

1208597 [2012] RRTA 952 (24 October 2012)

DECISION RECORD

RRT CASE NUMBER: 1208597
DIAC REFERENCE(S): CLF2012/7788
COUNTRY OF REFERENCE: China (PRC)
TRIBUNAL MEMBER: Alison Christou
DATE: 24 October 2012
PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

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 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 applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2012.
3. The delegate refused to grant the visa [in] May 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. 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 Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
7. 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 Sang* (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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of 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.

Complementary protection criterion

16. 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').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

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 [in] September 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Protection visa application

21. In his written application, the applicant indicates that he was born on [date deleted: s.431(2)] in [City 1], [Province 2] in China and was a small business owner prior to travelling to Australia. He states that he speaks, reads and writes Mandarin. The applicant indicates that he has no religion and is of Chinese Han ethnicity.
22. In his protection visa application, the applicant states that he is a single Chinese citizen and that he has a valid Chinese passport. He attached a photocopy of the passport to his application, showing the passport issue date as being [a date in] 2010 and an expiry date of [a date in] 2020. When asked in his application whether he had ever had, or used, any other passport or travel document he ticked the 'No' box.

23. He indicates that he left [China on a date in] October 2011 using his passport and a valid tourist visa. He entered Australia [the following day]. He stated that he had difficulties obtaining a travel document in his home country and that he bribed a government officer when applying for a passport. He also indicated that he had never applied to migrate to any other country other than Australia and that he had never applied for refugee status in any country other than Australia. He stated that he is not in contact with relatives in China or elsewhere.
24. When asked in his application whether he had ever travelled outside of his home country before her current journey to Australia, she ticked the 'No' box.
25. The applicant states that prior to his travel to Australia in 2011, he had lived from birth in [a particular] district of [City 1], [Province 2], China. The applicant states that he has undertaken a total of 12 years education. He indicates that between [dates deleted: s.431(2)] he completed his [schooling] in [City 1], [Province 2], China. His father remains in China.
26. The applicant was assisted in completing the application form by [name deleted: s.431(2)], a registered migration agent.
27. The applicant applied for a protection visa [in] January 2012. He failed to attend a Departmental interview scheduled for [a date in] May 2012. The application for a protection visa was refused by the delegate [later in] May 2012.
28. The applicant attached to his protection visa application a statement outlining his claims. This statement was typed in English and reads as follows:

My name is [name]. I came from [Province 2], China. I apply for protection visa because I was persecuted by Chinese government. The main reason is that my parents and I were practicing Falun Gong when someone discovered us. But at that moment, Falun Gong was banned in China. We were tortured after we were caught. After I was released, I wanted to go aboard.

I started practicing Falun Gong with my parents since I was in the junior school. When Falun Gong has been banned since 1999, my parents was involved and arrested because of practicing Falun Gong, so I was adopted by my grandparents. I became a homeless child because of Chinese government's evil act. My parents haven't been released until I was in senior high school. My life in the junior high school was in extreme misery since my parents were arrested. And my teachers and classmates discriminated me because my parents practiced Falun Gong. My grandparents gave me some pocket money to buy lunch at roadside stand because they were in poor health and cannot prepare lunch for me. However, some classmates started to rob my lunch money since my parents being arrested. I barely ate lunch because of it. And they are safety in numbers, so I cannot beat them. My teachers always blamed me for fighting with them without asking me why. Apart from that, my teachers often talked to me about Falun Gong and tried to convince me that Falun Gong was an illegal cult and I should not be as degenerate as my parents.

However, my parents are very nice people. I don't consider that their practice of Falun Gong does harm to someone else; on the contrary, my parents' health was getting better and they helped lots of people. I understood that my teachers and classmates would not believe whatever I said because they were already been brainwashed by

overwhelming propaganda of anti-Falun Gong. I lived under discrimination during the rest of my life in junior school. I didn't tell my grandparents about it since they have already been very sad because of my parents and I didn't want them to worry about me. I started having stomachache because I barely had lunch. I have developed a serious stomachache when I graduated from junior high school. My performance was top in my class until 1999. But it went down because of some unfair treatment and discrimination, together with my stomachache. I had poor performance in high school entrance examination. As a result, I could only be able to enter a normal high school instead of my ideal one. In Chinese society, the only way to change our fate is to have excellent performance for people who are born in poor families; otherwise, you will suffer from hard life in the future. The fact that I didn't enter my ideal high school indirectly caused that I didn't enter my ideal university. As it were, it changed my fate of life that Chinese government forbidden Falun Gong.

