

071896978 [2008] RRTA 31 (13 February 2008)

DECISION RECORD

RRT CASE NUMBER: 071896978

DIAC REFERENCE(S): CLF2007/121605

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Phillippa Wearne

DATE DECISION SIGNED: 13 February 2008

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

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).

The applicant, who claims to be a citizen of the People's Republic of China (China) arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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

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.

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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of "refugee"

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department case file which includes the applicant's original protection visa application and the delegate's decision record. The Tribunal has also before it the applicant's RRT file.

The applicant claims fear of persecution in China for the convention-related reason of religion and imputed political opinion.

Application for visa to enter Australia

According to Department records the applicant arrived in Australia, on a visa issued in China.

Protection visa application (PVA)

According to his protection visa application (PVA), the applicant was born in City A, Fujian Province. He attached a copy of an identity card (and a translation of it) to the PVA which is issued in another name. The applicant states that this name is his true name. He states that he is also known by another name which is the name on the passport which he used to travel to Australia. This passport was issued in another Province.

The applicant states that he got married in the Fujian Province. He has children. The applicant indicates that he has had a number of years of formal education. He indicates that he has never been convicted of an offence, nor is he currently charged with an offence. He gives his religion as *Catholic*.

The applicant attached a statutory declaration to the PVA. The text is set out below, with minor editorial changes indicated:

1. My genuine name is [name]. [I] was born on [date] in [Town 1], [City A], Fujian Province, the People's Republic of China ("PRC").
2. In [date], while I was [age], I started studying at [school] in my hometown, and graduated from it in [date][after] I completed my [number] year study at the school. I then studied at [City A] Middle School from [date] to [date].
3. In [date], while I was about [age], I went to [City] in [Province W] and I worked as a [job description] at a [factory] for [number] years.
4. In [date], while I was about [age] years old, I got married with my wife [name]. I got [number] children after that. My [child] [name] was born in [date] and my [child] [name], was born in [date].
5. Not long after I got married, I went to [City B], [Province X], being engaged in supplying [products] from Fujian Province to [Province X]. During following [number] year period, I frequently travelled between Fujian and [Province X], and I did make some money from

my business

6. In [date], I went to [City C] in [Province Y], where I invested [in] a [business] together with my friend [Mr A] [Mr A] was from my hometown in Fujian and we had known each other since our childhood. He used to work for a [business] for many years, and he was very experienced in this area. The name of our [business] was called as [business name] and it was in a very good location. So, our business was quickly developed.
7. However, with [the] business development of our [business], we found that we had to face more and more difficulties. [Mr A] and I, as well as [staff] of the petrol station, were from Fujian Province without any particular social contacts ("guanxi" in Chinese) with local officials. We gradually became the target of those corrupt local officials, such as officials from [various bureaus], and particularly those corrupt police from the Public Security Bureau ("PSB"). We had to give them "cash gift[s]" ("Hongbao" in Chinese) on special days, such as New Year Day, Chinese Spring Festival, International Labour Day, National Day, or other public holidays; and we also had to provide them particular [documents], which guaranteed those officials and their families to get [goods] without paying any [money] on [a] regular basis (normally once a month). But, in order to maintain our business, we had to tolerate [this] unfair treatment[t].
8. One day around [date], [number] men came to our [business] for [goods]. However, when I asked them for the payment after that, those [number] men were very rude to me. They showed me police ID cards and said that they were plain polic[e] from the PSB in [City C] and they were in hurry for an important case. They said that I could ask for the payment with the PSB if I wanted, but they refused to give me any official documents such as receipts before they left. I contacted the PSB after that, I was told that I should not worry about the payment and I would get it later on. I was also warned that I should actively support the police and actively assist them to deal with those cases.
9. From then on, those so-called plain police often came to our [business] for [goods], but they always refused to pay us with excuses that they were "in hurry for an important case". From [date] to [date], those plain police owed us at least RMB 100,000 yuan. During that period, [Mr A] and I had many times contacted the PSB in [City C], asking for the payment. However, those corrupt police just played games with us, and kicked us like a ball from one place to another
10. In [date], [Mr A] and I had to make a decision that we would not allow those so-call[ed] plain [clothed] police to get [goods] from us without any payment unless they gave us official receipts with which we could claim our money back.
11. On [date], [number] men came to our [business] for [goods] like before. They got the [goods]l, but refused to make the payment with similar excuse that they were plain [clothed] police and they were in hurry for an important case. My staff asked them to show their police ID card and to give us official receipt, and it immediately made those [number] men very upset. They beat my staff heavily with butt of their handguns, and denounced my staff to interfere with their public function. [Mr A] and I eventually lost our temper and we had big argument with those [number] police. We did not allow them to leave unless they made the payment. Then, one of the plain police rang someone from his mobile phone, and many police arrived in our petrol station shortly. They did not allow us to make any explanation, and arrested [Mr A] and me straight away. In the meantime, our

[business] was sealed by the PSB with an excuse that we had interfered with the police to deal with important cases.

