjected to suppression and persecution because of my religion, which is considered by the authorities as an anti-government religion and the religion is regarded as illegal to practice.
  - When I was a child, one of my grandfather's close friend who was a Lam (Tibetan Buddhist Reverend) came to my home as a regular guest and discussed Buddhism philosophy with my grandfather. His name is [name] Reverend. He was a highly educated and kind religious practitioner. He liked me and used to teach me the philosophy of Tibetan Buddhism to improve my life vision and wisdom.
  - My home town is [name] in Sichuan Province in China.
  - On [date], the Tibetan Buddhists gathered in the ancient monastery to read Buddhist Bibles and conduct religious ceremony as a form of non violent protest against the Chinese authority using

oppressive and violent actions against religious freedom. I went to the [name] Monastery to take part in the religious gathering to show our spiritual support to the Tibetan Buddhists. When we were in the course of meditation, [a number of] military trucks loaded with fully armed police raided the Monastery. They attacked the Buddhist followers with batons, beating at faces, chests regardless old or young, male or female. Many people were beaten to the ground with faces covered with blood. People were frightened to death and the police kept hitting the followers. The situation was chaotic; women screaming for help and young children crying desperately. Some followers started resisting with bare hands to protect the young but soon were subdued. Two policemen came towards me and started beating me. They hit me at my head, face and chest. My eyes were hit and started bleeding. I was beaten to the ground and then handcuffed and dragged into a police truck. I was handcuffed and locked to the truck. The police kept kicking my face and chest and reprimand me for being a Tibetan Buddhist follower.

- I was then imprisoned for a whole day without food or water. At that night I was later transported to a security station near [name] and was detained in closed cubicle. Later, one policeman came in and started hitting me for at least 10 minutes. Then another man came in and questioned me, “Did you receive any direction or assistance from Dalai Lama?” and I replied, “We were only meditating as a way of peaceful objection but without any assistance or direction from anybody.” Then he yelled, “You are not a Tibetan and you are a traitor of Han people and also an enemy of Han people.” But I said, “Religion is a personal freedom and has nothing to do with racial problems.” And the policeman said, “If you were willing to change your religious belief to another religion, you will soon be released. But you must sign a declaration and guaranteed deed.” But I firmly told him, “I will not change my religious belief to politicalised religion which is a mixture of Marxism and Buddhism. And I will not give up my faithful belief in Tibetan Buddhism as giving up my belief is the same as giving up my life.”
  - On [date] morning, I was then transferred to a Detention Centre at [name] where I was locked up for [a significant number of] days and received mistreatment throughout the period of detention. Without my knowledge, my [parent] had signed a Release Guarantee Deed with the security authority and I was then released. At the time of release, I was forced to sign an undertaking to report daily to the authority and not permitted to leave the county area without permission from the authority.
  - The subsequent days, my [family] had been living in fear. We were under constant surveillance of the authority. My [parent] cried all day. Then, it came to my mind that I need to seek freedom overseas. Locally, the local authority was not aware that I had a current passport. With a kind assistance from my friends, I was able to obtain a visa and then travel to Australia, which is a great, free, democratic, nation where human right and freedom of religion is highly respected.
  - I have been in contact with my family by phone and was informed that after my departure my home was searched. My family was under harassment and constant surveillance. The authorities has questioned about my whereabouts. If I go back I will face arrest, torture, mistreatment and persecution because of my religion as a devoted Tibetan Buddhist.”
22. The applicant provided a translation of the Notice of Detention (folio 57) which states that he was detained on a certain date and was being held in detention. In a statement (folio 55), the applicant stated as follows:
- He recently learnt from his family that the Community Committee and the Regional Security Office had been informed that he left China. They questioned his [family] about his whereabouts. The officer said to his [relatives] that the applicant had gone into hiding and that his family would not be able to run away and they must report to the security office every week and inform the office of any news about the applicant. They were told that if he contacted his family, they must tell him that he should not think of hiding in any regions or provinces on the mainland and try to

meet them. All his records and details were supplied to the national security internet data basis and all national security systems have been contacted and connected in an effort to search for the applicant and they must not think about protesting against the authorities. Since leaving his country the armed police have carried out sudden searches at his home many times. Recently the Community Committee arranged some specially trained officers to go to his home in an effort to “brainwash” his family.

- His [family] have become depressed and unwell due to the constant disturbance and duress by the local authorities and they worry about the applicant overseas. His [parent’s] high blood pressure and condition has deteriorated. He feels ashamed and worried that he is hiding overseas. He dares not write to or telephone his family often as he is afraid his home telephone and correspondence are under constant surveillance. He keeps in touch with his [family] using the internet.
23. The applicant provided a copy of his identity card and various photographs.
24. In a letter, the applicant’s advisors stated that when the armed police raided the temple, some managed to run away. The police targeted young and strong protestors like the applicant. Present was a large number of old master monks, elderly people, women and children. In relation to his travel to Country B, the applicant thought it was a good idea so as not to alarm the local authorities of his attempt to escape. His air ticket included Country B as a stop over. The applicant did not lodge his protection visa application immediately because he was new to Australia and also had language difficulties. It took him some time to find a registered agent to help to assist him in preparing an application.