After I entered high school, my parents were released. And I went back to my home and lived with my parents. My parents said that they have suffered hardships when they were in prison, which, on the contrary, didn't were their volition. They insisted that Falun Gong was great. At that time, we lived in hard conditions. We didn't have enough money to spend. In the meanwhile, we were being discriminated by lots of people. At that time, my parents told me many profound truth of life, such as "tolerance" that Master Li said. Besides, after my parents were released, my home was targeted by the police. They were like wolfs seeing fresh meat. They searched our house and asked for money in all kinds of names. My parents sold lots of valuable goods and turned it into money to give to the police in order to protect our safety. We suffered from extreme misery as in a hell.

I have been looking for jobs since I graduated in [year]. At that time, employment situation in China were so bad that I can't find a job. And my parents have been doing some casual jobs. I have been following the principles of truthfulness, kindheartedness and beauty that Master Li taught us. It helped me go through a tough time. And my parents and I insisted practicing Falun Gong in secret. However, in [month] 2004 I was being reported for practicing Falun Gong and being arrested. Luckily, my parents were [working]; otherwise, they would get caught as well. I was held in a re-education center and endured hardships. I don't want to recall those horrible memories. I was held for more than half a year and released at the end of 2004. It's harder for me to find job after I was released. Although I felt miserable, I didn't give up on practicing Falun Gong. I insisted practicing Falun Gong at home. In the meanwhile, I bought some books about computer to enrich myself. However, police still harassed my family and asked money in all kinds of names.

In 2006, I opened [a business] with my friend. And I could deal with some simple technical problems about [the business] on my own. After a while, I made some money. However, those horrible police didn't leave me alone. They kept asking for troubles either in my home or [at my place of business]. They even found some people of bureau of culture to investigate my [business]. Because it needed a special practicing license to open [such a business] in China, the police threatened me with it and asked for money. I can't open the [business] unless I gave them money. After a while, fire department also asked for troubles [at my place of business]. Actually, I have applied for all the licenses and security certifications. But the problems kept coming up since the police found out the [business] was mine. In China, police often

ganged up with government officials to oppress practitioners of Falun Gong like us. I didn't want to incriminate my friend and his family, so I spent money to have someone help me with the passport application and my passport was granted in 2010. Then, I saved money for a period of time. And finally, at the middle of 2011, I asked a travel agency to apply for Australian tourist visa. I have heard of the freedom and democracy in foreign countries, but I still felt moved when I saw it with my own eyes. I saw people practicing Falun Gong in the park and how happy they were. I took an active part in practicing Falun Gong here and other practitioners helped me a lot. I was afraid of going back to China. I didn't want to live under the harassment of the police. I can't live like that anymore.

29. The statement was signed by the applicant, noting the assistance of his migration agent in translating the contents to English.

Departmental interview

30. The applicant did not attend a hearing scheduled with the Department.

The review application

31. The delegate refused the visa application [in] May 2012, notifying the applicant on this date. The applicant lodged an application for review of the decision to the Tribunal [in] June 2012.

Applicant's evidence at Tribunal hearing

32. The applicant attended the hearing via video link between Sydney and Brisbane [in] September 2012. He was not accompanied by a representative or other person. An interpreter in the Mandarin language was present.
33. When asked to verify that his protection visa application claims were true and correct and whether he wanted to change anything, the applicant confirmed they were his claims and that there was nothing he wanted to change or add. [The applicant] stated that his migration agent assisted with the application.
34. The Tribunal noted that [the applicant]'s claims revolved around his status as a practitioner of Falun Gong and asked the applicant to explain his earliest involvement with the practice. He responded that as a child in [Province 2] in China he had early memories of practicing the discipline with his parents. Whilst in his younger childhood he had not been particularly interested in joining them, he was gradually drawn to join them in practising Falun Gong. This was [when he was aged in his early teens]. When asked what in particular drew him to practice with his parents, he explained that he simply liked the look the movements of Falun Gong and wanted to try these himself. He also admired the principles that his parents talked about in relation to their religion, such as being truthful at all times and having forbearance. As a family they would practice mostly at home, but also occasionally in parks.
35. The Tribunal questioned the likelihood of the family practising in public, considering the known hostility of the Chinese government in relation to Falun Gong. [The applicant] stated that troubles began around 1999, when rumours began to circulate about the government's growing dislike for the religion. To be safe, the family ceased practice in the

open, but still maintained their observance at home. They knew of the government starting to crack down, but were not going to give up Falun Gong.

