

**0800522 [2008] RRTA 69 (31 March 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0800522

**DIAC REFERENCE(S):** CLF2007/155205

**COUNTRY OF REFERENCE:** People's Republic of China

**TRIBUNAL MEMBER:** Giles Short

**DATE DECISION SIGNED:** 31 March 2008

**PLACE OF DECISION:** Sydney

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

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is a review of a decision made by a delegate of the Minister for Immigration and Citizenship refusing an application by the applicant for a Protection (Class XA) visa. The applicant was notified of the decision under cover of a letter and the application for review was lodged with the Tribunal. I am satisfied that the Tribunal has jurisdiction to review the decision.
2. The applicant is a citizen of the People's Republic of China. He arrived in Australia on a temporary visa and he applied for a Protection (Class XA) visa

### RELEVANT LAW

3. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Parts 785 and 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

‘(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
  - (i) is mentioned in paragraph (a); and
  - (ii) holds a protection visa.’

4. Subsection 5(1) of the Act defines the ‘Refugees Convention’ for the purposes of the Act as ‘the Convention relating to the Status of Refugees done at Geneva on 28 July 1951’ and the ‘Refugees Protocol’ as ‘the Protocol relating to the Status of Refugees done at New York on 31 January 1967’. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

5. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a ‘refugee’ as a 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.’

6. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

7. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear ‘persecution’. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve ‘serious harm’ to the person and ‘systematic and discriminatory conduct’. Subsection 91R(2) states that ‘serious harm’ includes a reference to any of the following:
- (a) a threat to the person’s life or liberty;
  - (b) significant physical harassment of the person;
  - (c) significant physical ill-treatment of the person;
  - (d) significant economic hardship that threatens the person’s capacity to subsist;
  - (e) denial of access to basic services, where the denial threatens the person’s capacity to subsist;
  - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person’s capacity to subsist.
8. In requiring that ‘persecution’ must involve ‘systematic and discriminatory conduct’ subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of ‘persecution’ that an individual be the victim of a series of acts:
- ‘A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is “being persecuted” for the purposes of the Convention.’
9. ‘Systematic conduct’ is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute ‘persecution’ for the purposes of the Convention, the threat of harm to a person:
- ‘need not be the product of any policy of the government of the person’s country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution’ (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)
10. Thirdly, the applicant must fear persecution ‘for reasons of race, religion, nationality, membership of a particular social group or political opinion’ Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless ‘that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution’. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions

or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

11. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'
12. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

## **CLAIMS AND EVIDENCE**

13. The Tribunal has before it the Department's file relating to the applicant. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from Father A, an Assistant Pastor of the Catholic Chinese Community. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented by a registered migration agent from a community group who attended the Tribunal hearing.

### **The applicant's original application**

14. The applicant is of middle age. According to the details in his original application he completed several years of education in City Z and then trained as a professional, working in Village Y, City Z. He said that he had qualified as a professional many years ago and had continued working in that capacity in Village Y until he left China although he also said that he had completed further education and that he had later completed further studies at a different School. He said that he had lived since birth in Village Y, City Z, although he had moved within Village Y in the last few years.

### *Involvement in the Catholic Church*

15. In a statement accompanying his application the applicant said that he was a Roman Catholic, that his relatives had been Catholics and that some relatives were nuns. He said that it had been his ancestor who had brought Catholicism to the city where he had grown up. The applicant attached a copy of what he said was his baptism certificate. He said that he had attended Catholic services regularly in people's homes during his childhood but that because the church had been banned they had met in secret in small groups. He said that he had married a Catholic and that their children had also been baptised and were practising Catholics.

16. The applicant said that he had been very involved with the Catholic Church. He said that he had been on the church committee, that he had organised services and other church activities and that their services had been held in different people's homes. He said that in order to avoid detection they had had to change the venue for the church services regularly. He said that he had also made arrangements for different visiting priests. He said that he had run a pre-marriage course for couples and he had run a children's Bible study class during summer holidays and other festivals. He said that he had also organised retreats for church members. He said that he owned a second house which had been used for church activities and that services had sometimes been held at this house as well as classes.
17. The applicant said that the police had watched the church very closely and the movements of the priests. He said that the scrutiny had usually intensified during the summer because there was a big festival - the Assumption - during this time (15 August) and also the children were on holiday and the police were concerned that the children were being indoctrinated with religion. He said that a number of church members and leaders in the diocese had been arrested and detained in recent years because of their involvement in the church. He said that a couple of years previously a nun who had been teaching a class for children had been arrested and that a few years previously after that incident, a priest had been arrested during a church service. He said that they had both been detained for several months before being released. He said that a high official of the diocese had also been arrested after he had been appointed to that position and that another church official had also been arrested at one time although he could not remember when. He said that at one time several members of a church group had been arrested.
18. The applicant said that the police had suspected him of involvement in church activities but he had never been caught. He said that they had come to his home to see whether there was a service or class in progress but even when they had come when something had been happening he had been able to convince them that the people were there to receive products. He referred in this context to the fact that he was a professional. He said that the police had accused him of church involvement a number of times and had warned him not to teach children's classes. He said that they had known about his role but they had never been able to find any evidence against him.