### **Departmental interview**

25. On his way to Australia, he briefly stayed in three other countries. He was a tourist there. He was asked if he had family or friends in Australia and he said he did not have any. His family live in China. He was asked when he last spoke to his family after his arrival in Australia. He said they spoke two weeks ago. He was asked how he contacted them. Because of the close monitoring of his family’s activities by the authorities, his family goes to an internet café to chat with him. He was asked what problems his family were experiencing at the hands of the Chinese authorities at present. After being released from detention, he was instructed to report weekly at the police office and also at the residential committee. After he left China, the local authorities could not get any information, so they put pressure on his family in an attempt to ascertain his whereabouts. They warned them that they should not think about going to another city or province because they were being monitored.
26. He was asked who in his family were Buddhists. He said that he and his grandfather were Buddhists. His grandfather was a Buddhist since he was young. He is a University graduate. The applicant worked before he came to Australia. His company was involved in construction.
27. He was asked what religion he practiced in China. He said he was a Buddhist. He was asked why he became a Buddhist. He said he was influenced by his grandfather’s friend, a Buddhist Reverend. He was asked what the main beliefs of Buddhists were. A discussion about Buddhist beliefs followed. He was asked about the difference between Tibetan Buddhism and Buddhism. He said Han Buddhism is very controlled

by the Chinese Communist Party. He said the Tibetan Buddhism belief is carried on through families and is stronger and more purified. He said also it was difficult for authorities to monitor Tibetan Buddhists because they tend to inhabit mountainous areas. Han Buddhists focus on text reading and learn about Buddhism in that way. Tibetan Buddhists focus on three ways of practicing, from the Master's mouths, ears of the students and the mouths of the students. He was asked which Tibetan school the Dalai Lama belonged to and he was asked what other schools are in Tibetan Buddhism. He listed 4 schools. He was asked what the most famous Tibetan Buddhist text was. He said there were many texts; there was no such a thing as one particular, most famous text. He was asked how he practiced his Buddhist beliefs. He chants at home where he has a Buddhist altar. He was asked if he went to any Buddhist Temples to practice Buddhism. He goes to two Temples and he visits a Buddhist school. He was asked how often he goes to the Temples and the school. He goes three or four times a month. He was asked what religious Buddhist activity he was involved in. Sometimes he meets fellow Buddhists and they chant together and spread thoughts of Buddhism. He was asked how he spread those thoughts. He said he did not have any difficulties practicing his religion prior to incident and detention. He did not have a leader's role in his religion.

28. He was asked what the purpose of the gathering was. It was a protest about the Chinese authorities' crackdown of Tibetan Buddhists. He said suddenly an army truck arrived with armed police. They used police batons and the butts of guns to assault people indiscriminately. He said it happened in the morning. He stated the day of the week. He was asked why he was not working that day. He said he had asked for leave. He was asked how many people were at the Temple that day. He said there were 500 or 600. He and his friend, Mr X, went together to the gathering. He did not see him at the time he was arrested. He was asked how many people were arrested. He said it was about 20 to 30 people. He was asked why only 20 to 30 were arrested given there were up to 600 people there. He said there were 20 or 30 people in the truck he was in. He said his eye was injured by the assault, so he could not see very well. He stated he lost consciousness. He said maybe some other people were taken to another place.
29. After he was arrested, he was taken to City Z in the afternoon. He was asked where he was taken in City Z. He said he was taken to a PSB office. He said it was late in the evening. He had not had anything to eat or drink all day. He said the Temple is many hours away from City Z. He could not say when the truck left the Temple but thought it was 5 or 6 in the afternoon. He was taken to a room for questioning. Prior to questioning he was physically assaulted again. He was asked if the gathering was supported by the Dalai Lama. He was accused of being a traitor and a believer in Tibetan Buddhism. He was at the PSB office for 2 hours and then he was taken to a detention unit.
30. Before that he was asked to sign an undertaking. He was asked where the detention unit was. He said he was placed in a vehicle and taken there. It took 30 to 40 minutes to get there. He did not know where he was taken. When he arrived he realized it was the detention centre of City Z. He arrived early in the morning at about 12 midnight or 1 am. He stated the day of the week. He stated the number of days he was held at the detention centre. He was asked to describe a typical day at the detention centre from the time he woke up until he went to sleep. They got up at 6 o'clock and had breakfast at 7. They did morning exercises, returned to wash face and brush teeth. They were

given very thin porridge and wheat bread. Lunch was usually cabbage with some meat and dinner was the same. His relative signed an undertaking with the police without his knowledge and the undertaking stated that he would voluntarily refrain from being a Tibetan Buddhist and no longer participate in any of their activities.

