

**1100529 [2011] RRTA 257 (5 April 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1100529

**DIAC REFERENCE(S):** CLF2010/111361

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

**TRIBUNAL MEMBER:** Alison Murphy

**DATE:** 5 April 2011

**PLACE OF DECISION:** Melbourne

**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), first arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] March 2008 on a Class TU subclass 572 (Vocational and Educational Training Sector student visa) and departed [in] April 2008. He next arrived in Australia [in] April 2008, again on a Class TU subclass 572 visa valid until [a date in] May 2010. [In] April 2010 he was granted a bridging visa valid until [a date in] May 2010 and [in] May 2010 he was granted a further bridging visa valid until [a date in] June 2010. [In] June 2010 he was granted a tourist visa valid until [a date in] August 2010 and [in] August 2010 he applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa [in] December 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
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 [in] January 2011 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 [in] March 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

#### **The primary application**

21. In his application for a protection visa lodged [in] August 2010, the applicant states that his full name is [name deleted] and that he was born on [date deleted] in Fuqing, China. He states that he is a Chinese citizen and that he attended elementary, middle and high schools in Fuqing and [University 1]. He states that his only country of former habitual residence or transit before leaving was China, from which he departed [in] March 2008. He states that he travelled to Australia on a Chinese passport valid from [a date in] October 2006 to [a date in] October 2011.
22. The applicant states that since arriving in Australia he has worked at [employer deleted] between July 2008 and March 2009 and [employer deleted] between May 2009 and May 2010. He states that he has been unemployed since May 2010. He states that he returned to China [in] April 2008 in order to attend the interviews for public service positions in Fujian province. He states that he has no close relatives, either in Australia or outside of Australia.
23. The applicant's refugee claims are contained in a statement lodged with his visa application, which states in summary:
  - He wishes to seek asylum on humanitarian grounds on the basis that he is a political dissident;
  - He graduated from [University 1] of Fujian in July 2006 with [qualification deleted] and a career in education was his first choice. As he had [qualifications deleted], he was confident in landing a job as a [teacher]. He reported to the Fuqing City Education Bureau as required, submitted his papers and was told to return the next day so he left. He returned the next day where the official shouted at him "where were you yesterday?" His father's colleague believed it was deliberate and that he needed

to follow hidden rules by bribing them to get in. He said no, he would try again next year because he believed that it was against the principle of “Knowledgeable as a teacher, ethical as a model”;

- As a probationary member of the Chinese Communist Party, he believed the local bureaucracy was growing, that corruption was rampant and the system rotten from the root so he quit the Chinese Communist Party, hoping to work in the educational system and join a democratic party that would better serve society;
- In 2007 he put in his application to the Fuqing Education Bureau at the recruitment fair at the Fujian Teachers College and was accepted. They phoned and asked him to report to the Bureau, but when he did so he was told that they did not accept graduates from previous years but could not produce official documents to prove it. His parents and friends once again recommended acceptance of the “hidden rule”, he refused and went to find a different job;
- In 2008 he sat the examinations for public servant positions in Fujian province and achieved [details relating to results deleted]. [In] April 2008 he returned to China from Melbourne to attend the interview and arrived at the [Organisational Department] to be greeted warmly and told that the examiner would decide his fate, suggesting between their words that if he bribed them then there would be no problem. He refused to do so;
- His experiences led him to believe that the Chinese Communist “One-Party dictatorship” was harmful to society and strengthened his political position for social democracy. He gave up the interview, changed the date of his return ticket and returned to Australia [in] April 2008;
- In Melbourne he can read many writings that are forbidden in China as well as sensitive political information and opinions and [website deleted] has become one of his favourite news platforms. Several years of study and information accumulation further strengthened his values and political ideas;
- With the help of [Mr A] and [Mr B], he joined the Australian Branch of Chinese Social Democratic Party [in] June 2010 and began the practice of his defense of democracy together with his fellow party members;
- The Chinese Social Democratic Party is different from that in China because we do not accept the leadership of the CPC and the constitution stipulates political ideas on the “establishment of a sound and constitutional democracy” and calls for “the armed services to be nationalised, government rules by the law, constitutional supremacy and equality before the law” as well as “an independent monitoring system and judicial system, a fundamental solution to the problem of corruption by officials” and to seek real democracy. This is unacceptable to the Chinese Communists who are doing all they can to control speech and use the political machine to suppress political dissent;
- Communist China used Professor Quan Guo, a scholar of Nanjing Normal University who promoted a multi-party system and the military nationalisation as an example of “subverting state power”, arrested and sentenced him in order to suppress and intimidate democratic activities and to maintain its authoritarian rule;

- If he returns to China he faces arrest and sentence of imprisonment and will be pressured to stop democracy activities and quit the opposition party, he will be forced to accept the Chinese Communist Party's sermons and brainwashing, returning to work in the Chinese controlled government or any organisation will be impossible because all the Chinese government officials must pass the final stage of political assessment conducted by the [Organisation Department];
- In addition, he will not be issued a Chinese passport to go ahead ever and will suffer a series of persecutions from the state machine controlled by Chinese Communists, as well as from their lackeys and accessories.

