

**1000150 [2010] RRTA 526 (8 June 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1000150

**DIAC REFERENCE(S):** CLF2009/122337

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

**TRIBUNAL MEMBER:** Mila Foster

**DATE:** 8 June 2010

**PLACE OF DECISION:** Sydney

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

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the People's Republic of China (China), arrived in Australia [in] April 2006 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2009. The delegate decided to refuse to grant the visa [in] December 2009 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 2010 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.
19. It is generally accepted that a person can acquire refugee status *sur place* where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention.

#### *Protection Obligations*

20. Subsection 36(2) of the Act, which refers to Australia's protection obligations under the Refugees Convention, is qualified by subsections 36(3), (4) and (5) of the Act. These provisions apply to protection visa applications made on or after 16 December 1999. They provide that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154.

### **CLAIMS AND EVIDENCE**

#### **Applicant's protection visa application**

21. The Tribunal has before it the Department's file relating to the applicant's protection visa application (CLF2009/122337).
22. According to his protection visa application the applicant is a [age deleted: s.431(2)] year old Chinese national. He was a student in China and had 13 years of education there. He had lived at the same address in China since his birth and entered Australia as a student. Included in his application was a statement in which he made the following claims:
  - a. His family had been "heretic(s)" for several generations; his father was the president of their village temple. His parents dedicated him to the god of the temple one month after he was born and he became weak. Several months later he was nearly dying and a Christian pitied him and baptised him when his family was not home [in] June 1989. He felt better after that.
  - b. When he was 12 years old he asked his parents about the meaning of the statues at the temple where they worshipped. His parents could not answer and he was disgusted.
  - c. Catholics invited him to attend a meeting in their church; they explained Catholicism to him.

- d. A month later his parents found the cross around his neck and told him not to go to the church again.
- e. At the end of January 2001 he attended Catechism for one month and “tested” until September 2001; he got the sacraments of initiation and became a good son of God.
- f. When his parents found out he had been baptised and trained by the church, they beat him and drove him from home. He prayed for them every day.
- g. In March 2003 his mother was baptised and he and his mother practised a Christian life.
- h. Two weeks later his father discovered his mother had been baptised and they lived apart.
- i. The Second Vatican Council published that every Christian had a duty to preach the Gospel.
- j. In the summer of 2005 he went to [Town A] to work; the boss was an executive manager of the church. When the boss came to know his faith the boss asked him to see a patient suffering from cancer; they prayed for the patient and sprinkled holy water on.
- k. On [a date in] July 2005 the father said a Mass for the person and he attended as the Father’s assistant. The Mass 50 was attended by people. Over 100 police from the [Town A] police station came, forced them to stop the Mass and beat the Christians injuring 10 people. They arrested him, the Father and over 10 Christians and took them to a “detention home” where they were beaten and not given water.
- l. The police from [Town B] police station took him to the local police station 7 days later. His mother and her friend “mediate(d) all the parties” They paid a 500 Yuan penalty and he had to write a “guarantee bond” and was then released.
- m. At the end of September 2005 he found some building workers who had come from other provinces who gambled, drank and quarrelled. He preached the Gospel to them, taught them to sing holy songs and showed them Christian books.
- n. At the end of November the government checked Hukou (household registration) and found the Christian books and “leafs” The police threatened the workers and they told he police everything he did. The local police station subpoenaed him to report and he was held in custody for 3 days and suffered cruelties. He was warned and returned home [in] November 2005.
- o. His father cut of his relationship with him. To preach the gospel he became homeless. He was not living with his father.
- p. With the help of Christian friends and his mother he began preparing to study overseas.