12. From [date] to [date], [Mr A] and I were detained at the detention centre in [City C] for [amount of time]. During that period, both of us were subjected to miserable persecution, because we refused to accept those allegations forced by the police. We were interrogated many times, and we were beaten and tortured by those cruel police as well as criminals who had been detained in the same cell together with us. Finally, [Mr A] could not stand miserable persecution, and he accepted everything forced by the police. As a result he was treated leniently and was released on [date].
13. I, however, never surrendered myself to those police from the beginning to the end. So, I was punished severely. On [date], without showing me any legal documents, the police sent me to [labour camp] of [Province Y], where I was forced to work at a [factory]. It was really a hell, and I had to work at least [number] hours every day, and my basic human rights have completely been deprived.
14. On [date], having forced to work continually for over 24 hours, I was too tired to concentrate on my work. As a result, I cut [myself] with a saw! I was then sent to a hospital. While I was in the hospital, my [family] and [Mr A] as well as many kind friends tried every means to save me. [T]hey spent a lot of money to bribe those police at the PSB in [City C]. Finally, I was allowed to return to my hometown in Fujian on [date].
15. I really did not know how to describe my feeling after I returned to my hometown at that time. Information deleted in accordance with s431 of the Migration Act as this information may identify the applicant. [E]xperiencing so many persecutions, I felt that I had lost everything in my life. I got [drunk] everyday and I even tried to kill myself.
16. Early [date], [Mr A] introduced me to know his relative [Mr B] who was a [devout] Catholic. [Mr B] was very kind, and he talked with me many times and tried every means to help me get out of those sufferings [of] the past. Particularly, he spread Gospel to me and arranged [for] me to attend secret religious gatherings. It was with [the] great [help] of [MrB] as well as many kind Catholics that I was able to re-start my new life.
17. On [date], I was baptised and became a Catholic like [Mr B] and many of other kind people. [Mr A] was baptised together with me on the same day.
18. The church that I had participated in China was Roman Catholic Underground Church ("the underground church"), and it has been regarded as an illegal church by the PRC authorities. I knew that it would be very danger[ous] to get involved in the church. However, I had to attend it actively, because I was in fact saved by the Lord as well as many kind Catholics including [Mr B].
19. On [date], I was instructed to [deliver] about 500 Bibles and 300 copies of religious materials to a Youth Group at a village in [Town 2] of [City A]. Unexpectedly, many police surrounded that village shortly after my leaving, and all members of the Youth Group were arrested. I was informed by a kind person while I was on my way home. I immediately changed my mind to return home and went for hiding at [Mr A]'s home. As I [expected] many police came to my home to arrest me, but they found nothing.
20. My "black records" with the PSB in the past made the police pay much more attention to my involvement in the underground church, and I have been regarded as a key activist. Since then, I have become the target of the PSB once more.
21. I dared not to stay at [Mr A]'s home for too long and [I] went to [City D] of [Province X]

shortly. I used to do business there for many years and I [have] many friends [there]. I was in hiding for some period. [T]hen I left China with hel[p] of my friends. However, in order to bypass the police check, I had to use the passport in [an]other's name (the name on the passport was "[name]"[D]).

22. On [date], I finally left China from [Town 3], [which] was very close to [City E] and [was] far away from my hometown. [I] arrived in Australia on [date].

23. I cannot return to China, because I must be subjected to persecution on return. As a matter of fact, the police have gone to my home in Fujian for many times since I escaped from my hometown. My wife, and many of my families have been questioned by the police, and they are required to report to the police as soon as they receive any news from me.

24. In Australia, I have continually attended activities of Roman Catholic Church.

Application for review

The applicant applied to the Tribunal for a review of the decision to refuse the protection visa. He was represented by a migration agent.

Evidence at the hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The hearing was conducted with the assistance of an interpreter in the Mandarin language.

The Tribunal explained the operation of s.91R(3) of the Act and confirmed that the applicant understood its operation.

The Tribunal asked the applicant about the assistance he had received in completing the PVA and the statutory declaration. He said that he “wrote out in Chinese and the lawyer translated it.” He said that “the lawyer then assisted by translating [it back] into Chinese so he could confirm the information contained in his claim. The Tribunal asked the applicant if he wanted to add to, change or delete anything contained in his application. He said that he do not wish to do so.

The applicant said that he did not know anyone by the name on the passport that he used to travel to Australia. He said that he had held no other passport. He said that the only travel he had done was to come to Australia from China.

The applicant said that his family lived in the Fujian Province.

The applicant told the Tribunal that he had been living at the recorded address since arriving in Australia.

The applicant said that he had opened the business with Mr A in Province Y and that initially the business had done well. Later when the police officers refused to pay for their goods the business lost about 100,000 RMB. The applicant said that the police officers had come again early the following year. An employee of the business had been beaten when he insisted that the police officers pay for goods. When the applicant and Mr A repeated the request that the goods be paid for the business was closed and they were arrested.

The applicant said that his family had not moved to Province Y when he and Mr A opened the business. His family had remained in Fujian Province. He said that he travelled back to

Fujian Province “once a year” to visit them. He said that he had no choice about this. He was working hard and had to stay near the business.