### **The departmental interview**

24. The applicant was interviewed by the delegate in Melbourne [in] October 2010 with the assistance of a Mandarin interpreter. In that interview he elaborated on his written claims and gave evidence that was materially consistent with evidence he presented at the Tribunal hearing and the documentary material contained in the Department's file.

### **The delegate's decision**

25. [In] December 2010, a delegate of the Minister decided to refuse to grant the protection visa, setting out in the decision statement his finding that the applicant had engaged in political activities to raise the risk of persecution for the sole purpose of strengthening his refugee claims. In making this finding, the delegate referred to the timing of his joining the Chinese Social Democrat Party in Australia, his participation in a Falun Gong march and the publication of his articles on [website deleted] and found that the applicant's actions were designed to enhance his application for protection.

### **The Tribunal hearing**

26. The applicant appeared before the Tribunal [in] March 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
27. The applicant told the Tribunal that he graduated from [University 1] of Fujian in 2006 and was planning to work as a certified teacher, but was unable to find a job as a teacher when he graduated. He stated that he went into the Education Bureau to enrol, where there were people reading newspapers. He was taken into a room where he had a good talk to an officer who seemed happy with him and told him to come and register the next day. As he was leaving, he saw that officer process the registration of another man who was there with his child. When he attended the following day, he saw the same officer who shouted at him that he was supposed to enrol the previous day. The Tribunal asked whether he had pointed out to the officer that he had attended the day before and been told to return the following day. The applicant stated that he didn't do so, being so upset that he left crying.
28. The Tribunal asked the applicant why he thought the Education Bureau had not processed his registration when he first attended. The applicant stated that the people there were reading newspapers and had enough time to process his registration on the first day he attended but failed to do so, even though he saw them processing the registration of another person. The applicant stated he talked to his family and a colleague of his father who had contacts in the Education Bureau. His father's colleague told him that the only way to handle the situation

was to offer a bribe but the applicant refused to do so, considering it totally unnecessary and not allowed by his principles. The applicant stated that his family also thought he should bribe the officials, but that he felt that if even a teacher had to bribe officials, students would have to go further to succeed and that teachers should be the conscience of their society.

29. When asked how such a bribe would be offered, the applicant stated that according to Chinese customs, he would be expected to invite the Director of the Education Bureau to a leisure or entertainment event and while that was happening, he would be expected to push over a lucky money envelope.
30. The applicant stated that he still thought he could go and apply to the Education Bureau the following year and that he went back to his mother's place and helped her with some jobs. However the next year he went to the Fujing Teachers Bureau and handed in his CV and the other documents that were required. He received a phone call asking him to attend an interview, but when he attended was told that they weren't taking graduates from previous years. This was at some time before the school year started in September 2007. At this time he started to think about coming to Australia to study. His brother is a student in Japan and he had advised the applicant to have his passport ready at all times because the process to obtain it is difficult and could take a long time. As a result he had applied for a passport in 2006.
31. In 2007 he also decided to sit the test for the Administrative Officers Certificate in China. Traditionally good students who had passed the test would be promoted to a minister or court official. He sat that test in January 2008 and travelled to Australia in March 2008 on a student visa granted in February 2008. At that time his intention was to leave China, see things around the world, return to China and see what he could find.
32. He returned to China after a couple of weeks in Australia to attend an interview for the Administrative Officers test. He attended the interview at the Chinese Communist Party (CCP) Resource Office in [town deleted]. There were three people present at the interview including the office supervisor who was immediately introduced as the main examiner for the interview. He was asked a few questions, not many, and then the interview finished. His father had accompanied him to the CCP Resource Office although he hadn't come in. When he came out of the interview, he told his father what had happened. His father told him it was his choice and he had to decide whether to bribe the officials or to leave the country and do other things. The applicant stated there was no way he wanted to bribe the officials.
33. The Tribunal asked the applicant what he thought should have happened in the interview. The applicant stated that the interview panel was not allowed to identify the main examiner which was a clear violation of the rules and that he believed this was a subtle suggestion that the office supervisor was the person that should be bribed. He said it wasn't just the identification of the main examiner that caused him to believe this, but also the expressions of the other two interviewers who were laughing and smiling and who told him that if the main examiner thought he was ok, then he was ok. The applicant stated that it was very clear to him that it was intended that he bribe the main examiner.
34. The applicant stated that he was very disappointed with the outcome of this interview and that afterwards he re-scheduled his travel itinerary to re-book his travel to Australia. On arrival, he studied [subject and college deleted] for more than a year and when that school folded, the students were sent to other schools and he went to [college deleted] where he continued his course before graduating in May or June 2010 with a [diploma]. The applicant