- q. On [a date in] January 2006 he found some young people who gambled, drank and quarrelled. He organised them and two months later they joined the church but their families complained but due to a friend who worked in the police station he was not subpoenaed again.
  - r. At the same time he found some aged people without children who were lonely and helpless. He preached the Gospel and met them every week and baptised them. As they were old they suffered heart disease and they died after being baptised. Their families reported him to the police. Thanks to his friend in the police station the police did not come and at the time he got his visa to study in Australia.
  - s. In May 2009 his friend in the police station retired and the “new police”, who hated Christians very much, checked his file and found that he was in Australia. They told his parents he had to return in a month or bear the result.
  - t. He graduated from high school in April 2008 (sic) and his student visa expired then.
  - u. [In] May 2009 his mother told him that his file at the local police station had been checked and he would be tried. The police came to his home many times to ask that he return home to answer the subpoena.
  - v. [In] July 2009 his mother told him she had received the subpoena from the local police station.
  - w. He was afraid to return to China. He was sure he would be arrested and persecuted.
23. Also included with the protection visa application were certified copies along with accredited translations of the following documents:
- a. A Subpoena issued by the Fuqing City Public Security Bureau (PSB) [in] July 2009 stating that the applicant must report to the [Town B] Police Station by 2.30pm on [a date in] July 2009 regarding his participation in “illegal religious congregations”.
  - b. A Christening Certificate issued by the Parish Manager of the Fuqing [Town B] Church [in] July 2009 certifying that the applicant was baptised [in] June 1989 by a priest at [Town B] Church.
  - c. A Notarial Certificate regarding the applicant’s birth.

24. The Department’s file contained a copy of the delegate’s decision. The Tribunal has had regard to the material referred to in the decision.

**Interview with delegate**

25. The applicant was interviewed by the delegate [in] December 2009 in relation to his refugee claims. The Tribunal has listened to a recording of that interview and has had regard to the information the applicant gave the delegate.

## **Review application**

26. The applicant's review application included a letter from the applicant in which he commented upon the delegate's findings and provided further information in support of his refugee claims.

## **Tribunal hearing**

27. The applicant appeared before the Tribunal [in] March 2010 to give evidence and present arguments. As requested by the applicant the Tribunal also received oral evidence from a witness, [Person A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The following is a summary of the hearing.

### *Student visa*

28. The applicant produced his passport at the hearing which contained his student visa. The applicant confirmed that his visa expired [in] August 2008.

### *Witness evidence*

29. The applicant told the Tribunal the witness was not a priest but knew a lot about the Bible and Catholicism and went from place to place in China preaching. The applicant said the witness was forced to leave China because he was persecuted by the Chinese government for religious reasons and was thus given protection in Australia as a refugee. The applicant told the Tribunal that he first met the witness in about 2002 when the witness came to preach in [Town B] and they also attended Mass together in [Town B] when the witness visited the town. The applicant stated that he met the witness in Australia at [Church A] where they both worshipped. He said the witness was aware of his arrest in 2005; he had told the witness about the Subpoena and sought advice from the witness about seeking protection in Australia.
30. The witness testified that he arrived in Australia in October 2005 and was granted protection by a delegate of the Minister in 2006. He recalled meeting the applicant in China but could not recall how many times as he travelled to many towns and villages preaching. He was aware that the applicant had previously believed in Buddha and that his parents believed in "superstition" but that his mother had later become a Catholic. He mentioned that the applicant was summoned by the police. When the Tribunal questioned the witness further about the applicant's arrest and summons his evidence became very confused. He appeared to claim that after coming to Australia he telephoned some nuns on [Town B] from time to time and they told him that the applicant had been picked up by the police and on another occasion, it appears in July or August 2009, they told him about the Subpoena. He was however sure that he had not seen the Subpoena and had only been told about it by a nun.

### *Catholic beliefs and treatment of Catholics in China*

31. In response to questions from the Tribunal the applicant gave evidence about Catholic beliefs, and the treatment and attitude of the Chinese authorities towards Catholics who did not attend official, registered Catholic churches.

### *Religious practice in China*

32. The applicant gave evidence about his baptism as an infant in China. He stated that he received the other Sacraments of Initiation – Confirmation and Holy Communion after

attending Catechism from January to September 2001. In relation to how he practised his religion in China the applicant testified that he regularly attended Mass on Sundays and a youth group on Saturdays where the Gospel was shared, hymns sung and verses read, and he prayed at home everyday. He said that on occasion he listened to the witness preach when the witness visited his area and confirmed, when prompted by the Tribunal, that he himself preached to others.

#### *Arrest and detention in China*

33. In relation to his arrest [in] July 2005, the applicant testified that he was told that the gathering he had attended was an illegal religious congregation and he was released after seven days upon payment of a bribe. The applicant described being detained again for preaching to construction workers.

#### *Religious practice in Australia*

34. The applicant testified that since arriving in Australia he had attended Mass at [Church A] every Sunday and occasionally attended Bible study when his work commitments permitted him to do so.