The applicant said that he had been detained for an initial period of several weeks, and later in a labour camp for a number of months.

The applicant said that while he and Mr A were operating the business they had to provide vouchers to the heads of the local government departments. He said that this was not a severe financial drain on the business because it was just “several 100 or several 1000 RMB, but not much” to each person. He said that they provided these vouchers to the heads of several local government bureaus.

He said that significant trouble started when the plain-clothed policemen started to take goods without paying. The applicant said that one of these officers was called Captain X. The applicant said that he will never forget this man. The applicant said: “at first we didn’t want to let them [take the goods]. But they said if you don’t let us we will come back and look at your account books.” The Tribunal asked whether he and Mr A had checked to confirm that these men were police officers. The applicant said that they had looked at their identity cards. He said that they knew that they were police “because they had guns.” He said that the police officers continued to take goods without paying. The policemen gave them “IOU’s” and told them that they would give them the money “next time”. The Tribunal asked the applicant whether he tried to redeem the “IOU’s” The applicant said that he had visited the head of the local PSB with this purpose. The applicant said “he referred me on to another person. I couldn’t find this other person.” He said that he realised that “they were just passing us on” It got to the stage that over a period these police officers had taken 100,000 RMB worth of goods without paying.

The applicant said that he and Mr A consulted a lawyer on a number of occasions, once before the business was closed and another time when he had been released from detention. The applicant said: “but the lawyer did not accept the case.” The lawyer refused, saying to them: “Do you want us to die?”

The applicant said that on one occasion, Captain X and the other plain-clothed policeman came to the business He and Mr A had been working in the office at the time. They heard screaming. One of their female employees ran into the office and told them that one of the police officers had hit a male employee with the butt of his gun. The applicant and Mr A rushed outside. The employee had told the police officers that he had been instructed by applicant and Mr A that the policemen were to have no more goods without paying. The police had reacted badly. The applicant said “Captain X verbally assaulted me. [He asked] How did you train your employees?” Captain X smacked the applicant on his face. Meanwhile Mr A was yelling to the police: “if you keep doing this we will sue.” The police replied: “OK you do that and we will close this business.”

The applicant said that the policemen were very angry and called other police to attend the business. The applicant and Mr A were taken into custody. The business was closed from this time on. The applicant said that they “lost the licence to operate the business” Some of the employees continued to live on the business premises. The applicant said that these employees were from Fujian and had nowhere else to go.

The applicant said that he and Mr A were detained for some weeks at a centre in City C and then he was sent by himself to a labour camp. Mr A was released because when the police asked him to admit that he “disrupted the public affairs,” he agreed that he had done so.

The applicant said that despite mistreatment during detention he had not complied with the police officers request to confess to disrupting public affairs. He said that he was handcuffed and his arms held in a very uncomfortable position on occasions. He said that he had also been hit with an electric rod on occasions. He said that he had not “confessed” because he had been too angry about loosing the money from his business.

The applicant said that he was sent to a labour camp in Province Y. He was forced to work long hours cutting planks of wood. On one occasion he had been forced to work an extra shift after the evening meal that had extended into the early morning hours. He had been too tired and accidentally cut himself severely. The applicant showed the Tribunal a scar. It was clear that the applicant had been cut severely at some time in the past. The applicant said that he had “passed out” after the accident and woke up in hospital.

As he was required to pay for the operation, the police contacted Mr A who had moved back into the premises of the closed business. Mr A had been there finalising the “pending account books”. The business had not sold anything for some months. The applicant said that Mr A contacted his family and together “they pulled some strings” to have him released. The applicant said that his family approached the head of the village who was related to one of the policemen. The head of the village handed over money to the police officer and the applicant was released

The Tribunal asked the applicant when he was first introduced to Christianity. He talked about his address in Australia The Tribunal asked him if he was saying that he had not been introduced to Christianity before he came to Australia. The applicant said that he was introduced to Christianity in China He said that he had been baptised with Mr A the year before he left the PRC.

The Tribunal asked the applicant to describe the procedure of his baptism, which he did in some detail. The baptism took place in Mr B’s house at night.

The Tribunal asked the applicant why he had become a Christian. He said that following the demise of his business, and then “the accident” with the saw he had become very stressed and anxious. He had no income. He became depressed, drank a lot and experienced suicidal thoughts. Mr A introduced him to Mr B who was a Christian. The applicant said that “[Mr B] evangelised to me.” Mr B asked the applicant to attend gatherings with him.

The Tribunal asked the applicant whether he knew these Christian gatherings where legal or illegal. The applicant said that he did not discuss the matter with Mr A. He said that he was introduced to the gatherings as a “new person”. He said that sometimes there were more than 20 people and sometimes there were less. His family did not accompany him. He said that he felt consoled and comforted by the people who attended these gatherings. They prayed for him and sang songs for him. He had cried.

He said that Mr B had told him that it was an illegal Church before he was baptised. He said that on the day that he was baptised Mr B told him that the Church was not registered.