stated that since graduating, he applied for a visitor's visa which was granted and that he has survived financially by doing odd jobs.

35. The applicant stated that he rents a room in a shared household at [address deleted] with other people, some of whom are students and some of whom are permanent residents and that he has been living at that address since arriving in Australia.
36. The applicant told the Tribunal that he first became interested in democracy while he was at [university] and that his teacher, [name deleted] motivated his interest in China's political system. He stated that his teacher was a person who made his own decisions and that he taught the applicant how to be a man, although they were not now in touch. After that he encountered other incidents which gradually formed his views about the dominant management of the CCP.
37. The applicant gave an example of a community group he became involved in 2005 or 2006 after the local government decided to develop an empty spot in his neighbourhood which had been left vacant to give the fire brigade access to surrounding buildings. The community group objected because it was not environmentally friendly, and produced a strong odour in summertime. They got into a conflict with the construction company and reported that to the police, but the police didn't take any action. There were consequences from the conflict including the robbery with firearms of some people involved and the slow reaction of government officials. The applicant stated that there were a whole chain of incidents that made him gradually form his view about Chinese society and planted a seed in his mind.
38. The applicant told the Tribunal that he met [Mr A] in [location deleted] in early 2010 when he encountered a man talking about a lot of topics that the applicant was interested in. He and [Mr A] shared similar political views and talked about Chinese territory conflicts as well as corruption in China. After they first met, they stayed in contact, communicating frequently, and [Mr A] offered to provide an introduction to the Australian Chinese Social Democratic Party if the applicant wished, with [Mr A] being a member and the [position deleted] of this party. The applicant stated that he was still in contact with [Mr A] and that he saw him at least once a month, often meeting at [Mr A]'s home at [address deleted].
39. The applicant told the Tribunal that he attended one meeting of the Chinese Social Democratic Party as an observer before joining that party [in] June 2010 and that there were around ten members present at the meetings which are held once per month. He stated that at the second committee meeting, they made plans for the next stage of their project and discussed whether a new person, [name deleted], should join as a member. The applicant stated that the committee was only advising that person and that they hoped that he would join.
40. The applicant stated that he attended a Falun Gong demonstration because he supported religious and democratic freedom. He stated that he was not a practitioner of Falun Gong and that the demonstration was not organised by the Chinese Social Democratic Party but that he opted to attend that activity which he found out about from a Chinese newspaper website.
41. The applicant told the Tribunal that he had been reading the [website deleted] for a few years now since coming to Australia and that people can send in their comments which will be considered for publication. The applicant told the Tribunal that the first article he had published by the website was the one contained in the Departmental file published [in] July 2010 and titled "[title deleted]" The Tribunal noted that the translated copy of the article



contained in the Departmental file identified the author as the applicant and asked if the Chinese language version did also to which the applicant responded that it did. The Tribunal asked if he had considered publishing the article anonymously as it observed that many of the English language articles published on the website did not identify the author. The applicant said that he wasn't aware of this and that he was mostly reading the Chinese part of the website. He stated that in group emails sent out to others for comment, you would be a joke if you didn't put your name down, although those residing in China stay anonymous and the Party's branches inside China were actually secret.