#### *Adverse information*

35. Pursuant to s.424AA of the Act the Tribunal invited the applicant to comment upon or respond to certain potentially adverse information. In each instance the applicant chose to comment or respond immediately rather than seek more time to do so. The information related to discrepancies between statements the applicant had made to the delegate and his written statement about how many people had attended the Mass [in] July 2005, on what basis he was released from detention and an inconsistency between his testimony and that of the witness about whether he had showed the Subpoena to the witness. The Tribunal also invited the applicant to explain why, if his claims were true, he only sought protection 3 years after he arrived in Australia. The applicant stated that he had a valid student visa and it was after he received the Subpoena that he sought and found information about obtaining protection.

#### *Subsection 91R(3)*

36. The Tribunal explained s.91R(3) of the Act to the applicant and informed him that if the Tribunal found that the applicant was not a Catholic in China it may conclude that he had attended Mass and Bible study in Australia for the purpose of strengthening his claim to be a refugee. The applicant responded that he was a Christian and had submitted his Baptism Certificate from a priest in China.

#### **Witness' protection visa application**

37. After the hearing the Tribunal obtained the Department's file containing the witness' protection visa application (CLF2005/104186).

#### **Assessment of subpoena**

38. Following the hearing the Tribunal sought and the applicant supplied the original Subpoena for an assessment of its authenticity. The applicant informed the Tribunal that he would

permit the Tribunal to disclose his personal details to the Chinese authorities to verify the genuineness of the document.

39. The Tribunal did not consider it appropriate to submit the Subpoena to the Chinese authorities but submitted the document for examination by the Department's Document Examination Section (DES). On 30 April 2010 the DES advised the Tribunal that a comment on the authenticity of the document could not be provided.

### **Independent evidence**

40. The Tribunal has had regard to the following information from other sources in making its decision.

#### *Restrictions on religious freedom in China*

41. The US Department of State has reported as follows regarding religious freedom in China and the treatment of underground Catholics.

The Constitution states that Chinese citizens "enjoy freedom of religious belief." It also bans the state, public organizations, and individuals from compelling citizens to believe in, or not to believe in, any religion. The Constitution and laws protect only "normal religious activities" that are overseen by the five (Buddhist, Taoist, Muslim, Catholic, and Protestant) state-sanctioned "patriotic religious associations" (PRAs). Officials have wide latitude to interpret the phrase "normal religious activities." By law only the PRAs may register religious groups and places of worship. The Government permits proselytism in registered places of worship and in private settings, but does not permit it in public, in unregistered places of worship, or by foreigners. The Constitution states that religious bodies and affairs are not "subject to any foreign domination" and affirms the leading role of the officially atheist Chinese Communist Party (CCP).

...

Government officials allowed increased space for some unregistered religious groups it viewed as non-threatening. A branch of the State Council also held an unprecedented meeting with a delegation of "house church" leaders. The house church leaders requested that the Government allow registration independent of the PRAs. Several Chinese academics supported the request. The ability of unregistered religious groups to operate varied greatly depending on their location. Officials in some areas detained Protestant and Catholic believers who attended unregistered groups, while those in other areas did little to interfere with the worship or social service activities of such groups. ...

The Government repressed the religious activities of "underground" Roman Catholic clergy in large part due to their avowed loyalty to the Vatican, which the Government accused of interfering in the country's internal affairs. The Government also continued to restrict severely the activities of groups it designated as "evil religions," including several Christian groups and Falun Gong.

...

The Constitution protects "normal religious activities." However, citizens do not have the ability to bring legal action based on the Constitution's guarantees of religious freedom. Religious groups are vulnerable to coercive action by local officials who often regulate through classified or informal administrative orders. The Government

restricted legal religious practice to government-sanctioned organizations, registered religious groups, and registered places of worship and sought to control the growth and scope of the activity of both registered and unregistered religious groups. The Government strongly opposed the profession of loyalty to religious leadership outside the country, most notably the Pope and the Dalai Lama. The treatment of religious groups varied significantly. Membership in many faiths continued to grow rapidly.

...