The applicant said that before he was baptised he chose a “God father” who was Mr B He said that he also chose a “sacred name”. He told the Tribunal his sacred name

The applicant said that he attended “a lot” of gatherings before he was baptised. They were held on Friday and Sunday nights. Mr B took him to the gatherings. He said that the gatherings were “very secret”. The applicant said “they did not want other people to know about them.” The applicant added that he did not specifically ask anyone if he could talk about the gatherings. He said after attending the gatherings he became “very optimistic” and “comfortable.” He stopped drinking. He said that he experienced “God’s power”.

The applicant said that he had attended a registered Christian Church on one occasion with a relative. She had taken him because he had been very depressed and she wanted to help him. He said that he had not felt involved in the service and it did nothing to relieve the stress that he was feeling at the time. He said that the people attending the registered Church were not allowed to participate. “There was only one person allowed to speak.” He said that the people attending the service had “no right to speak”. He said at the home gatherings “we can tell about our sorrows and ask God to protect us.” He said that “the government Churches are not real.” He said that he had received help from “his brothers and sisters” at the home gatherings.

The Tribunal asked the applicant many questions about Christianity and Roman Catholicism in particular. It also asked the applicant to describe his beliefs. He was able to respond correctly to almost all of the questions. Sometimes he returned to his responses and added more detail, saying that “sometimes I can remember. Sometimes I am confused.” Although he knew the significance of Christmas day, he did not know the date allocated to it.

The Tribunal asked the applicant about whether he had attended Church services since coming to Australia. He said that he had attended a Catholic Church every Friday and Sunday. He produced a letter from a representative of the Church. The letter stated that the applicant “has been attending the [Mass] which is celebrated at [Catholic Church], since arriving in [date].” He signed the letter and gave a contact phone number. The Tribunal asked the applicant whether it could speak to this Church representative. The applicant agreed to this and said that this person attended the Church and was aware of his application for a protection visa. However, he said that he thought that he was on leave. The Tribunal attempted to contact him, but was unable to do so.

The Tribunal asked the applicant about his claim that that he had come to the interest of the authorities again when he delivered Bibles to a remote village in Town 2 of City A. He said that he picked them up one night from Mr B’s house. He used Mr A’s mini van to make the delivery. He said that the Bibles were packed into boxes and the brochures were in another box. Mr B did not have a driving licence. The applicant said that he did not know why Mr B had asked him and not Mr A to deliver the Bibles. The applicant thought that he had been asked because he had made a previous delivery Bibles to someone else.

The applicant did not tell his family what he was doing. He did not want them to be concerned about his safety. The applicant said that the Bibles were printed in Taiwan He did not know the name of the publishing company. He said that the Bibles he used in China had also been published in Taiwan. He said that he “read the inside” and had not taken notice of the name of the publisher. The applicant told the Tribunal that he thought that the title of the brochures that he delivered was *The Road to Heaven*. He did not have time to read the content of the brochures.

The applicant told the Tribunal that that he could remember the telephone number of the person to whom he had made the delivery. The Tribunal asked him why it was he could still

remember this number from an occasion many months ago. The applicant said that “it was an easy telephone number to remember.” He said that he had rung an old friend who lived in the same village and asked her if she knew where the person he was delivering the Bibles to lived. The Tribunal asked why he did not ring the person taking delivery direct. The applicant said that he had done so, and had got directions but could not find the address. He said that it was a small village and everyone knew each other. He said that there were only several hundred residents. The Tribunal asked why he was delivering so many Bibles if that was the case. The applicant said that the delivery address would be a distribution point for other villages further out. He said that he had not told his old friend what he was delivering. She knew the person to whom he was making a delivery as he lived close to her and she was able to give him directions. He had met the person taking delivery of the Bibles at a Church gathering. After he had made the delivery his old friend rang him and told him that she could hear police sirens around the village and that the place that he had delivered the Bibles to appeared to be surrounded by the police.

The Tribunal asked the applicant why he was involved in the dangerous work of delivering Bibles; particularly, if he had already experienced time in detention. The applicant said: “God saved me and gave me another life. So even though [it was] dangerous I would do it.”

The applicant said that after receiving the phone call from his old friend he thought “we are busted.” He thought that the police would come to know that he had been involved if they spoke to the person taking delivery of the Bibles. He decided not to return to his own home. He decided to go to return to Mr A’s home. The Tribunal asked whether the police would have thought Mr A was involved in the delivery. The applicant said that they had no reason to think that he was. The Tribunal told the applicant that he claimed to have used Mr A’s min van. The applicant said that he did not think that the vehicle had been identified. He had considered that he would be safe at Mr A’s home. And he was “the only friend that I have who lived in City A. He stayed with Mr A for a number of days. He rang Mr B and requested his help. Mr B helped him leave China.

At the end of the hearing the Tribunal gave the applicant particulars of information that it considered could be the reason or part of the reason for affirming the decision to refuse the applicant a protection visa. The Tribunal explained the relevance of the information. The applicant requested time in which to comment or on respond to the information and the Tribunal allowed.