36. One day in [early] 1999, people appeared at the door of the family home. The applicant was home with his parents and recalls that it was approximately 10am. These people, some of whom were wearing uniforms rushed into the house and pushed the applicant's mother and father to the ground. His father asked 'why, what is happening?' and a response was given 'Falun Gong.' The applicant believes that his family must have been betrayed to the PRC by neighbours, who must have been spying and knew of the family's religion. [The applicant]'s parents were dragged out the front door and taken to a black vehicle parked outside. The applicant, a child at the time, held on to one of the uniformed individual's hands and pleaded that his parents not be taken away, but they would not listen and drove away. The applicant states that he just stood crying at the door for a while, unsure what to do. Eventually he walked over to his grandparents' house, approximately 10 minutes walk away in [a neighbouring] district and told them what had occurred. He ended up staying at their place for the three years that his parents were detained. The Tribunal asked [the applicant] to explain why he only had one address on his application form and he responded that he thought he only needed to put his household registration address.
37. [The applicant] was then asked to explain what happened in relation both to his parents and to the family home during their time of absence. The applicant responded that he was given no information about his parents and although he tried to find a way to visit them, he was not able. The Tribunal asked for more information about such attempts. [The applicant] stated that he approached the local police and explained his desire to see his parents. They responded by telling him that his parents were in an 'evil cult' and denied him access. He did not try again. He maintained the family home while they were away and in fact occasionally stayed there (he was [aged in his teens] during the years in question).
38. The Tribunal asked [the applicant] to describe in more detail his relationship with his grandparents, including their knowledge and/or acceptance of the family's Falun Gong practices. [The applicant] stated that he loves his grandparents but was very sad to be away from his parents, who are good people. His grandparents were not Falun Gong practitioners, but knew of and tolerated the practice. They were aware that the applicant and his family experienced health gains and lived a good life helping others, so were not opposed to the effects of Falun Gong. [The applicant] was able to continue his practice at their house; they did not encourage him but they also did not tell him to stop. He would practice a few times a week, sometimes at their house and sometimes at his own.
39. The Tribunal asked [the applicant] to describe his actual practice in more detail. He stated that there are five main groups of exercises in Falun Gong. Practices vary, but he would personally take about 30 minutes to carry out the complete set of exercises. The Tribunal asked if the practice involved more than exercises. [The applicant] responded in the affirmative, noting that he also follows Master Li's philosophy in his life. This means always being truthful and kind to others, which includes being real in your interaction with them. He also tries to follow *ren*, which is forbearance or abstaining. In his daily life, you must be sincere in your dealings and if you are experiencing troubles, it is important to 'hang in there.' If you can help people, it is important that you do so. For example, he had lent money to others in need and also been a listening ear when people need to discuss their troubles. It is also important to be a practical help, which he was when he helped some people out at one point after a car accident.