*Involvement in protests against pollution*

19. The applicant said that since completing further education there had been a serious problem with pollution in his city. He said that iron ore and other minerals were taken by truck from ships in the harbour to 'Business B' factory in the city and that the powder blown from the trucks made the air dirty. The applicant said that a couple years later he had decided to take action. He said that he had given an interview to the media saying that he was very concerned about the effects of pollution on public health. He said that he had organised protest activities from that time onwards. He said that along with some other church members he had made banners which said things like, 'Give us back our homeland!' and 'Why are you allowing us to inhale this powder?' He said that they had put up these banners at the crossroads out of the village where the trucks passed. He said that he attached photographs of this but none were attached.
20. The applicant said that after several days the local authorities had signed an undertaking to take steps to contain the pollution levels. He said that the authorities had undertaken that iron ore would no longer be loaded onto trucks at the harbour from a specific date onwards. He said that he and the other protesters had been threatened with arrest if they engaged in any

further protest activities. The applicant said that they had stopped loading iron ore on a specific date but had resumed a couple of days later. He said that the day after they resumed he had organised a protest with the villagers, blocking the road so that the trucks could not pass. He said that a representative had come and had told them that this was the last ship so he had called off the protest but more ships had come and the trucks had continued carrying iron ore. He said that they had blocked the road again. He said that in the beginning they had only blocked the road by day so the trucks had still been able to pass at night but later he had organised for the road to be blocked 24 hours a day. He said that he attached a photograph of him in front of a truck which he had stopped but this photograph was not attached. He said that he had posted a banner on it.

21. The applicant said that the following month the police had come to try to stop them blocking the road. He said that they had been told that the blockade was illegal and that if they continued to block the road they would be arrested. He said that a few people who had been at the front had been arrested but he had been standing behind other people and had not been arrested. He said that the same night he had run away. He said that he had been sure that they would come to arrest him as they had known that he was one of the organisers. He said that he had stayed with relatives until he could leave China.
22. The applicant said that his relative had been studying in Australia for a few years and he had only seen his relative when his relative had come home for a visit. He said that another relative had visited that relative in Australia. The applicant said that a few years later he had approached an agent to assist him to get a visa to visit his relative. He said that he had already had a passport, issued earlier, which he said had been organised through an agent and had cost a certain amount and he said that his visa which had been granted in the same year that he had approached the agent had also cost the same amount. He said that he had originally intended to travel later in the year but after the arrests at the protest he had become scared for his safety and had decided to leave earlier. He said that he had booked the first flight he could get and had left China a few months earlier than his intended travel.
23. The applicant said that he had been scared that he would not be allowed to leave because the police were looking for him and he had organised for a bribe to be paid to ensure that this did not happen. He said that he had arranged this through the agent who had helped him to get the passport and visa and that he did not know the details but he had paid the agent a large amount. He said that just before he had left China he had contacted an extended family member whose relative worked in the Public Security Bureau (PSB) and had been told that the PSB wanted to arrest him. He said that the day after he had arrived in Australia he had contacted his relative in China who had told him that the police had been to his house looking for him. He said that his relative had told him that one of the other people involved in organising the protests had been arrested after he had left and that the other organisers had gone into hiding.
24. The applicant said that since he had been in Australia he had been attending the service each Sunday at Church A. He said that he also attended Friday evening Bible studies. He said that he believed that if he returned to China he would be arrested because of his involvement in leading the anti-pollution protests and that he also thought it possible that he might eventually be arrested because of his religious activities. He said that his statement was not a complete account of his fears of returning to China and that he could provide more information if requested.

### **Further evidence given to the Department**

25. Under cover of a fax the applicant's representatives provided a further statement made by the applicant, a letter from Father A, an Assistant Pastor of the Catholic Chinese Community, stating that the applicant was personally known to him as a genuine and practising Catholic and that he had been attending the Chinese language Catholic Mass held every Sunday at Church A, and copies of photographs of a baptism ceremony (in one of which it was said the applicant appeared), of protest activity (two of which were said to feature the applicant) and of protesters injured by the police.
26. In his further statement the applicant said that the media interview he had given had been broadcast throughout Province W. He said that he had approached a journalist whom he knew through a friend and that he had paid the journalist a bribe to do the interview. He said that on the same day that the interview had been broadcast he and his friend and several others had put up protest banners at the crossroads out of the village through which the trucks had to pass. He said that, the day after the interview had been broadcast, officials from the PSB, the local government and the village leaders had come to his house and had told him that he was already on a black-list. He said that they had threatened to close down his business.
27. The applicant said that he had not taken the protest banners down and that a lot of people had started to become involved in 'the action'. He said that people had been gathering in large groups at the crossroads every day. He said that on one particular day officials from the Bureau of Religious Affairs had come to his home and had told him that he should 'stop the protests with the other Catholics'. He said that he had been one of the representatives of the protesters who had attended a meeting with the authorities later that same day. He said that at this meeting the local government, the Bureau of Commerce and Business, the Bureau of the Environment and the village head had signed an agreement to contain the pollution levels on condition that the protest activity stopped. He repeated that the authorities had breached this agreement and that he and the others had resumed their protest activities.
28. The applicant said that he had tried to contact the journalist who had done the interview but the journalist had told him that he was under house arrest. He said that he had contacted other media but none of them had wanted to do an interview. He repeated that he had gone into hiding after people had been arrested at that protest.
29. Under cover of a fax the applicant's representatives provided a copy of a baptismal certificate together with a translation stating that the applicant had been baptised and a copy of a news report apparently obtained from the Internet together with a translation. The press report refers to the fact that imported and exported raw materials are transported through Village Y. It says that the villagers have suffered from serious dust pollution caused by the transportation of raw materials and that this has been reported by news channels in Province W. It says that 'in the recent few days' the villagers closed off the roads, cutting off the passage of raw materials but that they were forced to leave by armed police sent by the local government. It says that the villagers clashed with the armed police and many people were injured. It also says that the local police arrested three villagers recently.

### **Further evidence given to the Tribunal**

30. Under cover of a fax the applicant's representatives provided a further copy of the baptismal certificate together with a translation which had been provided to the Department. Under a different cover of a fax they provided a statement of the same date from the applicant's

relative who is studying in Australia in which he said that both the applicant and his spouse and his entire extended family were Roman Catholics and that he had been baptised as a child. He said that throughout his childhood he had attended church services every Sunday in private homes including the applicant's home and that he had also attended Bible study classes during his summer holidays which had been organised by the applicant and taught by nuns.