The applicant submitted a statutory declaration It is set out below, with minor editorial changes indicated:

Regarding some issues arising from the Tribunal's hearing, I would like to provide further information as follows.

Firstly, I started approaching Roman Catholic Underground Church ("the underground church") through [Mr A] who was [Mr A]’s relative from [date]. [I] was baptised on [date]. Also, most of personal information regarding senior leaders such [as] Bishop [name], by whom I had been baptised at the underground church, was normally kept in confidential in order to guarantee their safety. So, [when] I was asked where [Bishop] [was] from at the Tribunal's hearing, I was unable to give the answer apart from knowing that he was a bishop in [area]. And furthermore, I thought that I might have been able to get more personal information about [Bishop] if I had joined the underground church much earlier than [date]; and thus I said that I had joined the underground church not quite earlier.

I do know what the date for Christmas [day] indeed and I even personally attended [the] celebration on Christmas last year, but unfortunately, I could not remember it at the Tribunal's hearing, because I, at that time, concentrated on the date when I had received [Church representative]'s letter.

Secondly, I started approaching the underground church through [Mr B] in a particular situation[,] and at that time, I even intended to kill myself. So, I was in fact saved by my Lord. Frankly speaking, in that particular circumstance, I did not care about too much about whether the religious gatherings which I had been involved to be legal or not; instead, what I had felt in my heart was that I have been saved by my Lord and my new life has been started. Furthermore, when I was asked by [Bishop] whether or not I was willing to join the underground church, it was just a normal procedure.

Thirdly, when the home of the person, who had received Bibles and religious promotion materials from, was surrounded by the police, it was impossible for me to ring him, because it would definitely be very dangerous. Normally, the police, in such a situation, would firstly control or even confiscated the person's phone; and then kept it opened but strictly monitoring who would contact the person through the phone. I, therefore, dared not to contact the person by phone.

Finally, I was instructed to delive[r] Bibles and religious materials to a Youth Group at a village on [date] Those Bibles or religious materials were not only used by members of the Youth Group but also were distributed by them to the local people in the village as well as the people in other villages around this village. That was why I had delivered about [number] Bibles to a village where only about [number] people were.

In summary, I [am]indeed a member of the underground Church in China. [M]y involvement in the underground church in China [has] already come to [the] particular attention of the PRC authorities. [I will] be subjected to persecution on my return.

Independent information

According to the 2007 US Department of State *International Religious Freedom Report on China*:

The Constitution states that citizens enjoy freedom of religious belief and the freedom not to believe in any religion. The Constitution limits protection of the exercise of religious belief to activities which it defines as "normal." The Constitution states that religious bodies and affairs are not to be "subject to any foreign domination." The law also prohibits proselytism.

The Government restricted religious practice largely to government-sanctioned organizations and registered places of worship and controlled growth and scope of activities of both registered and unregistered religious groups, including "house churches." The Government tried to control and regulate the growth of religious groups that could constitute sources of authority outside of the control of the Government and the Chinese Communist Party (CCP). Nonetheless, membership in many religious groups was growing rapidly.

During the period covered by this report, the Government's respect for freedom of religion remained poor, especially for religious groups and spiritual movements that are not registered with the Government...

Members of many unregistered religious groups of various faiths reported that the Government subjected them to restrictions, including intimidation, harassment, and detention. Some unregistered religious groups were pressured to register as "meeting points" of government-sanctioned "patriotic" religious associations (PRAs) linked to the five main religions--Buddhism, Islam, Taoism, Catholicism, and Protestantism. The treatment of unregistered groups varied significantly from region to region.

...

The Government restricts lawful religious practice largely to government-sanctioned organizations and registered places of worship and attempts to control the growth and scope of activities of both registered and unregistered religious groups. The Government tries to prevent the rise of religious groups that could constitute sources of authority outside of the control of the Government and the Chinese Communist Party. Nonetheless, membership in many faiths is growing rapidly. (*Section II. Status of Religious Freedom -Legal/Policy Framework*)

...

The Government officially recognizes five main religions: Buddhism, Taoism, Islam, Catholicism, and Protestantism. There are five state-sanctioned "patriotic" religious associations (PRAs) that manage the activities of adherents of the five officially-recognized faiths... (*Section I. Religious Demography*)

Members of many unregistered religious groups of various faiths reported that the Government subjected them to restrictions, including intimidation, harassment, and detention. Some unregistered religious groups were pressured to register as "meeting points" of PRAs linked to the five main religions. The treatment of unregistered groups varied significantly from region to region.

[Catholics]

There are 5.3 million persons registered with the official Catholic Patriotic Association (CPA), and it is estimated that there are an equal or greater number who worship in unregistered Catholic churches affiliated with the Vatican. According to official sources, the government-sanctioned Catholic Patriotic Association has more than 70 bishops, almost 3,000 priests and nuns, 6,000 churches and meeting places, and 12 seminaries. There are thought to be approximately 40 bishops operating "underground," some of whom are in prison or under house arrest. A Vatican representative estimated that there are 8 to 18 million Catholics in the country. [*Section I. Religious Demography*]

...