42. When asked what he thought would happen when this article was published, the applicant stated that he thought that many people would read this article and that it may change people's thoughts. When asked if he thought the publication may cause difficulties for him in China, the applicant stated that [Mr A] and [Mr B] suggested to him that this might be the case and asked him if he dared to do it. He stated that he knew the things he should do and he knew the things he shouldn't do it and he did it anyway. He stated that his parents didn't know that he had published such articles on the website because he didn't talk much to them about such matters. When asked if he had considered bringing [Mr A] or [Mr B] to the hearing to give evidence in support of his application, the applicant stated that he hadn't thought of it although he realised now that it might have been a good idea. The applicant stated that he didn't want to bring a father figure to the hearing because he was not a child and he preferred to face his own problems independently.
43. The Tribunal asked the applicant when he first thought it was no longer safe for him to return to China, to which the applicant stated that he realised this only when his articles were published and that before that, he hadn't properly understood the consequences. When asked what he feared might happen if he returned to China, the applicant stated that he thought he might first be visited by the National Security Bureau.
44. The Tribunal noted that it had before it eight articles identifying him as the author published on [website deleted] between [a date in] July 2007 and [a date in] January 2011 and asked if these were all of the articles that he had had published. The applicant stated that there were several more that he hadn't had translated because it cost a lot of money. The applicant stated that he didn't think there was much difference between publishing one or two articles critical of the CPP and publishing a lot.
45. The Tribunal noted that the applicant had provided a notice of his speech at a memorial service for [Mr C] dated [in] January 2011. The applicant told the Tribunal that [Mr C] was an influential figure in the democratic movement in Hong Kong who started as a teacher and saved a lot of exiled students and people holding different political opinions before the return of Hong Kong. The applicant stated that [Mr C] had rescued a very important student leader, by paying costs out of his own pocket. He stated that the CPP made invitations to [Mr C] but that [Mr C] was persistent about his own point of view and that he was never issued a pass to travel back to mainland China even though he had applied many times. The applicant stated that [in] January 2011 he attended a ceremony to mark [Mr C]'s life as he died a few weeks earlier in January 2011 and that the document on the Tribunal file was only a memoir of the applicant's speech at that ceremony and that he actually said a lot more.
46. The Tribunal asked the applicant how his relationship with his family was now to which the applicant responded that he still had a lot of respect for them, even though their opinions were at times so different from his own. He stated that he often argued with his father about the future.

47. The applicant stated that there were times in Jiamen when he wanted to take part in an anti-Japanese demonstration but didn't for different reasons and stated that he couldn't understand back then why the Chinese government were even against such a demonstration at a time when the relationship between China and Japan was so intense. He stated that there were so many territorial conflicts affecting China.
48. The applicant stated that if he returned to China he feared that the Chinese authorities would require him to quit all political activities and may even send people to monitor him, stating that the authorities were much stricter on people holding different political opinions. He stated that he thought this might have an effect on his career, telling the Tribunal that another activist, Professor Wenguang Sun at Changle University had been fired because of his conflicting political opinions and that some of his accommodation had been taken back.
49. The Tribunal asked the applicant about the documents he had provided concerning the arrest and sentence of [name deleted]. The applicant stated that that person had a lot of contact with their party, being a member inside China who decided to quit before things happened to him. Before he quit he talked to the General Chairman of the Party and then stopped communicating. Charges were still spread against him for promoting ideas harmful to Chinese society and he was imprisoned for turning against the Chinese Central authorities.
50. The applicant told the Tribunal that he believed something told to him by another member of the party, which is that as a man, he shouldn't be satisfied to be a warrior, but needs to be a general. He believed he needed to be active, not passive and be able to influence mass opinion and to be confident of change.

### **Country information before the Tribunal**

#### *Official corruption in China*

51. Country information before the Tribunal indicates that corruption is widespread in the People's Republic of China (PRC), both in the private sector and the public service. In 2010 the BBC News reported that the Communist Party's Central Commission for Discipline Inspection – China's anti-Corruption regulator – claimed 106,000 officials were found guilty of corruption in 2009, an increase of 2.5% on the previous year.<sup>1</sup>
52. In 2009, a *China Daily* article regarding the dismissal and detention of the head of a college in Guangzhou on suspicion of corruption reported "many professors and teachers have been investigated for offering and accepting bribes for promotion and evaluation of their professional titles in recent years".<sup>2</sup> In a 2007 article on corruption in the Chinese military, the *Global Times* reported on frequent allegations regarding the recruitment process, claiming that it was an 'open secret' that many officers in charge of enlistment solicit bribes from those seeking to join the army.<sup>3</sup>
53. A circular issued by the PRC Ministry of Personnel in 2001, evidences that this behaviour is widespread and longstanding. That circular urged local governments to "fight the

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<sup>1</sup> 'Corruption up among China government officials' 2010, *BBC News*, 8 January  
<http://news.bbc.co.uk/2/hi/8448059.stm>

<sup>2</sup> 'College head detained for corruption' 2009, *China Daily*, 13 October  
[http://www.chinadaily.com.cn/china/2009-10/13/content\\_8785052.htm](http://www.chinadaily.com.cn/china/2009-10/13/content_8785052.htm)