Local regulations, provincial work reports, and other government and party documents continued to exhort officials to enforce government policy regarding unregistered churches and illegal religious activities, although the extent to which officials interfered with the activities of unregistered churches varied and depended largely on local conditions. Urban house churches in some areas limited the size of their meetings to a few dozen individuals. In nonurban areas, some house churches were able to hold meetings that hundreds of individuals attended with which local authorities did not interfere. Some unregistered religious groups had significant membership, properties, financial resources, and networks. House churches faced more risks when their memberships grew, they arranged for regular use of facilities for religious activities, or forged links with other unregistered groups or coreligionists overseas.

In some areas, government authorities pressured house churches to affiliate with one of the PRAs and to register with religious affairs authorities by organizing registration campaigns and by detaining and interrogating leaders who refused to register. In other parts of the country unregistered groups grew rapidly and the authorities did not pressure them to register.

Although SARA does not officially acknowledge the existence of house churches, its website states that family and friends holding meetings at home (as distinct from formal worship services in public venues) need not register with the Government (the "Family and Friend Worship Policy"). Police and officials of local RABs in some areas disrupted home worship meetings, claiming that participants disturbed neighbors or social order, or belonged to an "evil religion." Police sometimes detained for hours or days worshippers attending such services and prevented further worship activities. Police interrogated church leaders and lay persons about their worship activities at locations including meeting sites, hotel rooms, and detention centers. Non-governmental organizations (NGOs) reported that church leaders faced harsher treatment than members, including greater frequency and length of detention, formal arrest, and reeducation-through-labor or imprisonment. According to NGO and media reports, in some cases local officials also confiscated and destroyed the property of unregistered religious groups.

Citizens are not permitted to attend religious services conducted by foreigners unless the services take place in an authorized venue under the supervision of a registered religious group. Citizens were not allowed to attend expatriate worship services, but foreigners were occasionally invited to preach at worship services at registered religious venues. On April 12, 2009, American Catholic Bishop Ignatius Wang celebrated Easter Mass for an estimated 2,000 attendees at Xujiahui Cathedral, Shanghai's largest registered Catholic church.

...

The Government and the Holy See have not established diplomatic relations, and there was no Vatican representative in the country. The role of the Pope in selecting

bishops, the status of underground Catholic clerics, and Vatican recognition of Taiwan remained obstacles to improved relations. A Ministry of Foreign Affairs spokesperson stated that the Government advocated improvement in relations.

The CPA does not recognize the authority of the Holy See to appoint bishops; however, it allowed the Vatican's discreet input in selecting some bishops. An estimated 90 percent of official Catholic bishops have reconciled with the Vatican. Likewise, the majority of Catholic bishops appointed by the Government have received official approval from the Vatican through "apostolic mandates."

The distinction between the official Catholic Church, which the Government controls politically, and the unregistered Catholic Church has become less clear over time. In some official Catholic churches, clerics led prayers for the Pope, and pictures of the Pope were displayed.

...

During the period covered by this report, officials continued to scrutinize, and in some cases harass, registered and unregistered religious and spiritual groups. In some areas government officials abused the rights of members of unregistered Protestant and Catholic groups, Uighur Muslims, Tibetan Buddhists, and members of groups the Government designated "evil religions," especially Falun Gong. Reports of abuse of religious freedom in the XUAR, Tibetan areas, and Beijing continued during the reporting period.

The Government detained, arrested, or sentenced to prison terms many religious leaders and adherents for activities related to their religious practice; however, the Government denied detaining or arresting anyone solely because of his or her religion. Local authorities often used an administrative process, through which citizens may be sentenced by a non-judicial panel of police and local authorities to up to three years in reeducation through labor (RTL) camps, to punish members of unregistered religious groups. During the reporting period, the Government reportedly held religious adherents and members of spiritual movements in RTL camps because of their religious beliefs. In 2009, the Government reported that there a total of 190,000 individuals were being held in 320 RTL camps throughout the country. The Laogai Research Foundation has estimated that there may be 500,000 to 2 million individuals in RTL camps. In some areas security authorities used threats, demolition of unregistered property, extortion, interrogation, detention, physical attacks, and torture to harass leaders of unauthorized groups and their followers.

Offenses related to membership in unregistered religious groups were often classified as crimes of disturbing the social order. Religious leaders and worshippers, however, faced criminal and administrative punishment for a wide variety of activities, including those related to the Government's refusal to allow members of unregistered groups to assemble, travel, and publish, or in connection with its ban on public proselytizing. Some members of unregistered groups were charged with conducting illegal business operations in relation to their publishing activities.