40. The Tribunal noted that a key concept described by Falun Gong practitioners is 'xingxing' and asked the applicant to explain his understanding of this tenet. [The applicant] stated that it is about actively developing your belief, character and personality. Doing the exercises and following the three principles of truthfulness, kindness and forbearance helps you to cultivate *xingxing*. Master Li has told people the importance of helping others and doing good things in daily life. The Tribunal asked [the applicant] to clarify if he believes that the principles for living are somewhat separate to the exercises. He responded that no, the exercises and the principles of Falun Gong are intertwined and not easily separated out.
41. As well as carrying out the practices of his religion, he was driven to encourage others to join him, as he felt that there were many benefits to be gained through Falun Gong. For example, the parents of one of his friends were having a tough time and he suggested that they try Falun Gong as a way of helping the situation. He also talked to some fellow students about his positive experiences with the religion. The Tribunal expressed surprise that the applicant would engage in such potentially risky behaviour as speaking openly about Falun Gong, considering what had happened to his parents. [The applicant] stated that whilst he was aware of potential dangers, his choice to talk with others was tied directly to his beliefs. This is particularly in relation to kindness and helping others whenever it is possible. He knows that Falun Gong can teach you to be a better person and felt obliged to tell others about this. Such thinking overrode any fears that he might have had.
42. The applicant was asked what response he received from his friends and associates in relation to his suggestion about Falun Gong. He responded that "*most people thought I was a psycho. My teachers told me that I was brainwashed and in a cult.*" He stated that at school he was picked on because of his religion, even by the teachers. Once, he had to defend himself against a physical attack by a group of students. Rather than be assisted by teachers, he got into trouble and was told not to fight other students.
43. [The applicant] told the Tribunal that eventually his parents were released and turned up at the grandparents' home, looking worn out and as though they had been tortured. They explained that they had been taken to [a certain] detention centre. This is what is called a '*laogai*' centre, which is reform through hard work. The applicant informed the Tribunal that he was personally held in the same detention centre in 2004, for [a number of] months. He finds this time very difficult to talk about, as he suffered many deprivations that are difficult to express. He is just grateful that at the time he was taken by authorities, his parents did not get taken as well. On the day that he was taken, they were both [working] and so avoided the authorities. The applicant thinks that he was picked up because of his ongoing practice of Falun Gong, which authorities must have somehow found out about. He and his parents were continuing to practice Falun Gong, regardless of the possible consequences. In 2004 the applicant's mother passed away at the age of [age deleted: s.431(2)]. She had no other health issues and simply had a heart attack and died. The applicant feels certain that this is a direct result of the torture and deprivations that she experienced in the prison camp. At the moment, his father is not very well at all, which the applicant thinks is also due to his experiences in the *laogai*. The father has been extremely sad since his wife died and has also developed diabetes.
44. The Tribunal asked the applicant to describe what led him to eventually leave China. [The applicant] stated that even after everything that he and his family had been through, he was determined to move on with his life. In 2006, he opened [a business] in [Province 2]. Despite doing everything right, he was continually scrutinised by authorities over endless bureaucratic details for many years until 2011. He had to comply with requests from the fire

brigade, the cultural bureau and many others, when he was simply trying to run a business. He realised that he was being watched and that attempts were being made to cause great difficulty to himself and his business. The situation became impossible He finally realised that he had to leave, as he would continue to suffer at the hands of authorities. He had to find a way to illegally get out of the country and finally did so, through a fake marriage with a Falun Gong woman suffering similar circumstances. The Tribunal asked for more details about [the applicant]'s knowledge of this pathway out of China. The applicant responded that he was looking for ways to solve the problem and got talking to a friend [name deleted: s.431(2)], who had all sorts of useful information. He was just a regular guy, not a Falun Gong practitioner. He was able to sort out the details both for the applicant and for the girl who was in the same situation.

45. Only his father and grandmother are still alive in his direct family. The applicant rings them and speaks with them regularly, about 2-3 times per week. The Tribunal noted that this was inconsistent with his application, where it is stated that he does not have contact with friends or relatives at home. The applicant responded that the form was filled in by his agent and that this might account for the discrepancy. The Tribunal also expressed some concern regarding the fact that [the applicant] had put 'no religion' on his form, which is difficult to reconcile with his claims related to Falun Gong. [The applicant] said that he has a hard time explaining Falun Gong in terms of 'religion', particularly regarding the English use of the term. It is a very intricate practice and he knows now that in terms of the definition of 'religion', he can say with confidence that his religion is Falun Gong. The term as understood in his language is usually attached to beliefs such as Buddhism, Catholicism and so on.
46. The Tribunal also noted that [the applicant] had waited quite some time in Australia before applying for protection. The applicant stated that when he first got here he wanted to seek help but did not really know how to. He was trying to find people to help him and was ringing solicitors. He has at least been able to continue his religious practice, and has joined in with other Falun Gong adherents in [a] park in Sydney.
47. The Tribunal asked why he did not contact the Department immediately regarding his situation, upon arriving in Australia. The applicant stated that his English was not at all good and that he still was not thinking straight for quite some time after arriving in Australia.
48. The Tribunal asked [the applicant] to describe what he thinks will occur on any return to China. He is not certain but feels that he must be on some sort of list of Falun Gong practitioners and will be sought after by the government. He does not know if he would be arrested straight away, but feels that it is highly probable that he would be eventually arrested again, put in detention and tortured His father is still practising and has people knocking on the door of the family home from time to time. The father gets asked if he is practising Falun Gong to which he answers 'no'. These troubles are ongoing.