<sup>3</sup> 'Military takes aim at corruption' 2010, *Global Times*, 28 September  
<http://china.globaltimes.cn/chinanews/2010-09/577869.html>

malpractice and corruption that takes place during recruitment of civil servants and promotion of officials” and cited numerous examples of such corruption, including:

- the forging of academic credentials by officials in Lixin County;
- the illegal recruitment and promotion of officials in two Northwestern counties;
- the illegal recruitment of 357 civil servants between 1991 and 1998 by Tongxin County officials;
- the illegal approval of 132 people, including 15 relatives, as officials by the former People’s Political Consultative Conference vice-chairman of the Ningxia Hui Autonomous Region; and
- the dereliction of duty of 20 officials in Gansu Province, some of whom kept paying wages for deceased staff, while others forged academic credentials for their relatives to gain government employment.<sup>4</sup>

#### *China’s monitoring of overseas dissidents*

54. It is widely accepted that Chinese authorities monitor and interfere with pro-democracy adherents and other groups perceived as dissident in many countries outside of China. In 2009, former PRC Ministry of State Security (MSS) officer Li Fengzhi told the US Congress that China was running a vast intelligence operation domestically and internationally to suppress dissent.<sup>5</sup> Li claimed the PRC government uses “lies and violence to suppress people seeking basic human rights”, and “uses huge expenditure of funds to suppress ordinary citizens and even extend their dark hands overseas”.<sup>6</sup>
55. In 2009, Germany’s Ministry of the Interior issued its Constitutional Protection Report relating to terrorism and espionage threats to the country. According to the *Epoch Times*, one section of the report – titled “Fighting the Five Poisons” – detailed how PRC intelligence services target “groups of people it considers the greatest danger to its own rule”.<sup>7</sup> The report cited the Five Poisons as “Uighurs and Tibetans...the Falun Gong...the democracy movement and advocates for an independent Taiwan”.<sup>8</sup>
56. According to Chen Yonglin, the former Political Consul at the PRC Consulate-General in Sydney who defected from his post in 2005, PRC officials in Australia actively monitor the activities of Five Poisons groups in Australia, including pro-democracy activists.<sup>9</sup> Chen said during his time at the mission, he was responsible for monitoring pro-democracy activities, as well as the Falun Gong. Chen would take photos of public gatherings and report on these activities to Beijing, providing information such as the number of attendees, the keynote speakers and general information about the content of speeches.<sup>10</sup> Chen further claimed some

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<sup>4</sup> ‘Ministry of Personnel to Crack Official Recruitment Graft’ 2001, China Internet Information Centre, 21 August <http://china.org.cn/english/17830.htm>

<sup>5</sup> ‘China has ‘vast dark spy network’: defector’ 2009, *ABC News*, 20 March <http://www.abc.net.au/news/stories/2009/03/20/2521919.htm>

<sup>6</sup> ‘China has ‘vast dark spy network’: defector’ 2009, *ABC News*, 20 March <http://www.abc.net.au/news/stories/2009/03/20/2521919.htm>

<sup>7</sup> ‘Germany Cracks Down on Chinese Regime’s Spying’ 2010, *Epoch Times*, 29 June <http://www.theepochtimes.com/n2/content/view/38233/>

<sup>8</sup> ‘Germany Cracks Down on Chinese Regime’s Spying’ 2010, *Epoch Times*, 29 June <http://www.theepochtimes.com/n2/content/view/38233/>

<sup>9</sup> ‘Chinese defector details spy claims’ 2005, ABC website, 20 June <http://www.abc.net.au/lateline/content/2005/s1396471.htm>

<sup>10</sup> ‘Chinese defector details spy claims’ 2005, ABC website, 20 June <http://www.abc.net.au/lateline/content/2005/s1396471.htm>

students and other PRC nationals in Australia would monitor individuals and report on their activities to the PRC missions.<sup>11</sup> Chen's claim that there was a network of up to 1,000 Chinese spies in Australia has been criticised by some as exaggerated; however, if the claim was to be interpreted as referring to informants rather than trained intelligence officers, the figure is considered to be more plausible.<sup>12</sup>

57. A 2007 article in *The Age* reported that Chinese students in Melbourne are sometimes pressed by consular officials to monitor the behaviour of other students.<sup>13</sup> The same article quoted Dr John Fitzgerald, professor of Asian studies at La Trobe University as saying that Chinese official surveillance of Chinese-Australians was "extremely widespread", with targets including democracy activists, academics and Falun Gong practitioners.<sup>14</sup> Dr Fitzgerald added that surveillance was often carried out by tourists, and threats were issued through intermediaries rather than directly from PRC officials.<sup>15</sup>