31. He was asked why he thought the police showed up at the Temple on that day. He said he did not expect it because they came suddenly. Nobody expected it. He was asked if that was the first time the police raided the Temple. He said it was the first time he had encountered anything like that. He heard that they had raided a place before but this incident was the worst one that had taken place.
32. He was asked when he first attended a Buddhist Temple in Australia. He said he went to Nan Tien Temple at Wollongong about 3 weeks before the interview. He heard there was a big Temple there and he wanted to visit it. He did not know whether there were any other Temples. If he knew, he would go. He said his belief in Buddhism is a lifetime belief and he intends to carry on his belief until the end of his life. The Delegate expressed surprise that he had not sought out any other Temples since his arrival in Australia. He said his situation is difficult. His family is suffering and upset and, once he gets protection, he can seek out Temples. He said language is also a problem.
33. He was asked if he suffered or if he experienced any other problems apart from the Temple incident. He said on one occasion he had been to the Buddhism school where he met a Tibetan person who invited him to his home. The person was accompanied by a very young relative. While they were on the way to the Tibetan person's home, they were stopped by police who said that the young relative was wearing a shield on her clothes which for her age was not allowed. The applicant said he felt that this was ridiculous as wearing the shield had been a Tibetan Buddhist custom for over 1,000 years and it was very unfair if one was forced not to wear it. He then argued with the police and more police came. He said he thought it happened several years ago.
34. He said that he will be arrested if he returns to China and he believes he will be accused of anti government activities. He was asked why he believed he would be targeted. He was warned and told to report once a week and after his departure they have been harassing his family and he has breached their instructions by not reporting and by leaving City Z. He was asked how much he paid to get his visa to Australia. A friend had helped him with the application. It did not cost him any money. He was asked if anyone else travelled with him to Australia. He mentioned some names. One person is Mr X, who was also a victim of that incident. He said he was very lucky to get out of China. The delegate expressed concern that the applicant had not left China as soon as he got his visa.

### **Tribunal Hearing**

35. The applicant, accompanied by his adviser, attended the Tribunal. He provided his passport to the Tribunal and a copy has been placed on the Tribunal file.
36. He told the Tribunal his family composition. His family all live in China. The applicant has lived in City Z all his life.
37. In relation to the monastery where the incident took place (the Monastery), the applicant stated that it is a few hours drive south from City Z. I asked why that

monastery was chosen for a silent protest. He stated that the Monastery is very famous and it is not too far from City Z. This particular monastery is the closest Tibetan Buddhist Monastery. Lamas live at the Monastery. The applicant has visited the Monastery on many occasions. His family did not attend the gathering. The applicant travelled there with his friend Mr X. Mr X also travelled to Australia with the applicant and applied for a protection visa. His matter was due to be heard before the Tribunal on the following day. The applicant stated that he and Mr X are very good friends and they met about 10 years ago. Mr X is also a Tibetan Buddhist. He was arrested on the same day as the applicant. He was not placed in the same truck as the applicant and he was not detained at the same detention centre.

38. I asked when he found out that Mr X had been arrested. He said, after he was released from detention he contacted him and was then told. He stated the number of days he thought he had been detained. Mr X was at a different detention centre. The applicant was detained at the City Z detention centre. He did not know the address and could not remember the street name. He left the detention centre. He travelled home by taxi. He said he was very upset by what had happened so he did not notice much around him.
39. He stated that he was not given any documents on his release. He was not charged with any offence. The detention centre operated a business and the inmates undertook manual labour in that business. The applicant was held in a room on his own.
40. I asked how he found out about the protest that was due to take place. He said a couple of days before that date, another follower contacted him and told him about it. The applicant and his friend Mr X travelled by shuttle bus. Four to five people got off when the applicant and his friend did. They left City Z about 4.00am and arrived about 9.00am at their destination. He thought there were about 300-400 people at the gathering. I mentioned to the applicant that during his interview he had stated 500-600. I mentioned that the adviser had stated over 100. The applicant stated it was difficult to estimate how many people were there. He stated that it was his intention to stay one day and to protest silently. He said they were praying around the Monastery. There were many banners and pictures of the Dalai Lama. The banners were in the Tibetan language. I asked the applicant what he was doing when the police came. He stated that they were chanting and doing a walking prayer. He demonstrated to the Tribunal what he meant and explained how Tibetan Buddhists twirl when they pray.
41. The police arrived about 10.00am. He said there were 4-5 police cars and 4-5 army cars. He said there would have been 60-70 police and army personnel. He said the whole place erupted into chaos. The police were beating people. There were 20-30 Lamas present. He was unable to say how many were arrested. He stated after a while people started to fight back. He was beaten and felt a severe blow to his head. He was handcuffed. He stated he was shocked because they were beating old people and children.
42. I asked the applicant if any people had been killed on that day. He said he did not know. He heard that some people had been badly beaten. I asked what inquiries he made about the incident after he had been released. He said he contacted other followers but he did not know how many Lamas had been arrested. He stated a lot of people were nervous about contacting one another in case they were being monitored.