31. The applicant's relative said that he had been living in Australia for a few years and that he had applied for permanent residence. He said that in Australia he had attended the Catholic Church and more recently Church A but that since late 2007 he had been working on Sundays so he had not been able to attend Sunday Mass. He said that since he had first come to Australia he had returned to China, for Chinese New Year. He said that he had noticed that the pollution was very bad and he said that the applicant had told him that it was caused by the factories and the dust from the iron ore that was being transported from ships to the factories in the city. He said that when he had spoken to the applicant by telephone the applicant had told him about protests in the city against the pollution. The applicant's relative said that the applicant's other relative had visited him and that it had been planned that the applicant would visit him but that he had come earlier than intended because he had had a problem with the authorities because of his involvement in the protests.

#### **The applicant's evidence at the hearing before me**

32. At the hearing before me the applicant confirmed that he had had the assistance of an interpreter when he had prepared his original application to the Department of Immigration for a protection visa. He said that one point which had not been accurately translated was that he had paid money to obtain his passport. (In fact his application says in answer to the relevant question 'see statement' and his statement makes the claim that he paid a certain amount to an agent to obtain his passport, as referred to above.) The applicant said that there was nothing else that he wanted to correct but in the course of the hearing he would like to provide further information to clarify or to rectify things. He said that the statement accompanying his original application had been read back to him in his own language. The applicant produced the photographs which his representative had faxed to the Department. He confirmed that he himself only appeared in a few of the photographs: the photographs in relation to a baptism and the photographs in relation to the anti-pollution protests.
33. I noted that the applicant had referred in his statement to his involvement in the Roman Catholic Church and to his involvement in protests against pollution in his city. However he had also said that his statement was not a complete account of his fears of returning to China. I asked the applicant if there was anything he wanted to tell me which had not been included in his statement. The applicant said that if he were returned to China he would be arrested because he had participated in religious activity and also because he had participated in protests against pollution. I asked the applicant if there was any other reason why he thought he would be arrested. The applicant said that he had played a leading role in organising other religious followers to engage in activities and children's worship services had been held in his home. He said that apart from his religious activities and his involvement in protests against pollution there was no other reason why he thought he would be arrested if he returned to China.

*Involvement in protests against pollution*

34. I noted that the statement which the applicant's representatives had produced from the applicant's relative suggested that the pollution had already been very bad when he had returned to China for Chinese New Year. I noted, however, that the applicant had said in the statement accompanying his original application that it had only been recently that he had decided to take action about this problem. The applicant said that there had been other people who had taken action against the pollution earlier but they had been threatened or 'persuaded' by the local authorities and they had given up. He referred to the fact that he was a professional. He said that the pollution problem had started a few years earlier and had been getting worse over time. He said that he had considered that he had no other choice but to do something because he had realised that the pollution was very harmful to people's health.
35. I referred to the applicant's evidence that he had given an interview to the media which had been broadcast throughout Province W and that the journalist had been put under house arrest as a result. I noted that as I understood it the applicant did not claim that anything had happened to him. The applicant referred to his evidence that the PSB, the village head and representatives of the local council had come to his home. He said that they had told him that pollution had nothing to do with him and that what he was doing was against the law. I asked the applicant why the authorities would have put the journalist under house arrest when they had not done anything to the applicant. The applicant said that his analysis was that they had targeted the journalist because they had wanted to black out information: they had not wanted more people to know about this incident. He added that earlier he had telephoned the media organisations but no one had come to interview him.
36. I referred to the applicant's evidence that from that time onwards he had organised protests and that he had put up banners at the crossroads out of the village where the trucks passed. The applicant confirmed that the crossroads had been on the border of the village. He drew a map showing that the crossroads was to the north of Village Y, where the road from the port (to the south of the village) where the iron ore was unloaded met the road which went in one direction to City X and in the other direction to City Z. I referred to the applicant's evidence that the authorities had given undertakings that iron ore would no longer be loaded onto trucks at the harbour. I asked the applicant if there was any other way for iron ore to reach the steel works other than by passing along the road from the port which he had drawn in his map. The applicant initially said that there was another road from the port but that the trucks would have had to travel a longer distance, then that if they had continued to use this port they would have had to use the road which he had drawn on his map. He initially said that the port had to be used if the iron ore was to be delivered to the steel works, then that there were other ports which were available although this would impose increased costs.
37. I referred to the applicant's evidence that he had organised a protest, blocking the road so that the trucks could not pass. The applicant said that he had only stopped the trucks belonging to one company, not other trucks. He said that he had been able to identify these trucks by their appearance. He said that the place where they had blocked the road had been narrower than the road shown in the photographs he had produced of the protest. He said that it had taken many people to block the road. He said that they had let through the cars and trucks which did not belong to the particular company and they had stopped the trucks belonging to it. I asked the applicant what the trucks had done when they had been stopped. The applicant said that the drivers had telephoned the company and the company had in turn telephoned the PSB and the council leaders who had come to the scene to negotiate with them. He said that they

had told them that this was the last shipment and that they would not unload iron ore in future.