...

In some locations, local authorities reportedly forced unregistered Catholic priests and believers to renounce ordinations approved by the Holy See, join the official church, or face a variety of punishments including fines, job loss, detentions, and having their children barred from school. Ongoing harassment of unregistered bishops and priests was reported, including government surveillance and repeated

short detentions. Numerous detentions of unofficial Catholic clergy were reported, in particular in Hebei Province, traditionally home to many unregistered Catholics. (US Department of State, *International Religious Freedom Report 2009 – China*, 26 October 2009)

42. In February 2007, the Australian Department of Foreign Affairs (DFAT) advised that the implementation the religious policy in China not only varied widely between different locations but also between different officials (Department of Foreign Affairs and Trade, *DFAT Report 604 – RRT Information Request: CHN31325*, 19 February 2007).
43. Whilst some sources consulted by the Tribunal state that China's official religious policy is applied relatively liberally in Fujian province there are nevertheless reports that from time to time Catholics who practise their religion in the underground church in that province are subjected to arrest and detention (Immigration and Refugee Board of Canada, CHN100387.E – *China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong* (2001-2005), 1 September 2005; Lambert, T., *China's Christian Millions*, 2006, Monarch Books, Oxford, p.241; 'Another underground priest arrested in Fujian', *Asia News*, 24 March 2010<http://www.asianews.it/news-en/Another-underground-priest-arrested-in-Fujian-17965.html#>).

#### *Baptismal certificates*

44. The Tribunal found little information about Baptismal Certificates issued in China. An Immigration and Refugee Board of Canada report from 2004 commented on Baptismal Certificates issued by underground Catholic churches:

During a 4 June 2004 telephone interview with the Research Directorate, a representative of the Cardinal Kung Foundation stated that there are no standardized baptismal certificates within underground Catholic churches in China nor are baptismal certificates issued as a matter of course. Instead, if a baptismal certificate were requested at the time of baptism, the priest might issue an informal document that would most likely be written in Chinese (ibid) (Immigration and Refugee Board of Canada, CHN42650.E – *China: Whether underground Catholic Churches issue baptismal certificates; if so, in what language*, 8 June 2004, [http://www.irb-cisr.gc.ca/en/research/rir/index\\_e.htm?action=record.viewrec&gotorec=416315](http://www.irb-cisr.gc.ca/en/research/rir/index_e.htm?action=record.viewrec&gotorec=416315)).

#### *Document fraud in China*

45. In response to a request from the Tribunal to verify the authenticity of a Certificate of Arrest and Summons issued by Fuqing Public Security Bureau in relation to another case, DFAT informed the Tribunal:

Post is not able to determine the authenticity of the Certificate of Arrest and summons issued by Fuqing Public Security Bureau without identifying the applicant to Chinese authorities. However, we would point out the very high level of document fraud in northern Fujian Province, especially in Fuqing, as illustrated by the other documents referred for verification.

...

Post confirms that fraudulent documents continue to be widely available and frequently used in China.

...

Authenticating documents from China is a major issue for a number of governments, including China's own government. (Department of Foreign Affairs and Trade, *DFAT Report No.1132 – China: RRT Information Request: CHN36355*, 3 March 2010).

46. The preceding DFAT advice is consistent with information gathered by the Immigration and Refugee Board of Canada regarding the production and use of fraudulent documents in China particularly in Fujian: Immigration and Refugee Board of Canada, *China: The manufacture, procurement, distribution and use of fraudulent documents, including passports, hukou, resident identity cards and summonses in Guangdong and Fujian in particular (2005 - May 2009)*, 24 June 2009, CHN103134.E, available at: <http://www.unhcr.org/refworld/docid/4a7040b72.html>.