43. I went through the photographs that the applicant had provided to the Department. He explained the events captured by the photographs and also named the persons in the photographs. I returned the photographs to the applicant. The applicant explained that one of the photographs showed the symbol of Tibetan Buddhism. Also in the same picture were the applicant's prayer beads. He said he carried them with him to Australia. He hid them carefully. He said he had to bring them because it is his faith.
44. The applicant stated that he often went to temples to study and spend time with the Lamas. If he was on holiday or had days off for any reason, he would go to the Tibetan Buddhist temples. He stated they are quite a distance from his home. He also meditated at home or at friends' places. He stated there are about 4-5 homes they can visit and about 20 people congregate to pray.
45. The applicant stated that one of his nuclear family member's is a Tibetan Buddhist. The applicant stated that his grandfather, grandmother and his father's siblings were all in favour of Tibetan Buddhism but only his grandfather devoted himself to the faith. I asked if there was any reason why the rest of the family were not devoted. He said perhaps they were not that determined.
46. I discussed the applicant's release from detention. He said his parent signed a release guarantee deed. His parent went to the police station to sign that document. He thinks his family was told about his detention in the morning. He stated the date. He stated his family was very upset about his detention.
47. I discussed the applicant's visa application with him. I asked if he had visited the company mentioned in the application. He said he did not. He said a lot of friends helped him to organize the documents.

### **Resumed Hearing**

48. The applicant, accompanied by his adviser, attended the Tribunal.
49. The applicant told the Tribunal that he prays in the Sanskrit language, which is an ancient Indian language. He said he would like to visit India one day. The applicant stated that he had set up his own altar at his home in Sydney. He is trying to establish some more contacts with Tibetan Buddhists in Australia. He said he has seen his friend Mr X and was willing to give evidence on his behalf at his Tribunal hearing. Mr X was unable to attend the Tribunal to give evidence for the applicant because he was not granted leave from work.
50. The applicant stated that, whilst in detention, several discussions took place about the applicant discontinuing his practice of Tibetan Buddhism. He said if his parent had not signed the deed he would have refused to cooperate. He said he would prefer to give up his freedom than give up his faith. He stated this would mean that he would be detained for a very long time. He said they also tried to brainwash him. He said there are many people in detention for that reason. The applicant stated that a third person of the same faith travelled to Australia with the applicant and Mr X. This person's name is Mr Y. He stated that he was not as active as the applicant and Mr X.
51. The applicant visited Lhasa for two years. He stated that it meant a lot to be able to go there.

52. The applicant was required to report weekly to his local police station. He usually reported on Monday, Tuesday or Wednesday in the morning before work. He continued to report to the police station and also to the community committee every week. After attending the police station he would then go to the community committee as their office is in the same area. He would show his ID card and they interviewed him about his activities and asked him if he had contacted anyone. He was asked if he was still practicing his religion. He said he denied practicing his religion because his parent had signed the guarantee.
53. I asked the applicant how the documents from China were sent to him. He said his family member scanned the notice of detention and sent it to him by email. I asked the applicant why he delayed leaving China even though he had a visa for over 4 weeks. He said all his activities were being monitored. He said it was impossible for him to do everything in a public way. His friend purchased his tickets. His friend is not a Tibetan Buddhist but he trusts the applicant. I mentioned to the applicant that his friend had taken a big risk, given the police interest in the applicant. The applicant stated that was correct and he spoke to his friend after he left China. His friend told him that he had been interviewed by the police. His friend told the police that he did purchase an air ticket for the applicant but he had no idea why he went overseas. This inquiry took place 1-2 weeks after the applicant left China.
54. I asked the applicant when the police started looking for him. He said it was one week after he left because he had not reported as required. He said they started looking for him around the time he arrived in Australia.
55. He stated circumstances are still the same in China. They are still attending his home. He said the police think that the applicant knows many things and suspects that he was an organizer and wish to question him to obtain more information. I mentioned to the applicant that I found it difficult to believe that the police would suspect he was an organizer because, if they had, they would have detained him for a long time. I mentioned to the applicant that the Tribunal was of the view that he was exaggerating his claims.
56. I discussed the incident when the applicant was in the company of a Tibetan Buddhist whose son was wearing a protection charm. The applicant stated that the police did not allow Tibetan children to wear these charms. Five to six police happened to be walking around at that time. They did not arrest the applicant for stating his views. However, matters have escalated since then.
57. I asked the applicant what he believed would happen to him if he returned to China. He said he will be arrested because he disobeyed the orders to report. I discussed relocation with the applicant. He stated that it would not be a viable option as the police would locate him. The applicant stated that his family are suffering psychologically because of what has happened.
58. I asked the applicant if he wished to add anything further. He stated that he did not.