38. I noted that the applicant had said that after that more ships had come and the trucks had continued carrying iron ore so he and the other protesters had closed the road again. The applicant confirmed that this had been what had happened. He said that they had closed the road again and had stopped the trucks again a few days later. He confirmed that there had been trucks with iron ore waiting to pass along the road and ships waiting to offload iron ore at the port. I referred to his evidence that there had been no other way for the iron ore offloaded at the port to reach the steel works except along the road. The applicant reverted to his earlier claim that there had been another road but it would have required the trucks to travel a longer distance. I noted that he had subsequently told me that they would have had to use another port. The applicant repeated that there had been another road which would have required the trucks to travel a longer distance but he said that maybe they had not been permitted to use that road.
39. I indicated to the applicant that the reason I was asking these questions was that it was a little difficult for me to accept that the police would not have intervened earlier if the protesters had been blocking the road and preventing the iron ore from getting to the steel works in the way he had suggested. The applicant said that in the daytime the trucks had not been able to get through but they had got through at night. I noted that he had said in the statement accompanying his original application that they had blocked the road 24 hours a day. The applicant confirmed that he claimed that when he had found out about this he had blocked the road for 24 hours a day. I put to him that this was what concerned me: he was saying that they had blocked the road, that there had been no other way for the iron ore to get to the steel works but that the police had not intervened. The applicant said that the first time they had blocked the road for 24 hours but later on they had not been able to block it for 24 hours because they had had to work in the daytime.
40. I noted that this was not what the applicant had said in his statement: he had said that initially they had blocked the road during the day, then they had found that the trucks were passing by night so they had blocked the road at night as well. The applicant confirmed that this was correct. I put to him again that if he had been blocking the road and preventing the iron ore from getting to the steel works, it was difficult to accept that the police would not have intervened to keep the road open. The applicant said that initially the PSB had just persuaded them to keep the road open but on one day they had formally intervened and the next day they had started to arrest people. I noted that the applicant had said that the protests had begun about a week later, that the protesters had been persuaded to lift the blockade but it had been reimposed three days later, but the police had not intervened to arrest people and to keep the road open until a particular day. The applicant said that on one occasions the police had not intervened because the trucks had been able to pass through at night.
41. I asked the applicant if he understood that it was difficult for me to accept that the police would not have intervened earlier. The applicant said that the undertaking had been given on an earlier date that the trucks would stop coming one month later but a few days after that date, they had still been coming so he had blocked the road with other people. People from the authorities had told them that this was the last shipment but it had not happened as promised and so a few days later they had blocked the road again. He repeated that the trucks had still been able to get through at night so it had not affected the steel works. I referred to paragraph 19 of the applicant's statement accompanying his original application in which he had said that:

‘In the beginning we were only blocking it during the day which meant that the trucks could still pass at night. Then I organised for the blockage to occur 24 hours a day.’

42. I put to the applicant again that if the protesters had been blocking the road 24 hours a day, stopping the iron ore trucks from passing and preventing the iron ore from getting to the steel works, it was a little difficult to accept that the police would not have intervened to stop this. The applicant said that they had blocked the road during the daytime but the trucks had been able to get through at night. He said that later on the trucks had changed to another type of truck. He said that the steel factory had still been working so the police had not intervened.
43. In response to a question put by his representative the applicant said that from about a certain date they had blocked the road for 24 hours. He confirmed that he claimed that for a period of about two weeks they had blocked the road for 24 hours but he said that during this period the trucks had been changed to another type of trucks and they had not realised this so the trucks had been able to pass through. The applicant said that they had only realised this when they had seen that the pile of iron ore at the port had diminished. I put to the applicant that he had demonstrated that one could see the port from his village so that if they had been loading the iron ore onto trucks he and the other villagers would have been able to see this. The applicant said that they had been very smart: they had concealed what they were doing behind the pile of iron ore. I noted that he had shown me pictures of the road and of the gate to the port. I put to him that if there had been a steady stream of trucks coming out of the port he and the other villagers would surely have noticed. The applicant said that it had been at night and they had not been able to see clearly.
44. I asked him if he was saying that his blockade had been completely ineffective and had achieved absolutely nothing. The applicant said that this problem had come to their attention one day and they had blocked the trucks that night. I noted that the applicant had said that he had been there one day when the police had finally intervened. The applicant confirmed that he had been there although he stressed that he had not been in the front line. He said that this had been in the daytime. I noted that I had understood him to be saying that the trucks had been passing at night. The applicant said that he had blocked the truck depicted in the photograph he had produced one night. He said that the photograph had not been taken at night: it had been taken the next day. He confirmed that he claimed that he had not merely blocked the truck but that he had impounded it, preventing it from leaving. He said that altogether he had stopped three trucks. He said that the trucks behind these trucks had realised that the trucks ahead of them had been stopped so they had stopped coming.
45. The applicant said that on one day there had been hundreds of protesters initially but more and more had come. He said that many police had come. I asked the applicant why so many people had been there if he and the other protesters had been blocking the road at night. The applicant said that initially there had not been so many people there. He said that there had been some people on guard and they had telephoned other people to tell them that the police had come so people had come gradually and the number had built up to. The applicant said that the three people who had been arrested had been ‘on duty’ that morning. He said that they had been taking turns to block the road. He said that the three people who had been arrested had telephoned other people. When I queried this he said that there had been other people present but when the police had wanted to remove a banner these three people had come forward to stop the police action and they had been arrested. I noted that previously the applicant had said that they had been arrested because they had been on duty. The applicant said that they had been on duty when they had been arrested.