#### *The treatment of political dissidents in China*

58. The Chinese government is well known to treat those it perceives as dissident – be they in country, off-shore, or returnees – in a manner inconsistent with accepted international human rights standards. The families of dissidents can also be threatened with harm as leverage in an attempt to ensure compliance.
59. The US Department of State (USDOS) reported that in 2009 "[t]he government continued to refuse re-entry to numerous citizens who were considered dissidents, Falun Gong activists, or trouble makers. Although some dissidents living abroad have been allowed to return, dissidents released on medical parole and allowed to leave the country often were effectively exiled. Activists residing abroad have been imprisoned upon their return to the country".<sup>16</sup>
60. According to the USDOS 2007 *China Profile*, the PRC government monitors some political activities of students living abroad. Those who joined organisations considered as hostile to China have been advised through state-owned media that they should quit before returning to China, and that they should refrain from activities that violate Chinese law whilst overseas. Some pro-democracy activists who have been politically active in the United States have been prevented from returning to China. According to the USDOS, a few activists have returned in recent years, and while some have encountered no apparent problems, people who have participated in high-profile democracy activities in the US risk arrest and imprisonment upon return to China.<sup>17</sup>

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<sup>11</sup> 'Chinese defector details spy claims' 2005, ABC website, 20 June

<http://www.abc.net.au/lateline/content/2005/s1396471.htm>

<sup>12</sup> 'Chinese defector offers information on secret agents' 2005, ABC website, 6 June

<http://www.abc.net.au/worldtoday/content/2005/s1385487.htm>

<sup>13</sup> 'Hard power, soft targets' 2007, *The Age*, 11 November

<http://www.theage.com.au/articles/2007/11/10/1194329562764.html?page=fullpage#contentSwap2>

<sup>14</sup> 'Hard power, soft targets' 2007, *The Age*, 11 November

<http://www.theage.com.au/articles/2007/11/10/1194329562764.html?page=fullpage#contentSwap2>

<sup>15</sup> 'Hard power, soft targets' 2007, *The Age*, 11 November

<http://www.theage.com.au/articles/2007/11/10/1194329562764.html?page=fullpage#contentSwap2>

<sup>16</sup> US Department of State 2010, *Country Reports on Human Rights Practices 2009 - China*, 11 March, Section 2.d

<sup>17</sup> US Department of State 2007, 'China Profile', USDOS website, May, Section D.2 [73]

[http://pards.org/pacc/China%20\(May%202007\)%20Profile%20of%20Asylum%20Claims%20and%20Country%20Conditions%20Report%20PARDS%20Report-](http://pards.org/pacc/China%20(May%202007)%20Profile%20of%20Asylum%20Claims%20and%20Country%20Conditions%20Report%20PARDS%20Report-)

61. Many students have claimed that their political activities in the US, such as demonstrating at the United Nations or at PRC consulates, criticising the PRC government on television, writing articles for Chinese-language newspapers, and joining US-based dissident groups would prompt security officials to target them for punishment on their return to China. Some claimed that their families have been harassed as a result of their political activities in the US.<sup>18</sup>
62. In an interview with the *ABC* in 2005, former PRC diplomat Chen Yonglin confirmed the existence of 'blacklists' containing names of individuals targeted for surveillance in Australia. Chen said if an individual appearing on the list were to travel to China, they would be monitored and be subject to surveillance by public security officers, and their movements within China would be restricted.<sup>19</sup>

*[Details in relation to website deleted]*

63. [Details deleted]
64. [Details deleted]

## **FINDINGS AND REASONS**

65. The Tribunal found the applicant to be a credible and reliable witness who gave his evidence consistently and without hesitation. The applicant's claims were consistent throughout the determination process and the Tribunal considered that the applicant displayed a persuasive knowledge of recent developments in the democratic movement in China, speaking openly and passionately about his political beliefs and his commitment to expressing those beliefs despite the cost of doing so. The applicant did not appear to exaggerate his claims and where there have been inconsistencies the Tribunal considers that they are minor and not significant and that they do not impact adversely on the applicant's credibility. In addition, the applicant's claims were consistent with the independent country information before the Tribunal.

### ***Country of Nationality***

The Tribunal accepts that the applicant is a Chinese national on the basis of the certified copy of his passport on the departmental file. The Tribunal also finds that the applicant was born in China and is not a national or citizen of any country other than China. The Tribunal finds that the applicant is a citizen of China and has considered his claims against that country.