#### **INDEPENDENT COUNTRY INFORMATION**

59. According to Forum 18 News Service, "Even casual observers note that the great majority of Han Chinese Buddhists are clearly distinct from their Tibetan Buddhist

counterparts. Most prominently, Han Chinese Buddhists owe no spiritual or temporal allegiance to the Dalai Lama. There are also a variety of practices and beliefs held by Chinese lay Buddhists” (Hornemann, Magda 2006, ‘State-imposed religious monopolies deny China’s religious reality’, Forum 18 News Service, 5 December [http://www.forum18.org/Archive.php?article\\_id=883](http://www.forum18.org/Archive.php?article_id=883) – Accessed 12 July 2007).

60. Raoul Birnbaum in the 2003 book entitled *Religion in China Today* provides the following information on the differences between Tibetan and Han Buddhism:

Tibetan Buddhist forms and customs differ significantly from Han practices. Not only is the liturgy conducted in Tibetan language, but the daily rites are not at all the same as the thrice-daily communal rituals carried out in Han monasteries. The images in worship halls also are not the same: there are many figures in the Tibetan pantheon who are not encountered on Han altars. Practice methods also may differ, with a special emphasis on mantra and certain types of visualization methods as central elements of daily practice. In terms of daily sustenance, there are different customs for economic maintenance of monks and nuns, and importantly Tibetan monastics eat meat if available, in contrast to the strict vegetarian diet of Han Buddhists. And of course the altitude and harsh climate are challenging for outsiders to endure (Birnbaum, Raoul 2003, ‘Buddhist China at the Century’s Turn’, *Religion in China Today*, The China Quarterly Special Issues New Series No. 3, Cambridge University Press, Cambridge, p.142).

61. According to the US Department of State, it is difficult to estimate the number of Buddhists in China “because they do not have congregational memberships and many practice exclusively at home.” The US Department of State reports that there is a “growing number of ethnic Chinese” who practice Tibetan Buddhism:

The Government estimated that there are 16,000 Buddhist temples and monasteries, 200,000 Buddhist monks and nuns, more than 1,700 reincarnate lamas, and 32 Buddhist schools. Most believers, particularly ethnic Han Buddhists, practice Mahayana Buddhism, while the majority of Tibetans and ethnic Mongolians, as well as a growing number of ethnic Chinese, practice Tibetan Buddhism, a Mahayana adaptation (US Department of State 2008, *International Religious Freedom Report 2008 – China* (includes Tibet, Hong Kong, Macau), 19 September, Section 1 ‘Religious Demography’).

62. Raoul Birnbaum in the 2003 book entitled *Religion in China Today* provides the following information on Han Chinese and Tibetan Buddhism:

Over the past decade, there has been a small but steady flow of Han monks and nuns to the eastern Tibetan border regions of Amdo and Kham, such as beyond Kangding into the mountainous far western reaches of Sichuan. They travel there to study with Tibetan teachers, and often remain for a year or two to live under extremely harsh conditions. Groups of Han laypeople also have been travelling to well-known pilgrimage sites important to Tibetan Buddhists, sites in the Tibetan Autonomous Region as well as those in Tibetan culture areas within Sichuan and Qinghai provinces. Tibetan Buddhist books in Chinese translation, and books about Tibetan Buddhism, have been circulating on the mainland. Some are lurid, romantic accounts, others provide traditional biographies of saintly culture heroes such as Milarepa, while others are demanding works that have become the focus of long-term lay study groups, such as the 14-century Tibetan reformer Tsongkhapa’s *Great Stages of the Path*. While a few Tibetans have become monastics in the Han tradition, for the most part of the flow of learning has been in the opposite direction.

...Some monastics and lay Buddhists make the journey to Tibetan culture areas to fulfil fantasies or simply for the wild adventure of it. But in between these extremes, there are very

serious individuals who endure hardships in order to learn advanced meditative techniques and study practices aimed at overcoming and dissolving inner obstructions: traditional aims of Buddhist practitioners (Birnbaum, Raoul 2003, 'Buddhist China at the Century's Turn', Religion in China Today, The China Quarterly Special Issues New Series No. 3, Cambridge University Press, Cambridge, pp.142-143).