### *Involvement in the Catholic Church*

46. I noted that the applicant had referred in the statement accompanying his original application to a high official of the diocese having been arrested several years ago. The applicant said that this was the diocese and that the high official who had been arrested was [name]. I noted that it was a little surprising that this had not been reported anywhere. The applicant produced a Chinese language press report which referred to the arrest. He said that someone else had given him this report. I noted that there were a number of organisations which monitored the situation of the church in China and that they reported the arrests of clergy in China. I noted that they made the point that they did not claim to be comprehensive but that it would be surprising if the arrest of someone as prominent as the person stated had gone unreported. The applicant said that this person had been arrested and this was a fact.
47. I noted that the applicant had said that he had been involved in the unofficial Catholic Church all his life and that the local authorities and the Religious Affairs Bureau had all been aware of this but that nothing had happened to him as a result. The applicant referred to his evidence that the police had visited his home when he had been conducting a religious education class but he had pretended that this was a work session. I noted that nothing had ever happened to the applicant in terms of persecution involving serious harm which was what the law required in order to come within the definition of a refugee. The applicant said that he had organised other religious followers to take part in the protest. He said that he had been engaged in underground Catholic activity for many years and he had been suspected by the police for many years. I noted that this was my point: he had been a Catholic all his life, he had been an activist all his adult life and by his account the authorities had been well aware of this. The applicant said that they had known something about him but they had not had significant evidence against him because he had been very cautious and he had used his occupation as a disguise.
48. I put to the applicant that the information available to the Tribunal indicated that the authorities in Province W were very tolerant of the unofficial Catholic Church. I noted that a representative of an Embassy in Beijing who had visited City Z several years ago had reported that only about one eighth Catholic parishes were affiliated with the state-sanctioned Catholic Patriotic Association. He had said that the other parishes which were loyal to Rome and which were therefore technically illegal or 'underground churches' were not harassed by the local authorities at that time. The applicant said that this was impossible: it was not the case. He said that there was a provision in the law that people under the age of 18 were not allowed to participate in religious activity.
49. I put to the applicant that the Australian Department of Foreign Affairs and Trade had advised several years ago that it had heard no reports of worshippers in Province W not being able to practise their religion. It had noted that the official bishop had been reported as stating that the unofficial Catholic Church in that area had many churches and over 160,000 worshippers, more than in his own officially-recognised church [Information deleted under s431]. The applicant said that he thought that this information was not accurate because he had been approached by the police and warned not to involve children in any religious activities.
50. I noted that as I understood it this had not stopped the applicant's activities in any way. The applicant said that he thought that information was blocked out by the Chinese authorities so that the information to which I had referred was not reflecting what actually occurred in China. He said that, when he had applied for his passport, he had heard that a nun who

belonged to the underground church had not been allowed to apply for a passport at all. I noted that I had not been referring to information but to the applicant's own evidence regarding his activities: organising services, running pre-marriage courses for couples, running a children's Bible study class and organising retreats for church members. The applicant said that he had found a proper place for children to study the Bible: he had been responsible for finding the location.

51. I put to the applicant that the executive secretary of the Hong Kong Christian Council had reported that Province W and Guangdong had 'the most liberal policy on religion in China, especially on Christianity' He had said that he was aware of a number of unregistered churches that had been allowed to function for years and that the local authorities generally tolerated the activities of unregistered Christian groups [*Information deleted in accordance with s431 of the Migration Act as this information could identify the applicant*]). The applicant said that this information was a little bit misleading: this had not happened in China.
52. I put to the applicant that this information appeared to be borne out by his own experience: he had been involved in the 'underground' Catholic Church, practising and attending services, for many years, and nothing had ever happened to him. The applicant said that he had narrowly missed being arrested by the local authorities on several occasions and on other occasions he had used his occupation to disguise their activities as when he had pretended that the Bible study class was a work promotion activity. I asked the applicant when he had narrowly escaped being arrested. The applicant said that over the years he had accumulated experience in how to escape their attention. He said that this did not mean that they had not wanted to arrest him. He said that just because of his experience he knew how to cope with the situation.
53. I noted that the only occasion on which the applicant had talked about arrest in his statement related to the protest against pollution, not his church activities. The applicant said that he had engaged in a very dangerous activity by teaching the children under 18 years old. He said that he had done this for many years and that he had risked his life to do it. I referred to the applicant's evidence that after certain events the police had come to his home looking for him. The applicant said that the police had come to his home looking for him only on one date, after he had arrived in Australia. I referred to his evidence that before he had left China he had contacted his aunt whose son worked in the PSB and she had told him that the PSB wanted to arrest him. The applicant said that they had wanted to arrest him but they had not taken any action at that point. He said that the police had needed to collect evidence and they had needed to do a lot of work.
54. I put to the applicant that this did not make a lot of sense: he had said that they had known that he was a leader of the protest. The applicant said that he had appeared on television but that at that stage he had not been a leader. I noted that he had said that the PSB and the local council and the Religious Affairs Bureau had all come to visit him. The applicant said that this had happened after he had appeared on television but the incident had not happened yet. I put to the applicant that if the PSB had wanted to arrest him the obvious thing would have been for them to have gone to his home but he said that they had not done this until some time later. The applicant said that the confrontation on one particular day had been a village issue and the police had needed to take time to take care of this. He said that before this he had been approached by the local council, not the police.