Police sometimes closed unregistered places of worship, including Catholic churches and Protestant house churches with significant memberships, properties, financial resources, and networks. The Government closed churches in Zhejiang, Jilin, and Fujian Provinces during the reporting period. In some cases local officials destroyed the properties of unregistered religious groups. SARA considers unregistered churches to be illegal, although SARA has stated that prayer meetings and Bible study groups held among friends and family in private homes are legal and do not require registration. In some areas unregistered house churches with hundreds of members met openly with the knowledge of local authorities. In other areas house church meetings of more than a handful of family members and friends were proscribed. House churches could encounter greater difficulties when their

membership grew, when they arranged for the regular use of facilities for the specific purpose of conducting religious activities, or when they forged links with other unregistered groups or with coreligionists overseas. Urban house churches were generally limited to meetings of a few dozen members or less, while meetings of unregistered Protestants in small cities and rural areas could number in the hundreds. It was also difficult for registered groups to register new places of worship, such as churches and mosques, even in areas with growing religious populations.

[*Restrictions on Religious Freedom*]

...

[The Vatican]

The Government does not have diplomatic relations with the Holy See and generally does not allow the CPA and its clergy to recognize the authority of the pope to make clerical appointments. This remained a significant reason for the persistence of a large unregistered Catholic church that remains unaffiliated with the Government and CPA. Pressure by the CPA on unregistered Catholic bishops to join the official Church continued, and some unregistered priests and bishops were detained. Despite some efforts toward rapprochement between the Government and the Vatican, the Vatican's diplomatic recognition of Taiwan and differences over selection of bishops remained the primary obstacles to improved relations. In January 2007 the Vatican issued an invitation to the Government to enter a dialogue on restoring diplomatic relations and announced that it would set up a permanent commission to handle relations with China. In June 2007 Pope Benedict issued an open letter to Chinese Catholics inviting them to resolve differences and calling on China to engage in "respectful and constructive dialogue" with the Vatican to normalize relations. An MFA spokesperson said that China advocates improvement in Sino-Vatican relations. A leader of the CPA said he hoped the Pope's letter would be of help in establishing China-Vatican ties...

In January 2007 the Vatican approved the ordination of a mainland-selected Catholic priest to become bishop of Guangzhou Diocese, the first such backing given by the Holy See after bilateral ties were strained with the appointments in April and May 2006 of Bishops Ma Yingling of Kunming, Yunnan Province, and Liu Xinhong of Wuhu, Anhui Province, without Vatican approval. The Vatican criticized these ordinations as illicit. The CPA and SARA responded that the bishops had been democratically elected by priests of their dioceses, the Vatican was interfering in the country's internal affairs, and the appointments were required to fill vacancies. The disagreement over the appointments of Bishops Ma and Liu disrupted a period during which several bishops were appointed with both Government and Vatican approval. Many priests and bishops publicly acknowledged that the Vatican had approved their appointment. They suffered no punishment for this public stance, although the Government denied that the Vatican played any role in approving the country's clergy.

In fact, the large majority of bishops recognized by the Patriotic Association have been recognized by the Vatican either before or after their appointment by the Government. In a few cases, the bishop named by the state-sanctioned church conflicted directly with a bishop recognized by the Vatican, a situation that contributed significantly to tension between the Patriotic Association and the unregistered Catholic Church and to tension between the Vatican and the Government. The CPA said that 40 of China's nearly 100 dioceses have no bishop in place. [*Restrictions on Religious Freedom*]

...

The Roman Catholic Church forbids abortions and the use of artificial contraception. Many Protestant leaders also teach that abortion violates the Biblical commandment not to kill. In many parts of the country, government population control agencies require women to use contraception and to have an abortion if the pregnancy violates government population control regulations. In some provinces, government population control agencies may also forcibly sterilize men and women after they have had their first child. Many Chinese Catholics and Protestants consider the Government's birth limitation laws and policies a violation of their religious beliefs. In Guangxi Province a Protestant pastor protested when his wife was forced to have an abortion at 7 months. In Shandong Province a Christian woman who was six months' pregnant protested against the attempts of family planning officials to force her to have an abortion. [*Restrictions on Religious Freedom*] (US Department of State 2007, *International Religious Freedom Report 2007 – China*, 14 September – <http://www.state.gov/g/drl/rls/irf/2007/90133.htm> - Accessed 21 January 2008).

According to an article dated 12 April 2007 on the Forum 18 website:

The most egregious problems that confront the Catholic community in China today involve local officials cracking down on the clerics and lay members of the so-called “underground” Catholic Church. According to the Cardinal Kung Foundation, whose founder, Joseph Kung, is a nephew of former Cardinal Ignatius Pei-Min Kung (who had served 30 years in prison between 1955 and 1985), as of March 2007, five bishops and 14 priests in the underground church were in prison, eight bishops were under house arrest or surveillance, and two others were in hiding. The problem of local officials attacking religious freedom is a long-standing problem, and affects all China's religious communities (see F18News 1 September 2005 http://www.forum18.org/Archive.php?article_id=641) (Hornemann, Magda 2007, ‘CHINA: China's Catholics, the Holy See and religious freedom’, Forum 18 website, 12 April http://www.forum18.org/Archive.php?article_id=942 – Accessed 8 February 2008).