## **FINDINGS AND REASONS**

47. On the basis of the applicant's passport the Tribunal finds that he is a national of China as he claims.
48. The applicant demonstrated a knowledge of and familiarity with Catholicism which leads the Tribunal to accept that he is a Catholic. However, the Tribunal is not without doubts about whether the applicant's other claims are true. There are inconsistencies in the applicant's evidence which the applicant has not explained to the Tribunal's satisfaction. For example, he stated in the written statement he submitted with his protection visa application that 50 people attended the Mass [in] July 2005 in [Town A] but told the delegate 20-30 people attended. The Tribunal also found the evidence of the witness about how he discovered that the applicant had been arrested in July 2005 vague and confused. The Tribunal believes the applicant has submitted fake documents to the Tribunal. The Christening Certificate states that the applicant was baptised by a priest at [Town B] Church and bears the seal of the church yet the applicant testified before the Tribunal that he was baptised at his neighbour's home. Further, given he claims the neighbour belonged to an underground church the Tribunal would not expect such a formal certificate with a seal to be issued by an underground church in relation to a christening that occurred in a home rather than a church 10 years before. The information from the Cardinal Kung Association referred to above about Baptismal Certificates issued in China reinforces the Tribunal's view about the certificate. In relation to the Subpoena, the applicant was adamant in his oral evidence to the Tribunal that he had shown his witness the Subpoena but, contradictorily, the witness was equally adamant that he had not seen the Subpoena. Further, there is credible evidence that fraudulent documents are widely available and used in China especially in the applicant's home province. Finally, if the applicant was arrested, detained and subjected to cruelty by the Chinese authorities as he alleges then the Tribunal finds it hard to believe that he would not have applied for protection sooner, at least when his student visa expired and thus was in Australia illegally. The Tribunal therefore does not believe that the applicant attended the Mass in [Town A] [in] July 2005, or that he preached to building workers, young people or the elderly about Catholicism. Nor does the Tribunal believe that the applicant was arrested, detained or mistreated by Chinese authorities, or has been subpoenaed by the Fuqing PSB.
49. The applicant's credibility is undermined by the fact that the Tribunal does not believe the applicant has been truthful about the preceding matters and submitted fake documents. Nevertheless, the Tribunal cannot exclude the possibility that the applicant did practise in the underground Catholic church in [Town B]. The information and evidence the applicant gave in his protection visa application, to the delegate and to the Tribunal about his attendance at

gatherings and Mass in the underground Catholic church in [Town B] was consistent. As indicated above the Tribunal obtained the Department's file relating to the witness' protection visa application. In the case of the witness, the delegate found he was a Catholic who participated in religious activities in the underground Catholic church in China for many years which included preaching in the [Town B] area. Much documentary, photographic and audiovisual evidence of the witness' activities was submitted in support of his application which gives weight to his claims. Whilst the witness' evidence about the information he claims to have obtained about the applicant's arrest and the Subpoena did not impress the Tribunal, his testimony about the applicant's attendance at gatherings of the Catholic underground church in [Town B] was given in a more clear and forthright manner. He also gave evidence about the religious practises of the applicant's parents which was consistent with the applicant's claims. Whilst not without doubts the Tribunal cannot confidently find that the applicant did not attend gatherings and Mass in the underground Catholic church in [Town B]. Legal principles dictate that the Tribunal must therefore take into account the possibility that he did do so (*Abebe v The Commonwealth* (1999) 197 CLR 611 at [83], *MIMA v Rajalingam* (1999) 93 FCR 220 at 240 and 250).

50. Having accepted that the applicant is a Catholic who attended gatherings and Mass at an underground Catholic church in China, the Tribunal accepts the applicant's testimony which is corroborated by his witness that he has been regularly attending Mass at [Church A] and is thus satisfied that he had done so otherwise that for the purpose of strengthening his claim to the a refugee. Subsection 91R(3) therefore does not apply in this case.
51. As a Catholic who attended an underground Catholic church in China the Tribunal finds that the applicant would wish to worship in such a church in the reasonably foreseeable future if he returned to China. Whilst the independent evidence before the Tribunal indicates a relatively high degree of religious tolerance in Fujian province, its also indicates that the attitude of the authorities varies at the local level to a great extent and that Catholics who worship in the underground Catholic church in China, including in Fujian, have been arrested and detained for doing so. The Tribunal therefore finds that whilst the chance that the applicant would be harmed for practising in the underground Catholic church in China is not high there is nevertheless a real chance that he would be subjected to serious harm amounting to persecution in the reasonably foreseeable future if he did so. The Tribunal therefore finds that the applicant has a well-founded fear of being persecuted for reason of religion if he returns to China.
52. There is nothing before the Tribunal to suggest that the applicant has the right to enter or resident in any other country besides China. He is thus not excluded from Australian protection by s.36(3) of the Act.

## **CONCLUSIONS**

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

## **DECISION**

54. 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.