55. The applicant said that when he had approached the local authorities to apply for a passport he had been told that he was unable to get a passport. He said that later he had bribed an official to get his passport but he had been told that he could not use the passport to go overseas while the official remained in that position. He said that he had been told that when the official moved to another position he could use the passport. I put to the applicant that this was very difficult to believe: he had never been in any trouble with the authorities so he should not have had any difficulty getting a passport. The applicant said that he had been told that if he got a passport he could go overseas to participate in activities outside China. He said that he had been told that he was on a black-list. I noted that I had understood from his statement that he had only been told this recently. The applicant said that dating back several years his name had already been on a blacklist.
56. In response to questions put by his representative, the applicant initially said that the road had been being blocked 24 hours a day for about a two week period. He then said that on one day he had closed the road just in the daytime, not at night, but later on, from which day he could not remember, they had started to close the road for 24 hours. He then said that on another date they had closed the road for 24 hours. He said that then the police had come and they had had a negotiation. He agreed with his representative that at some point after then the road had again been closed for 24 hours. He said that this had continued for 'a couple of days'. He assented when his representative put to him that this had in fact only been for several days leading up to that time.
57. The applicant asked that I take evidence from Father A. I noted that I accepted his evidence that the applicant was a genuine and practising Catholic. (In response to a question from the applicant's representative I noted that this meant that I accepted that the applicant had practised in unofficial or 'underground' Catholic churches.) I noted that Father A had also referred in his letter to the persecution of Catholics in China and I asked him if he had information particularly bearing on the situation in Province W. Father A said that in Province W Catholic people were more aligned with the unofficial church than with the official church. I noted that the information available to me suggested that this was the case but it also suggested that a considerable degree of freedom was allowed to the unofficial church in Province W. Father A said that this could be the case with the exception of people becoming more prominent as leaders or organisers in the church.
58. I noted that the applicant had referred to the arrest of the high official of the diocese. Father A said that he could not remember this particular instance but there had been high profile priests who had been arrested. I noted that there had been, referring to the arrest of a church leader which had been quite well-reported. I noted that there had been instances of priests being arrested more recently but that I was not aware of the arrest of people higher up in the hierarchy. Father A suggested that a distinction should be drawn between clergy and lay people in that clergy would be high profile whereas lay people would not, meaning that the arrest of clergy would be news whereas if harassment, arrest or detention befell lay people it would not make big news at all. He added that, with the Olympic Games coming fairly soon, there was a lot of tension on the part of the Government and government agencies at the moment with groups and individuals who showed any kind of resistance or objection or contradiction to the Government's policies or party lines. He said that he was inclined to feel that this would continue even after the Olympic Games were completed.

## Background

59. According to the US State Department *Country Reports on Human Rights Practices for 2006* in relation to China:

‘The People's Republic of China (PRC) is an authoritarian state in which, as specified in its constitution, the Chinese Communist Party (CCP) is the paramount source of power. Party members hold almost all top government, police, and military positions. Ultimate authority rests with the 24-member political bureau (Politburo) of the CCP and its nine-member standing committee. General Secretary Hu Jintao holds the three most powerful positions as CCP general secretary, president, and chairman of the Central Military Commission. The party's authority rested primarily on the government's ability to maintain social stability; appeals to nationalism and patriotism; party control of personnel, media, and the security apparatus; and continued improvement in the living standards of most of the country's 1.3 billion citizens. Civilian authorities generally maintained effective control of the security forces.

Although the constitution asserts that "the state respects and preserves human rights," the government's human rights record remained poor, and in certain areas deteriorated. There were an increased number of high-profile cases involving the monitoring, harassment, detention, arrest, and imprisonment of journalists, writers, activists, and defense lawyers, many of whom were seeking to exercise their rights under law. The government tightened restrictions on freedom of speech and the press, including stricter control and censorship of the Internet. Nongovernmental organizations (NGOs), both local and international, continued to face increased scrutiny and restrictions. As in previous years, citizens did not have the right to change their government. Other serious human rights abuses included instances of extrajudicial killings; torture and coerced confessions of prisoners; and the use of forced labor, including prison labor. Legal reforms continued to stall, as the party and state exercised strict political control of courts and judges, and maintained closed trials and administrative detention. Executions often took place on the day of conviction or immediately after the denial of an appeal. A lack of due process and new restrictions on lawyers further limited progress toward rule of law. Individuals and groups, especially those considered politically sensitive, continued to face tight restrictions on their freedom to assemble; their freedom to practice religion, including strengthened enforcement of religious affairs regulations implemented in 2005; and their freedom to travel.’ (US State Department, *Country Reports on Human Rights Practices for 2006* in relation to China, Introduction)

60. With regard to freedom of religion the US State Department reported that:

‘The constitution and laws provide for freedom of religious belief and the freedom not to believe. However, the government sought to restrict religious practice to government-sanctioned organizations and registered places of worship and to control the growth and scope of the activity of religious groups. The government recognized five main religions: Buddhism, Taoism, Islam, Protestantism, and Catholicism. A government-affiliated association monitored and supervised the activities of each of these faiths. Membership in these faiths as well as unregistered religious groups grew rapidly. The government tried to control and regulate religious groups, especially groups that were unregistered.

The extent of religious freedom continued to vary widely within the country. Freedom to participate in officially sanctioned religious activity continued to increase in most areas. Religious activity grew not only among the five main religions, but also among the Eastern Orthodox Church and folk religions. Bibles and other

religious texts were available in most parts of the country. At the same time, some unregistered groups continued to experience varying degrees of official interference and harassment. Crackdowns against unregistered Protestants and Catholics, Muslims, and Tibetan Buddhists (see Tibet Addendum) continued. The government continued its repression of groups that it determined to be "cults" and of the Falun Gong spiritual movement in particular.

All religious venues were required to register with the State Administration for Religious Affairs (SARA) or its provincial or local offices (known as Religious Affairs Bureaus (RABs)). SARA and the RABs were responsible for monitoring and judging whether religious activity was "normal" and therefore lawful. SARA and the CCP's united front work department provided policy guidance and supervision over implementation of government regulations on religious activity.

New regulations governing religious affairs, which came into effect in March 2005, delineated regulatory activities governing religious affairs and consolidated official pronouncements within a legal framework. However, the regulations provide general protection only for freedom of "religious belief," and not for expressions of belief. The regulations protect only those religious beliefs categorized vaguely as "normal." In practice, party doctrine guides resolution of religious issues and implementation of the regulations. The regulations protect the rights of registered religious groups, under certain conditions, to possess property, publish literature, train and approve clergy, and collect donations. However, the regulations have not created additional room for lawful religious activity by groups not affiliated with the five main religions. In this regard, the regulations merely codify past practices and give authorities broad discretion to define which religious activities are permissible.