### **Treatment of Buddhism by the PRC**

63. The US Department of State's International Religious Freedom Report 2008 – China published on 19 September 2008 reports that the Chinese Government officially recognises five main religions including Buddhism, the Chinese Government “restricts legal religious practice to government-sanctioned organizations and registered religious groups and places of worship”, and there is a Patriotic Religious Association which manages the activities of Buddhists in China (US Department of State 2008, International Religious Freedom Report 2008 – China (includes Tibet, Hong Kong, Macau), 19 September, Introduction & Section 1 'Religious Demography'). Raoul Birnbaum in the 2003 book entitled Religion in China Today provides the following information on the China Buddhist Association (CBA):
64. In keeping with other comprehensive changes in Chinese society, there has been a significant change in the way that Buddhist monastic life is organized, controlled and regularized. Of the many organizations that Taixu [monk] and his cohorts formed, the China Buddhist Association (Zhongguo fojiao xiehui) (CBA) has remained as a pivot point between Buddhist monastics and responsible agencies and figures in the government. This national organization is internal to the Buddhist world and bears responsibility for such matters as setting policy, overseeing monastic life, disbursing certain funds, transmitting government directives downwards, and also representing Buddhist interests in an official and unified manner. In addition to its national office in Beijing, the CBA also has provincial and county branches, as well as braches in large cities with substantial Buddhist presence. Thus, it is thoroughly integrated into a wide range of Buddhist matters and activates, from the broad national level to the most local concerns. It has a scrutinizing and regularizing function. The officers who fill its many positions by and large are monks and nuns, ordinarily including the heads or administrators of the most important monasteries. Also, there have been several laymen with key positions at the national level, notable the long-time president Zhao Puchu (d. 200). The CBA provides a structure for clerics to have some voice in self-governance. By their positions and responsibilities such monks and nuns are pulled inexorably into a complex political work (Birnbaum, Raoul 2003, 'Buddhist China at the Century's Turn', Religion in China Today, The China Quarterly Special Issues New Series No. 3, Cambridge University Press, Cambridge, pp.132-133).
65. According to the US Congressional-Executive Commission on China (CECC), “State repression of Tibetan Buddhism in 2008 has reached the highest level since the Commission began to report on religious freedom for Tibetan Buddhists in 2002.” The CECC continues:

Chinese government interference with the norms of Tibetan Buddhism and unrelenting antagonism toward the Dalai Lama, one of the religion's foremost teachers, serves to deepen division and distrust between Tibetan Buddhists and the government and Communist Party. As the Commission's 2007 Annual Report documented, law, regulation, and policy that seek to prevent or punish Tibetan Buddhist devotion to the Dalai Lama, categorize him as a “splittist” (a criminal under Chinese law), and that set aside centuries of religious tradition

create obstacles of profound implications for Tibetan Buddhists. Legal and regulatory interference with Tibetan Buddhism antagonizes Tibetans in general, but it is especially harmful to Tibetans who regard the Dalai Lama (in his capacity as the spiritual leader of the Gelug tradition of Tibetan Buddhism) as their guide on what Buddhists believe is the path toward enlightenment.

66. The following extracts of the US Department of State's International Religious Freedom Report 2008 provide a summary of the March 2008 demonstrations which started in Tibet and spread to other Tibetan areas of China:

The Government strictly controlled access to and information about Tibetan areas, particularly the TAR, making it difficult to determine accurately the scope of religious freedom violations. The Government tightened restrictions on access after the protests in March 2008. The Government's respect for religious freedom in the TAR and other Tibetan areas of China deteriorated further following the violent unrest of March 2008.

On March 10, 2008, monks and nuns in Lhasa and Tibetan areas of Gansu, Sichuan, and Qinghai provinces held peaceful demonstrations to mark the 49th anniversary of the unsuccessful Tibetan uprising against Chinese rule and protested against government policies, including restrictions on religious freedom. After security forces reportedly arrested protestors in Lhasa, monks from the Drepung, Sera, and Ganden monasteries, as well as nuns from the Chutsang nunnery, protested the arrests. After permitting the protests for almost 2 days, police began using tear gas to disperse the monks and then surrounded major monasteries in Lhasa. According to reports, on March 14 when the People's Armed Police (PAP) confronted a group of monks from Ramoche Monastery protesting near the Jokhang Temple in Lhasa, Tibetan onlookers began pulling up paving stones and throwing them at the police. The police retreated, and Tibetan crowds began attacking Han and Hui civilians and their businesses. According to media reports, the police forcibly regained control of Lhasa by the evening of March 15. The Government then closed monasteries and nunneries in Lhasa, imposed a curfew, and prohibited foreign media from entering the TAR.

In the days and weeks following the violence in Lhasa, protests – nearly all of them peaceful – spread across Tibetan areas, including in Qinghai, Sichuan, and Gansu provinces. The Government responded with increased police and military presence in these areas. By March 27 more than 42 county-level locations, as well as Chengdu, Sichuan Province; Lanzhou, Gansu Province; and Beijing, reported protest activity. According to researchers at Columbia University, there were approximately 125 documented protest incidents between mid-March and early June 2008. Many protests that began peacefully were met by a forceful security response. In a small number of cases, local authorities effectively defused escalating tension through negotiation and dialogue with local religious figures. Daily protests were reportedly continuing in Ganzi TAP at the end of the reporting period.