### ***Well founded risk of persecution***

66. The Tribunal accepts the applicant's oral evidence that he became interested in democracy while a student at [University 1], encouraged by his teacher at that time. The Tribunal also

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[Specific%20Source%20and%20Reliability%20Assessment%20\(rev.%20December%2012,%202009\)%20\(DOC,%20\).doc](#)

<sup>18</sup> US Department of State 2007, 'China Profile', USDOS website, May, Section D.2 [74]

[http://pards.org/paccc/China%20\(May%202007\)%20Profile%20of%20Asylum%20Claims%20and%20Country%20Conditions%20Report%20PARDS%20Report-Specific%20Source%20and%20Reliability%20Assessment%20\(rev.%20December%2012,%202009\)%20\(DOC,%20\).doc](http://pards.org/paccc/China%20(May%202007)%20Profile%20of%20Asylum%20Claims%20and%20Country%20Conditions%20Report%20PARDS%20Report-Specific%20Source%20and%20Reliability%20Assessment%20(rev.%20December%2012,%202009)%20(DOC,%20).doc)

<sup>19</sup> 'Chinese defector details spy claims' 2005, ABC website, 20 June  
<http://www.abc.net.au/lateline/content/2005/s1396471.htm>

accepts that the applicant's own experiences with the Chinese authorities, firstly with a local community group and later in relation to his frustrated attempts to obtain work in the education system and other parts of the bureaucracy, caused him to question both the tenets and the procedures of the CCP and heightened his interest in and developing commitment to democracy.

67. In accepting the applicant's evidence on these matters, the Tribunal notes the abundance of country information cited above which indicates that official corruption is wide-spread in China, including in the recruitment and promotion of civil servants. The Tribunal accepts the applicant's evidence that his refusal to bribe officials in the Fuqing Education Bureau and the CCP Resource Office had a detrimental impact on his employment opportunities and accepts the contents of the translated version of the applicant's exam result query for the Fujian Province Public Servant Exam and Appointment website, indicating that the applicant undertook an "A class" test from the Fujian Public Servant Bureau in January 2008 and achieved a position ranking of [deleted].
68. The Tribunal notes that the applicant gave evidence that he did not publicly express criticism of the CCP while in China, but considers this to be understandable given the prevailing political situation, the relative infancy of his political thinking and his young age. The applicant was [age deleted] when he arrived in Australia in 2008 and the Tribunal considers it understandable that in a more liberal political environment, the applicant began to explore, develop and ultimately express his political ideas in a more direct manner.
69. The Tribunal accepts that a chance meeting with [Mr A] in [location deleted] in early 2010 provided the applicant with someone to discuss and develop his political ideas and accepts that they have met frequently since. The Tribunal accepts that his relationship with [Mr A] led to the applicant's attendance at a meeting of the Chinese Social Democratic Party, with [Mr A] being a member and the [position deleted] of this party. The Tribunal accepts that the applicant joined this party [in] June 2010, noting that the original membership registration has been provided to the Department and is contained on the Departmental file. The Tribunal also has before it a letter from [Mr B], [position deleted] of the Australian Branch of the Chinese Social Democratic Party, confirming that the applicant joined the party on that date and that he has since actively participated in and contributed to party activities. [Mr B] states that the applicant has democratic ideals and endeavours to do all he can on the road to the pursuit of democracy.
70. The Tribunal also accepts that the applicant has published on [website deleted] many articles critical of the CCP and the broader political and civil system in China, the first being published [in] July 2010. The applicant gave evidence that each of the articles was published in the Chinese language section of that website, providing to the Tribunal both print outs of the Chinese language articles and translations of each of those articles. Each of the articles examined by the Tribunal was highly critical of the CCP and official corruption in China. Some extracts include:

*"[Various extracts deleted]"*
71. On this evidence, the Tribunal accepts that the applicant has made many public statements while in Australia that are highly critical of the CCP and which promote the development of democracy in China. The Tribunal also accepts the applicant's evidence that he attended a Falun Gong march in Australia in 2010, although he is not a practitioner.