Corruption in China

Corruption has been identified as a major problem throughout China and there are thousands of cases of corruption each year. The US Department of State *Country Reports on Human Rights Practices 2006 – China* states:

Corruption remained an endemic problem. The National Audit Office found that 48 ministerial level departments misused or embezzled approximately \$685 million (RMB 5.51 billion) from the central government's 2005 budget, a 70 percent increase over the amount reported in 2004. Corruption plagued courts, law enforcement agencies, and other government agencies. In March 2000 foreign citizen Jude Shao was sentenced to 16 years' imprisonment for tax evasion after allegedly refusing to pay bribes to local tax auditors. He remained in prison at year's end, despite receiving a one-year reduction in his sentence in September.

The courts and party agencies took disciplinary action against many public and party officials during the year. According to the SPP's March 11 report to the NPC, prosecutors filed and investigated 24,277 cases of embezzlement, bribery, or dereliction of duty; prosecuted 30,205 officials while investigating a total of 41,477 officials in 2005; and transferred 7,279 cases to judicial organs for prosecution. The CCP's CDIC reported that 110,000 officials were disciplined for breaking laws and party discipline in 2005. Inspection committees stripped 11,071 persons of CCP membership, more than twice the number in 2004. In some cases, sanctions

administered by the CDIC reportedly substituted for sanctions by courts and other legal agencies. (Sec.3)
(US Department of State 2007, *Country Reports on Human Rights Practices 2006 – China*, March www.state.gov/g/drl/rls/hrrpt/2006/78771.htm – Accessed 8 March 2007)

The *China Daily* reported in 2004:

More than 20,000 corruption cases were investigated in the first six months of this year, a senior official confirmed at a meeting of chief prosecutors from around China.

Procurator-General of the Supreme People's Procuratorate Jia Chunwang said 24,247 people were being questioned for 21,164 'job-related criminal cases,' about 4 per cent involving more than 1 million yuan (US\$120,000) in bribes. (Cao, Zhe 2004, 'Prosecutor: Big graft cases increase', *China Daily*, 9 August http://www.chinadaily.com.cn/english/doc/2004-08/09/content_363317.htm – Accessed 30 March 2007).

Because of the illegal nature of corruption and the difficulty in its detection, reports on specific cases within given areas are often difficult to find. In addition, the Chinese government, whilst publicly attempting to eradicate corruption, also frequently attempts to silence reports of widespread corruption in China. For example, Human Rights Watch reported,

On September 8, 2001, former Xinhua reporter Gao Xinrong, sentenced to a thirteen-year term in 1998 for exposing corruption associated with an irrigation project in Shanxi province, wrote U.N. High Commissioner for Human Rights Mary Robinson asking that she intercede on his behalf after appeals in China were unsuccessful. Similarly, Jiang Weiping, a Dalian, Liaoning province journalist, who also exposed corruption, was arrested in December 2000 and tried in September 2001 on charges of "leaking state secrets." He received a nine-year sentence.

...

In the Three Gorges dam area, four men, He Kechang, Ran Chongxin, Jiang Qingshan, and Wen Dingchun, were sentenced to two-and three-year terms on charges of disturbing public order. They had attempted to bring local corruption associated with residents' resettlement to the attention of central authorities (Human Rights Watch, 2002, *China Human Rights Update*, Human Rights Watch Press Backgrounder, February Section 'Freedom of Religion and Belief' http://hrw.org/backgrounder/asia/china_update.htm – Accessed 20 February 2007).

A paper by Xia Lollar from the University of Wisconsin comments:

While the Chinese economy is experiencing spectacular growth under Deng Xiaoping's reform program, embezzlement, bribery, extortion, favoritism, nepotism and smuggling have not only increased in frequency, scale and variety, but have also spread into every corner of society. The perversion of government function (using existing office for the purpose of private gain) has become so serious an issue that it begins to threaten social and political stability." According to a recent *China Youth Daily* report, the party secretary of Zhenghe County in Fujian Province had received 72 personal gifts which were worth 503,066 yuan and 2,300 dollars within three years. To repay those individuals for their gifts, the party secretary promoted 42 of them, offered others government contracts and bank loans (Lollar, X., Undated, 'Have the Chinese People Changed Their Social Behavior? Findings from a 1999 Survey', *Asia International Forum*, http://www.siue.edu/EASTASIA/lollar_080400.htm – Accessed 18 December 2007).

[Country Information has been deleted in accordance with S.431 as it may identify the applicant]

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a national of China. It accepts that his true name is the name that he has provided. The applicant submitted a Chinese identification card and translation of it in that name.

The applicant claims to fear persecution in China for the convention based reason of religion and imputed political opinion.