On March 15, 2008, the Government reportedly arrested approximately 600 people in Lhasa. According to official sources, more than 1000 Tibetans turned themselves in to security forces at the end of March, following a government-issued request for surrender. Unofficial reports estimated that by the end of March authorities detained at least 1,200 Tibetan protestors in addition to those who voluntarily turned themselves in to authorities. Official sources reported in mid-April that 4,000 individuals had been detained in Lhasa and parts of Gansu Province, with nearly half of those detained being released several weeks later.

The number of monks and nuns at several monasteries reportedly decreased after March 14, 2008. Information about the location of many who were arrested was difficult to confirm. There were reports of ongoing mass detentions of monks and of monasteries being sealed off by police and military personnel as "patriotic education" campaigns intensified. More than 80 nuns reportedly were detained in Sichuan Province alone since March 2008.

According to numerous sources, many of those detained after March 10 were subjected to extrajudicial punishments, such as beatings and deprivation of food, water, and sleep for long periods. In some cases detainees reportedly suffered broken bones and other serious injuries at the hands of PAP and Public Security Bureau (PSB) officers. According to sources claiming to be eyewitnesses, the bodies of people killed during the violence or who died during interrogation were disposed of secretly rather than returned to their families.

67. The CECC provides further information on the March 2008 demonstrations including the number of deaths, number of detentions and the subsequent increase in patriotic education:

State repression of Tibetan Buddhism in 2008 has reached the highest level since the Commission began to report on religious freedom for Tibetan Buddhists in 2002. Chinese government and Party policy toward Tibetan Buddhists' practice of their religion played a central role in stoking frustration that resulted in the cascade of Tibetan protests that started on March 10, 2008, when approximately 300 Drepung Monastery monks attempted a protest march in Lhasa. The protests spread quickly across the Tibetan plateau and involved a large but undetermined number of Tibetan Buddhist monastic institutions and thousands of monks and nuns. [See figure titled Map of Tibetan Protest Sites, County level Areas above and Addendum: List of Tibetan Protest Sites, County-level Areas at the end of this section.] Reports have identified hundreds of Tibetan Buddhist monks and nuns whom security officials detained for participating in the protests, as well as members of Tibetan secular society who supported them. Peaceful protesters raised Tibetan Buddhist issues by calling for the return of the Dalai Lama, the release of the Panchen Lama (Gedun Choekyi Nyima), and freedom of religion generally. [See box titled The Panchen Lama and the Golden Urn: China's Model for Selecting the Next Dalai Lama.] Details about the detainees' well-being and status under the Chinese legal system are few. Armed security forces maintained heightened security at some monasteries and nunneries after the protests as authorities conducted aggressive campaigns of patriotic education ("love the country, love religion"). Demands that monks and nuns sign statements denouncing the Dalai Lama angered monks and nuns and prompted a second wave of protests and detentions.

...At no time since Tibetans resumed political activism in 1987 has the magnitude and severity of consequences to Tibetans (named and unnamed) who protested against the Chinese government been as great as it is now upon the release of the Commission's 2008 Annual Report. Few details are available about the thousands of Tibetans whom Chinese security officials detained, beat, fired on, or otherwise harmed as armed forces suppressed protests or riots and maintained security lockdowns. China's state-run media reported extensively on personal injury and property damage that Tibetan rioters caused from March 14 to 19 in locations such as Lhasa city, Aba County, and Gannan TAP, but authorities provided few details about the thousands of Tibetans whom they acknowledge detaining as a result of the incidents. Moreover, officials have provided little information about the suppression of peaceful Tibetan protests that took place over a period of weeks in more than 40 counties where Chinese state media did not report rioting, and where security officials reportedly detained thousands more Tibetans.<sup>130</sup> [See Section II—Rights of Criminal Suspects and Defendants for more information about legal process and abuse of Tibetan detainees.]

An article dated 22 December 2008 by Radio Free Asia reports on the detention and sentencing of Tibetans detained during the March 2008 protests in Sichuan province:

Authorities in China's southwestern province of Sichuan have handed down further prison terms to Tibetans detained in anti-China protests earlier this year, according to sources in the region.

The sentences follow a wave of jailings last month in which a court employee said that detained Tibetan protestors were being sent to prison “one after another,” and promised “More will be sentenced.”

...More than 200 Tibetans were detained following protests throughout Kardze earlier this year, according to another source in the region.

“About 20 were released, while the rest are still being held. About 70 percent of those are said to have been sentenced to prison terms of different lengths.”

68. The CECC reports that authorities in Ganzi, Sichuan province “have announced unprecedented measures that seek to punish monks, nuns, religious teachers, and monastic officials accused of involvement in political protests in the prefecture.” The CECC continues:

The government of Ganzi (Kardze) Tibetan Autonomous Prefecture (TAP), Sichuan province, issued on June 28, 2008, with immediate effect, unprecedented measures that seek to punish or eliminate from the prefecture’s Tibetan Buddhist institution those monks, nuns, religious teachers, and monastic officials whom public security officials accuse of involvement in political protests in the prefecture.