Country Information

49. There is ample country information to indicate that Chinese authorities ban certain types of religious and cultural practice. According to the 2010 US Department of State Report on Human Rights Practices in China (emphasis supplied):

The constitution states that Chinese citizens "enjoy freedom of religious belief." It also bans the state, public organizations, and individuals from compelling citizens to believe in, or not believe in, any religion. The constitution and laws protect "normal"

religious activities," which are overseen by the five (Buddhist, Taoist, Muslim, Catholic, and Protestant) state-sanctioned "patriotic religious associations." By law only they may register religious groups and places of worship. Chinese Communist Party (CCP) members are discouraged from participating in religious activities. The government permits proselytizing in registered places of worship and in private settings. **Proselytizing in public, unregistered places of worship, or by foreigners is not permitted. Some religious or spiritual groups are outlawed, including the Falun Gong.** Other religious groups, such as Protestant "house churches" or Catholics loyal to the Vatican, are not outlawed, but are not permitted to openly hold religious services unless they affiliate with a patriotic religious association. In some parts of the country, authorities have charged religious believers unaffiliated with a patriotic religious association with "illegal religious activities" or "disrupting social stability." Punishments for these charges range from fines to imprisonment. "(US Department of State 2010, *International Religious Freedom Report for 2010 – China (includes Tibet, Hong Kong, Macau)* , 17 November 2010, Introduction).

50. A recent UNHCR report refers specifically to the persecution faced by Chinese Falun Gong practitioners, including the use of 're-education through labour' camps: (Site: <http://www.unhcr.org/refworld/docid/4f71a67335.html/>, accessed on 13 July, 2012, emphasis supplied) Source: United Nations High Commission for Refugees (UNHCR):

PEOPLE'S REPUBLIC OF CHINA: USCIRF Annual Report 2012 - Countries of Particular Concern: People's Republic of China

*FINDINGS: The Chinese government continues to violate severely its international obligations to protect the freedom of thought, conscience, and religion or belief. **Religious groups and individuals considered to threaten national security or social harmony, or whose practices are deemed superstitious, cult-like, or beyond the vague legal definition of "normal religious activities" face severe restrictions, harassment, detention, imprisonment, and other abuses.** Religious freedom conditions for Tibetan Buddhists and Uighur Muslims remain particularly acute, as the government broadened its efforts to discredit and imprison religious leaders, control the selection of clergy, ban certain religious gatherings, and control the distribution of religious literature by members of these groups. The government also detained hundreds of unregistered Protestants in the past year and stepped up efforts to shutter "illegal" meeting points and public worship activities. Dozens of unregistered Catholic clergy remain in detention or have disappeared, and relations between the Vatican and Beijing have declined in the past year. **Falun Gong adherents continue to be targeted by extralegal security forces and tortured and mistreated in detention.** The Chinese government also continues to harass, detain, intimidate, disbar, and forcibly disappear attorneys who defend vulnerable religious groups...*

*The Chinese government continued its thirteen-year campaign to eradicate Falun Gong activity and pressure practitioners to renounce their beliefs. China maintains an extrajudicial security apparatus, the 6-10 office, to stamp out Falun Gong activities and created specialized facilities known as "transformation through reeducation centers" to force practitioners to renounce their beliefs. **Over the past decade, the government has carried out an unprecedented campaign against the Falun Gong, imprisoning large numbers of practitioners and torturing and abusing***

them in detention. Practitioners who do not renounce their beliefs are subject to torture, including credible reports of deaths in custody and the use of psychiatric experiments. In the year before the Olympic Games, police waged a concerted campaign to harass and detain known Falun Gong practitioners and brutally suppressed their activities. That campaign continued in the past year with specific emphasis on "transforming" practitioners through coercive means in special detention facilities or in re-education through labor centers (RTL).

Falun Gong adherents report, and official Chinese government statements confirm, long-term and arbitrary arrests, forced renunciations of faith, and torture in detention. Officials detain Falun Gong practitioners using Article 300 of the Criminal Procedure Code, which deals with individuals accused of crimes associated with "evil cults," and its associated legislation, the Decision of the Standing Committee of the National People's Congress on Banning Heretical Cult Organizations, Preventing and Punishing Cult Activities. These pieces of legislation do not conform to international human rights standards which China has pledged to uphold.