The law requires religious groups to register places of worship. Spiritual activities in places of worship that have not registered may be considered illegal and participants can be punished. Government officials stated that private homes where family and friends meet to study the Bible would not be required to register, but venues for formal worship services should be registered, even if such formal worship takes place in a private home. Clergy need not be approved by the government but must be reported to the government after being selected pursuant to the rules of the relevant government-affiliated religious association. Pressure on religious groups to register or to come under the supervision of official "patriotic" religious organizations continued during the year. Some groups registered voluntarily, while a number registered under pressure; several groups avoided officials in an attempt to avoid registration, and authorities refused to register others. Various unofficial groups reported that authorities refused them registration without explanation. The government contended that these refusals were mainly the result of failure to meet requirements concerning facilities and meeting spaces. Some religious groups were reluctant to comply with the regulations out of principled opposition to state control of religion or due to fear of adverse consequences if they revealed, as required, the names and addresses of church leaders and members.

Local authorities' handling of unregistered religious groups, especially Protestant "house churches," varied widely. In certain regions government supervision of religious activity was minimal, and registered and unregistered Protestant and Catholic churches existed openly side-by-side and were treated similarly by the authorities. In such areas many congregants worshipped in both types of churches; congregants in unregistered churches were also able to procure Bibles at official churches. In some parts of the country, unregistered house churches with hundreds of members met openly, with the full knowledge of local authorities, who characterized the meetings as informal gatherings. In other areas house church meetings of more

than a handful of family members and friends were strictly proscribed. House churches often encountered difficulties when their membership grew, when they arranged for the regular use of facilities for the purpose of conducting religious activities, or when they forged links with other unregistered groups.

Leaders of unauthorized groups were sometimes the target of harassment, interrogation, detention, and physical abuse. Authorities frequently disrupted house church meetings and retreats, detained and questioned leaders and church members, and confiscated the personal property of house church leaders and members. During the year thousands of house church members were detained; a large number of these detentions occurred in Henan Province.’ (US State Department, *Country Reports on Human Rights Practices for 2006* in relation to China, Section 2.c, Freedom of Religion)

61. A representative of an Embassy in Beijing visited Fuqing and three other counties in Province W. He reported that:

‘There is a high degree of religious tolerance in this part of China. In [name] county only 10 of 80 Catholic parishes are affiliated with the state sanctioned Catholic Patriotic Association (CPA). The other 70 remaining loyal to Rome are technically illegal and therefore “underground churches,” but reportedly these congregations are not harassed by the local authorities at present. Reports of the recent arrest of [church leader] who has consistently refused to cooperate with the CPA, is a cause for concern. [Church leader] has served close to [number] years in detention in China since his first arrest in [date]. However his arrests have not directly impacted on the activities of local congregations in the [number] rural counties which are the subject of this report. In recent years Catholics there have been allowed to profess their faith in accordance with their own consciences. There is no indication that this is about to change. Nevertheless, the Embassy will continue to monitor the situation closely.’

62. The Australian Department of Foreign Affairs and Trade (DFAT) provided the following advice in August 1999:

*‘Demolition of churches*

11. According to a well-informed, long-term observer of the unofficial church from whom the Australian Embassy in Beijing sought advice in mid-1999, the authorities in [Province] demolished some churches earlier in 1999 to make the point that all structures must have planning approval. They also demolished a number of unapproved commercial and residential structures. The problem for members of the unofficial church is that planning approval is unlikely to be given for any but official church buildings, so that the existence of an unapproved building depends on the continued tolerance of the local authorities.

12. The demolitions in [Province] are in practice a small proportion of what is a large number of places of worship. According to the official [church leader], reported in the China Study Journal (a British inter-church publication) of [date], the unofficial Catholic Church in [city] had many churches and over 160,000 worshippers, more than in his own officially-recognised church. [City] is the capital of [Province] province. Members of the unofficial church also have access to religious services in private houses. Provided churches do not disrupt “public order”, for example by attracting some hundreds of worshippers or by proselytising in public, they are free to do this in peace.

*Leaders and ordinary worshippers*

13. The pattern of action reported by [media outlets] is that custodial sentences are only imposed on a few leaders, who they would consider repeat offenders. The observer referred to in paragraph 11 above told the Australian Embassy in Beijing in mid-1999 that claims of persecution could be credible only in the case of a small proportion of believers. The observer also told the Embassy that even high-profile members of the unofficial church are tolerated provided public order is not disrupted. These statements fit the general pattern of the Chinese authorities' approach to social control, which is to deter leaders without alienating their followers. The observer's statement that action would be taken against only a small proportion of believers is corroborated by the small number of instances of such action in a large and growing Catholic population.

...

15. There has been no [details deleted] media report in recent years of penalties being applied against ordinary Catholic worshippers in [three Provinces]. This is not conclusive evidence that penalties have not been applied, but the international Catholic church has links into all these areas and it is most unlikely that a repeated practice of applying penalties to ordinary worshippers would have gone unreported.

...