The applicant claims to have been a hard-working and reasonably successful businessman until he came to the adverse attention of the PSB after refusing to give any more goods to plain-clothed policemen. Those policemen had taken approximately 100,000 Yuan worth of goods without paying over a period. The applicant claims that as a result of him taking the stand to refuse further goods he was held for in a local detention centre. Because he did not confess to the crime of “disrupting public affairs” he was detained for months at a labour camp until his family and a friend were able to secure his release. The applicant claims following his release he was despondent because of the action of the corrupt police officers, the loss of his business and the injury he sustained in the labour camp, which he saw as affecting his future livelihood. He claims to have been introduced to an underground Catholic Church where he was “comforted and consoled”. He claims that from this time he became committed Christian who worked to repay the salvation he considered himself to have been given. He claims that the authorities in China are searching for him following his involvement in the delivery of Bibles and other religious material to the leader of a youth group. He claims that he would be arrested and detained if he were to return to China in the future.

The Tribunal found the applicant overall to be a credible witness. The Tribunal accepts that the applicant has given a substantially truthful account of his claims. The evidence that he provided to the Department and throughout an extensive hearing with the Tribunal has been consistent.

There were some aspects of this application which concerned the Tribunal. Most of these were resolved during the hearing or by the applicant’s statutory declaration submitted after the hearing. There remain some lingering concerns which have not been resolved. For example, why the applicant rang his friend rather than re-calling the person to whom the religious material was to be delivered when he could not locate the address.

The Tribunal accepts that the activity engaged in by the applicant in regard to him refusing the supply of goods without payment has resulted in him being perceived as an anti-government activist. The Tribunal accepts that he was detained for a period of time and that he was mistreated during detention. After considering the applicant’s responses during the hearing, the Tribunal accepts that the applicant became a committed Christian as a member of an underground Catholic Church group in China in the circumstances which he described. It accepts that he found solace in his faith and that he continued to practise it since his arrival here. The Tribunal accepts the Church representative’s statement that the applicant has been attending Catholic Mass every Sunday since his arrival in Australia.

The Tribunal accepts that if the applicant were to return to China it is likely that he would already be of interest to the authorities as he has claimed. In any event, the Tribunal accepts

that he would continue his activities with the underground Catholic Church and that he would come to the attention of the authorities in this regard. The independent information available to the Tribunal indicates that the repression of members of unregistered Churches in China continues. The following is taken from the Human Rights Watch website:

[L]ocal officials continue to repress religious activities that they determine to be outside the scope of the state-controlled religious system. Their decisions are often made arbitrarily and in a manner inconsistent with the right to freedom of belief or religion. Chinese officials continue to detain and arrest religious believers, close religious sites, and impose restrictions on the movements, contacts, visits, and correspondence of religious personnel.

“Chinese officials claim the new regulations safeguard religious freedom through the rule of law, but the intentional vagueness of the regulations allows for continued repression of disfavored individuals or groups,” said Brad Adams, Asia director of Human Rights Watch. “There’s nothing accidental about the vagueness – it gives officials the room they need to legitimize closing mosques, raiding religious meetings, ‘reeducating’ religious leaders, and censoring publications.”

Human Rights Watch said the most significant problem with the regulations is that arbitrariness is implanted in the text. The regulations state that “normal” religious activities are allowed, but then fail to define what the term “normal” means, leaving practitioners unclear about what is allowed and what is banned. The regulations also include other undefined key terms, such as “religious extremism,” “disturbing public order,” and “undermining social stability,” each of which only adds to the ambiguities and the potential arbitrariness of the application of the regulations. (Human Rights Watch, *A Year After the New Regulations, Religious Rights Still Restricted*, New York, March 1, 2006; <http://hrw.org/english/docs/2006/03/01/china12740.htm> Accessed 8 February 2008).

The Tribunal also accepts that if the applicant were to return to China now or in the foreseeable future there is a real chance that he would be detained for reasons of his religion. The Tribunal considers that the persecution which the applicant fears clearly involves "serious harm" as required by paragraph 91R (1)(b) of the Act in that it involves a threat to his life or liberty or a significant physical harassment or ill treatment. The Tribunal considers that the applicant’s religion is the essential and significant reason for the persecution which he fears, as required by paragraph 91R (1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, that is his religion.

The independent evidence referred to above indicates that repression of underground Christian groups prevails throughout China. The Tribunal therefore considers 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 the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any other country apart from his country of nationality, China. The Tribunal therefore finds that the applicant is not excluded from Australia’s protection by subsection 36(3) of the Act.

The applicant was able to demonstrate a detailed knowledge of Christianity, and in particular, Catholicism, and the Tribunal accepts that he is genuine in beliefs. The Tribunal notes for the sake of completeness that it is satisfied for the purposes of subsection 91R(3) of the Act that his conduct in attending a Catholic Church in Sydney and participating in Christian activities in Australia has been engaged in otherwise than for the purpose of strengthening his claim to be a refugee.

CONCLUSIONS

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) for a protection visa.

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.