It is difficult to determine how many Falun Gong practitioners are in detention because they are most often incarcerated in RTL camps and mental health institutions. However, in its 2011 Country Report on Human Rights Practices for China, the U.S. Department of State noted that Falun Gong adherents constituted at least half of the 250,000 officially recorded inmates in RTL camps. The UN Special Rapporteur on Torture reported that Falun Gong practitioners make up two-thirds of the alleged victims of torture in custody presented to him in China.

51. Further, several related reports such as that provided by Amnesty International below confirm the harsh and arbitrary treatment sustained by known Falun Gong practitioners in China (emphasis supplied):

Falun Gong is a spiritual movement, which gained a large number of supporters in China during the 1990s. After the movement staged a peaceful gathering in Tiananmen Square in July 1999, the government outlawed the group and launched a long-term campaign of persecution. Individuals are imprisoned for their spiritual beliefs and for exercising their rights to freedom of expression by distributing materials about the group. They are sentenced to long prison terms, held in psychiatric hospitals, re-education through labour facilities (a form of administrative detention imposed without charge, trial or judicial review), and held in specialized detention centres, where the mission is to "transform" Falun Gong practitioners by forcing them via coercion into renouncing their spiritual beliefs, often through the use of torture and ill-treatment.

Torture and other ill-treatment is common in all forms of detention, despite China's ratification of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988. Amnesty International has documented numerous deaths in custody believed to have been caused by torture and other ill-treatment, and torture and ill-treatment leading to permanent disability, including of Falun Gong practitioners.

(excerpt from CX295452: PEOPLE'S REPUBLIC OF CHINA: Urgent Action: More Falun Gong at risk of torture in China , Amnesty International, 18 September, 2012,

Added: 20/09/2012 - Available at:

<http://www.amnesty.org/en/library/asset/ASA17/035/2012/en/5715e8ab-8810-4a63-9bb3-f26ebbf903/asa170352012en.html>)

FINDINGS AND REASONS

52. The Tribunal does not have to accept uncritically all statements and allegations made by an applicant. As stated by Beaumont J in *Randhawa v MILGEA* (1994)124 ALR 265 at p.278 "The mere fact that a person claims fear of persecution for reasons of political opinion does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for reasons of political opinion. It remains for the Minister in the first place to be "satisfied" and, where that decision is adverse and a review is sought, for the applicant to persuade the reviewing decision-maker that all of the statutory elements are made out." (*MIEA v Sang and Anor* (1997) 191 CLR 559)
53. The applicant claims to fear returning to China, as he believes that he will face serious harm as a result of being a member of the Falun Gong religion. That is, he will be subjected to treatment involving conduct of a systematic and discriminatory nature, amounting to serious harm. The essential and significant reason for such treatment is claimed to be [the applicant]'s religion of Falun Gong, with the persecution being carried out by Chinese authorities on any return of the applicant to China.
54. I note that Article 1A(2) of the Refugees Convention requires that a person's fear of persecution must be a 'well-founded fear'. The High Court in *Chan Yee Kin v MIEA* (1989) 169 CLR 379 held that the concept of well-founded fear involves both a subjective and an objective element. That is, there must be a state of mind, a fear, and an objective basis for that fear. There will be a basis for that fear if there is a 'real chance' of being persecuted. A real chance is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent. In that case, McHugh J notes:
- [A] fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur... and applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be... persecuted. Obviously, a far-fetched possibility of persecution must be excluded* (at 429)
55. In assessing whether the applicant possesses a fear that is objectively well-founded, it is necessary for me to examine the credibility of the applicant's specific circumstances against the backdrop of reliable and independent information regarding China and various practices within Falun Gong
56. The applicant has claimed that he is a citizen of China and he arrived in Australia on a Chinese passport in his own name. The Tribunal accepts on the basis of documentary evidence before it that the applicant is a Chinese national, outside of his country of nationality. Accordingly, the Tribunal has assessed [the applicant]'s claims against China.
57. On the basis of the credible and consistent evidence submitted by [the applicant] across time, as well as the concurrence of independent information relevant to his claims, the Tribunal finds the applicant to be a witness of truth on all material matters. In particular, the Tribunal notes the applicant's detailed, credible and internally coherent responses to key questions such as those relating to his Falun Gong practice and his family's enduring problems in this regard with Chinese authorities. For example, specific elements of [the