19. We have heard no reports of worshippers in [Province] being unable to practice their religion. It is always possible for people to worship in private houses, provided the numbers in the congregation are not considered excessive by the authorities. The fact that the Vatican claims that the unofficial church is growing rapidly at the national level indicates that worshippers are able to practice their religion, even if a church building is not available.' (DFAT Country Information Report No. 297/99, dated 12 August 1999, CX36797)

63. Notwithstanding the positive picture painted by these reports, there have been instances where adherents of the unofficial Catholic Church in Province W have been subject to arbitrary arrest when carrying out ordinary religious activities. A Father of the underground Roman Catholic Church outside City X in Province W was arrested along with nuns and laypersons from the same church. Some of the nuns were reportedly released a few days later after a group of parishioners had paid the police a large sum of money. The whereabouts of the remaining detainees remained unknown at the end of the year (Amnesty International, *Report 2001* in relation to China [Information deleted under s431]).
64. Other country information from around that same time a priest, several nuns, several seminarians and a number of lay people were detained by the county security office of Province W province for worshipping at an unauthorised place of worship. Most of the group were released but two nuns were forced to sign prepared documents renouncing their faith. Some time later some adults and children were arrested during a summer school vacation catechism class being held in a private home in Province W. One of the adults was sentenced to 15 days in gaol for giving catechesis while the other four adults received an official warning and were released on the day of their arrest, as were the children who had received the catechesis [Information deleted under s431].
65. Father B, an underground Roman Catholic priest, a seminarian and several parishioners were arrested while celebrating mass in a private home in City X diocese in Province W. Many parishioners were beaten and suffered severe injuries, the private house where the arrests took

place was totally ransacked and Father B, the seminarian and the parishioners were still being detained in a detention centre at last report [Information deleted under s431].

*Protest against pollution*

66. China Human Rights Defenders (CHRD) reported in a monthly newsletter that hundreds of villagers protesting against pollutants released from the local Steel Factory in Village Y, City Z, Province W had been dispersed by many policemen. CHRD said that many villagers had been injured and three had been taken away for questioning. It said that it was unclear whether they were still being detained [Information deleted under s431].

**FINDINGS AND REASONS**

67. In the present case the applicant changed his evidence in significant respects in the course of the hearing before me, for example with regard to whether there was an alternative road along which the trucks could pass carrying iron ore from the port to the steel works and when he claimed he and the other protesters had actually blockaded the road for 24 hours a day. As referred to in paragraph 56 above, he eventually said in response to questions put by his representative that they had in fact done this for only a few days before the protest had been broken up by the police on a particular date.
68. Other aspects of the applicant's evidence are also problematic. As I put to the applicant in the course of the hearing before me, I find it difficult to accept that the authorities would have put the journalist who he claims interviewed him under house arrest but that they would have taken no action against him. I likewise find it difficult to accept that, if PSB had wanted to arrest him before he left China, as he claims, they would not have gone to his home looking for him until later, after he had arrived in Australia. Furthermore, in the course of the hearing before me the applicant changed his evidence from claiming that he had had to pay money to get his passport (as he had said in the statement accompanying his original application) to claiming that he had been told that his name was on a black-list for several years, that he had been told that he was unable to get a passport and that even after he had bribed an official to get his passport he had been told that he could not use the passport to go overseas while the official remained in that position.
69. I accept that the protest against pollution in Village Y described by the applicant took place: as referred to in paragraph 66 above, this fact is attested by an independent source which confirms the applicant's evidence that hundreds of protesters were dispersed by many police on one occasion. Having regard to the problems with the applicant's evidence outlined above, however, I consider it likely that the applicant has exaggerated his own involvement in the protests. I accept that he had some involvement as depicted in the photographs he has produced. As I indicated to the applicant and his representative in the course of the hearing before me, I accept that the applicant is a genuine and practising Catholic and that he has practised all his life in the unofficial or 'underground' Catholic church.
70. As I put to the applicant in the course of the hearing before me, the evidence available to me indicates that the authorities in Province W generally tolerate the activities of the unofficial or 'underground' Catholic Church and I consider that this attitude of toleration is borne out by the applicant's own experience. However, as referred to in paragraphs 63 to 65 above, there have been some incidents in which adherents of the unofficial Catholic Church in Province W have been subject to arbitrary arrest when carrying out ordinary religious activities and it may be that, as the applicant suggested, teaching children under 18 years old is particularly

dangerous [Information deleted under s431]. I accept that, as Father A suggested, arrests of clergy are more likely to make the news than arrests of laypeople and that there has been a hardening of the attitude of the Chinese authorities towards the exercise of fundamental freedoms in the lead-up to the Olympic Games.

71. I accept that the local authorities and the Religious Affairs Bureau were aware of the applicant's involvement in the unofficial Catholic Church in China and I consider that, even if (contrary to the applicant's claims) the authorities were not aware of the applicant's involvement in the protest against pollution in Village Y before he left China, they would certainly be aware of that involvement now. I consider that there is a real chance that, if the applicant returns to China now or in the reasonable foreseeable future, he will be arrested or detained for reasons of his involvement in the unofficial or 'underground' Catholic Church and his involvement in the protest against pollution in his village. As referred to in paragraph 59 above, arrest and detention in China is arbitrary and serious human rights abuses including torture continue.
72. I accept that the persecution which the applicant fears involves 'serious harm' as required by paragraph 91R(1)(b) of the Act in that it involves a threat to the applicant's liberty and significant physical harassment or ill-treatment. I consider that the applicant's religion and his political opinion are the essential and significant reasons for the persecution which he fears, as required by paragraph 91R(1)(a) of the Act. I further consider that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason. Since the Chinese Government is responsible for the persecution which the applicant fears I consider that there is no part of China to which the applicant could reasonably be expected to relocate where he would be safe from the persecution which he fears. There is nothing in the evidence before me to suggest that the applicant has a legally enforceable right to enter and reside in any other country apart from his country of nationality, the People's Republic of China. I therefore find that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act (see *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229; upheld on appeal, *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154).
73. I find that the applicant is outside his country of nationality, China. For reasons given above, I find that he has a well-founded fear of being persecuted for reasons of his religion and his political opinion if he returns to China now or in the reasonably foreseeable future. I find that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Chinese Government and that he is not excluded from Australia's protection by subsection 36(3) of the Act. It follows that I am satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

## **DECISION**

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

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

Sealing Officer's I.D. prrt44