72. The Tribunal notes that the applicant's conduct in Australia was considered by the delegate to have been undertaken for the purpose of strengthening his refugee claims. As a result, the delegate was required to disregard that conduct pursuant to section 91R(3) of the Act, which provides in essence that in determining whether the person has a well-founded fear of being persecuted for a Convention reason, the decision-maker must disregard any conduct engaged in by the person in Australia unless the person satisfies the decision-maker that he or she engaged in that conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.
73. As the applicant's conduct in Australia significantly strengthens his claim for refugee status, it is necessary for the Tribunal to consider his motivation in engaging in that conduct. Given the short space of time between the applicant commencing his public denunciations of the CCP and lodging his claim for protection, it is quite proper that the delegate in this instance turned his mind to whether the applicant's conduct in Australia must be disregarded under section 91R(3). However the Tribunal has reached a different conclusion on that matter in this instance.
74. The High Court has held that an applicant seeking to rely upon conduct engaged in Australia must show that the conduct was not engaged in solely to strengthen his or her claim. French CJ and Bell J comment further that:
- By way of example, conduct in Australia may reflect a continued commitment by the applicant to religious practices followed or political opinions held and expressed in his or her country of origin. It could not be said to have been engaged in solely to strengthen the claim to be a refugee. It might then be relied upon by a decision-maker to infer prior commitment to a particular religious practice or political opinion in the country of origin<sup>20</sup>.
75. The Tribunal considers that the applicant's conduct in Australia in this case reflects a continued commitment to political opinions held and expressed by the applicant in China. While the Tribunal accepts that the applicant did not publicly express direct criticism of the CPP while in China, it considers that he began formulating his pro-democracy opinions while at [University 1] and that he expressed his fledgling political views by his actions when he participated in a neighbourhood community group seeking to prevent development of vacant neighbourhood land and when he declined to bribe officials in the Fuqing Education Bureau and the CPP Resource Office, despite it costing him employment for which he appears to be eminently qualified. As a result the Tribunal finds that his conduct in Australia was not undertaken for the sole purpose of strengthening his refugee claims and concludes that it must not be disregarded under section 91R(3).
76. On the basis of the country information cited above, in particular Germany's Ministry of the Interior issued Constitutional Protection Report, the Tribunal is satisfied that proponents of democracy in the PRC are actively targeted and monitored by PRC intelligence services. On the basis of the same country information, the Tribunal accepts that PRC officials in Australia actively monitor the activities of pro-democracy activists in Australia and report these activities to Beijing.
77. On the basis of country information including a 2006 Human Rights Watch report, the Tribunal accepts that the word "[deleted]" is contained within a censored list of words used by Chinese internet hosting services as blocking mechanisms and also accepts the country

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<sup>20</sup> *MIAC v SZJGV* (2009) 238 CLR 642, per French CJ and Bell J at [13]

information which indicates that the [website deleted] has been blocked for internet users in China since [date deleted], on the basis that it publishes material critical of the Chinese government and its policies.

78. On the basis of country information cited above, including an article published by the Committee to Protect Journalists in October 2006, the Tribunal accepts that contributors to that website have been arrested and jailed, with their postings on the website cited by prosecutors of evidence of “their crimes against the state”.
79. Country information before the Tribunal indicates that the Chinese government is well known to treat those it perceives as dissident – be they in country, off-shore, or returnees – in a manner inconsistent with accepted international human rights standards. For example, the US Department of State reported in 2009 that the government continued to refuse re-entry to numerous citizens that were considered dissidents and that activists residing abroad have been imprisoned upon their return to the country. Other reports cited above confirm the existence of ‘blacklists’ containing names of individuals targeted for surveillance in Australia and former PRC diplomat Chen Yonglin stated in an interview with the ABC in 2005 that if an individual appearing on the list were to travel to China, they would be monitored and be subject to surveillance by public security officers, and their movements within China would be restricted.<sup>21</sup>
80. The Tribunal is satisfied that if the applicant returned to China, there is a real chance that he would be monitored, detained and/ or arrested on the basis of his political beliefs. On the basis that these actions constitute a threat to his liberty, the Tribunal finds that there is a real chance he would be subjected to serious harm by the CCP and the Chinese authorities amounting to persecution as outlined in s 91R of the Act.
81. On the basis of the country information cited at paragraph 78 of this decision statement, the Tribunal is further satisfied that the persecution feared by the applicant involves systematic and discriminatory conduct by the CCP and the Chinese authorities in their targeting of political dissidents and that the applicant’s political opinion is the ‘essential and significant reason’ for the feared persecution for the purpose of section 91R(1)(c).
82. Thus the Tribunal is satisfied that the applicant’s fear of persecution on return to China is well-founded.
83. Given the highly organised system of government in China and the determination of the Chinese government to extirpate the democracy movement and its proponents, the Tribunal is satisfied that the applicant could not reasonably avoid persecution by relocation to another part of his country of nationality.

## **CONCLUSIONS**

84. 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.

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<sup>21</sup> ‘Chinese defector details spy claims’ 2005, ABC website, 20 June  
<http://www.abc.net.au/lateline/content/2005/s1396471.htm>



## **DECISION**

85. 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.