applicant]’s evidence regarding the detention of both his parents and himself have been presented coherently and consistently at all relevant times since [the applicant]’s applications was originally made. Further, in discussing the central tenets of Falun Gong, [the applicant] provided cogent and detailed references to the quite complex intersections of the physical and spiritual elements of the faith, including the development of internal *xingxing* through both regular practice and virtuous living. This, and related evidence, was devoid of artifice or embellishment on all issues of substance. The Tribunal accepts that this evidence is genuine. Whilst there were some minor discrepancies, such as his communications with relatives since being in Australia, the Tribunal does not find that such elements detract in any material way from the overall consistency and credibility of claims made.

58. The Tribunal accepts that the applicant is a Falun Gong practitioner and that he has directly suffered serious harm in the past as a result of this practice. The Tribunal also finds on the basis of [the applicant]’s detailed and plausible accounts of his long term personal commitment to the religion that he will certainly continue to practice Falun Gong, should he return to China at any time in the reasonably foreseeable future. The repercussions of this must be considered in the light of objective country information regarding the applicant’s likely future treatment in China. The Tribunal finds there is sufficient objective data available to conclude that Chinese nationals who are Falun Gong practitioners have a real chance of facing one or more of the consequences of arbitrary arrest, detention and/ or torture on the basis of their religious practice in China. Such objective data is exemplified in the specific country information set out *supra* at paragraphs 47-49, regarding the harsh treatment of Falun Gong practitioners in China. The Tribunal accepts that [the applicant]’s personal beliefs and connection with the Falun Gong will continually animate his adherence to and practice of the Falun Gong religion, drawing him to the inevitable adverse attention of Chinese authorities.
59. The Tribunal notes that a portion of [the applicant]’s religious observance has occurred whilst in Australia, which raises prima facie questions pertinent to s91R(3) of the Act. That is, by practicing Falun Gong in the park in [Sydney], [the applicant] has engaged in conduct in Australia relevant to his Convention-based claims. However in light of the matters accepted above by the Tribunal regarding the genuine and credible basis for [the applicant]’s claims, the Tribunal finds that s91R(3) is not enlivened, in that the applicant engaged in this conduct otherwise than for the purpose of strengthening his claim to be a refugee within the meaning of the Convention.
60. The arbitrary nature of the Chinese government’s documented response to unauthorized and underground religious groups, including Falun Gong, is such that the Tribunal finds there is a real chance that the applicant will be subjected to serious harm as specified by s.91R(1)(b) of the Migration Act. The Tribunal considers that the persecution which the applicant fears involves systematic and discriminatory conduct as required by s.91R(1)(c), in that it is deliberate or intentional and involves selective harassment for a Convention reason, namely her religion. The Tribunal further finds that the applicant’s religion of Falun Gong is the essential and significant reason for the persecution which the applicant fears, as required by s.91R(1)(a). The Tribunal finds that there is a real chance that the applicant would be detained and harmed as a result of his involvement in Falun Gong activities, if he were to return to China now or in the reasonably foreseeable future.
61. In summary, and in light of both available country information and having accepted the genuine nature of the applicant’s claims, the Tribunal finds that the applicant faces a real chance of persecution in the reasonably foreseeable future by Chinese authorities. It is accepted on the combined evidence before the Tribunal that the chance is not insubstantial,

nor far-fetched. Such harm will arise no matter what location [the applicant] might choose as his residence in China, due to the documented arbitrary nature of official responses to unauthorised religious observance across China. The Tribunal is satisfied that the applicant has a well-founded fear of persecution.

62. The Tribunal finds that the applicant is outside of his country of nationality, China. The Tribunal finds that the applicant is unwilling, owing to her fear of persecution, to avail himself of the protection of the Chinese Government. There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any third country such that s 36(3) would apply to his circumstances. The Tribunal therefore finds that the applicant is not excluded from Australia's protection by s 36(3) of the Act.

CONCLUSIONS

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

DECISION

64. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfied section 36(2)(a) the Migration Act.