## **FINDINGS AND REASONS**

69. The Tribunal accepts that the applicant is a citizen of China.
70. The applicant claims that if he returns to China he will face persecution for reasons of his religion. He claims that he has been practicing as a Tibetan Buddhist for many years and that he was detained and upon his release was required to report weekly to the police and the neighbourhood committee. He claims that because he did not abide by the instructions of the authorities, he will be arrested and seriously harmed should he return to China. In assessing the applicant’s Convention Claims, the Tribunal is required to determine whether he has a well-founded fear, and if so, whether what he fears amounts to persecution for a Convention reason.
71. In the present application, the Tribunal is satisfied that the applicant is a practising Tibetan Buddhist. The Tribunal accepts that the applicant has visited Lhasa in the past and that he has practised his faith by attending Tibetan Buddhist Monasteries and that he practises his faith both at home and with other Tibetan Buddhists at their homes from time to time. The Tribunal is satisfied that the applicant has a well-founded fear of persecution for reasons of his religion and sets out its reasons below:

### **Persecution**

72. Based on the applicant’s evidence in his protection visa application, his Departmental interview and during his Tribunal hearing, the Tribunal is satisfied the harm the applicant is claiming to fear would at least constitute significant physical harassment of the person or significant physical mistreatment of the person (see s.91R(2)(b) and (c) of the Act). The applicant was arrested while peacefully attending a gathering at the Monastery. The Tribunal accepts that he was detained for a period of days. The Tribunal is satisfied that he suffered constant harassment and attempted brainwashing whilst in detention, in an effort to persuade him to discontinue the practise of his faith.

Accordingly, the Tribunal is satisfied the harm the applicant claims to fear is sufficiently serious to constitute persecution for the purposes of the Refugees Convention.

### **Convention Ground**

73. The claimed fear of persecution must be for reasons of one of the grounds set out in the Refugees Convention. The applicant claims to fear persecution for reasons of his practise of Tibetan Buddhism. It is accepted by the Tribunal that the applicant has practised Tibetan Buddhism for many years and is determined to carry on that practice should he return to China.
74. Country information set out above indicates that Tibetan Buddhists are the targets of persecution by the Chinese authorities and many have been arrested, detained and seriously harmed. Research also indicates that the Chinese authorities do not intend to tolerate such practice and will endeavour to stamp it out by using severe tactics.
75. The Tribunal is satisfied that the applicant was detained by the Chinese authorities and suffered harm as claimed. Accordingly, the Tribunal accepts that the applicant fears persecution for reason of his religion.

### **Well-founded fear**

76. The Tribunal now needs to consider whether the applicant has a real chance of being subject to the persecution feared. A real chance is not a remote chance; there needs to be a real substantial basis that an applicant will be subjected to the persecution feared.
77. The Tribunal is satisfied that all Tibetan Buddhists, especially those of Han ethnicity, have a real chance of persecution because of their practice of their religion. In the present case, it is the view of the Tribunal that the applicant now has a profile as a practising Tibetan Buddhist who has attended a silent protest at the Monastery, in support of the views of the Dalai Lama and the practice of Tibetan Buddhism. It appears from the evidence that the authorities were of the opinion that he would honour the guarantee signed by his parent not to practise his religion. However, his discontinued reporting and departure from the country shows a blatant disregard for the restrictions placed on him by the authorities in China. It is the Tribunal's view that such actions will attract adverse attention from the Chinese authorities, should the applicant return to China.
78. The applicant did not depart China until a month after his Australian visa was granted. The delegate was concerned about this delay. However, having spoken to the applicant about this issue, the Tribunal is satisfied that his explanation for this delay is convincing and persuasive. The Tribunal is satisfied that the applicant travelled to Australia because he held a fear of persecution.
79. The Tribunal notes that the applicant held a good position in China and prior to the incident was happy living in China. The Tribunal accepts that the applicant did not anticipate that he would be the victim of such persecution. Country research available to the Tribunal indicates that there was a massive crackdown on persons supporting the Dalai Lama and practising Tibetan Buddhism. The Tribunal is satisfied that the essential and significant reason the applicant would face persecution is for reasons of

his religion. The Tribunal cannot exclude as remote and insubstantial the chance that if he returned to China he would face persecution for a Convention reason. The Tribunal is therefore satisfied that there is a real chance the applicant would be persecuted for a Convention reason if he returned to China.

### **Relocation**

80. The Tribunal is satisfied that relocation is not a safe option for the present applicant.
81. Accordingly, the Tribunal is satisfied that the applicant has a well founded fear of persecution for a Convention reason in China.

### **CONCLUSIONS**

82. 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 s.36(2)(a) for a protection visa.

### **DECISION**

83. 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.

Ann O'Toole  
Member

<p>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. PMRTJA</p>
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