

071652176 [2007] RRTA 298 (22 November 2007)

DECISION RECORD

RRT CASE NUMBER: 071652176

DIAC REFERENCE(S): CLF2007/63175

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: David Dobell

DATE DECISION SIGNED: 22 November 2007

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 China (PRC) arrived in Australia and applied to the Department of Immigration and Citizenship (the Department) 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 by letter. 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) of the Act, 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:

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] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (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's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

The applicant's claims of persecution are set out in his statement attached to his protection visa application and are as follows:

1. I am from the People's Republic of China ("PRC"), and arrived in Australia on [date].

2. On [date], I was born in Fujian Province. [Information regarding the applicant's personal history deleted in accordance with section 431 of the Act.]
3. [Information relating to the applicant's education history deleted in accordance with section 431 of the Act as it can help identify the applicant.]
4. [Information relating to the applicant's employment history deleted in accordance with s.431 of the Act.]
5. On [date], I came to Australia for the first time on a [type of] visa together with [his family]. However, shortly after that, we were informed that an urgent project had been taken by [company A]; and my [family member] had to return to China only 3 days after [their] arrival; and my [family member] and I had to depart the country within one week even though our visas were valid for one month (I departed Australia on [date]).
6. [Information relating to the applicants further education activities in Australia deleted in accordance to s.431 of the Act.]
7. On [date], however, I was unexpectedly arrested by the plainclothes police of Xinjiang National Security Bureau ("NSB") while I was preparing to come to Australia from Shanghai; and from then on, I was illegally imprisoned by the NSB for about one and half years in [city 1].
8. Back to [date], my [family member] urged me to return to China while I was in Australia for the first time. At that time, he obtained a [work project]. Shortly after I returned to China, I took some staffs of [company A] to go to [town A]; and after I arrived there, I recruited some of local labourers as usual. To my surprise, one of local labourers, [Mr 1], was from Fujian Province; and who was able to speak fluent Fuqingnese which was a special dialect in my hometown. Naturally, [Mr 1] became my good friend naturally in a short time.
9. [Mr 1] was a Catholic; and he was a member of Roman Catholic Church. However, Roman Catholic Church has not been recognised by the PRC authorities even today; and Catholics are only been allowed to have their religious practices in the official church called as "Patriotic Church". But, so-called "Patriotic Church" is definitely not a genuine Catholic Church, because it has been under the supervisory of the Communist dictatorship. Therefore, a genuine Catholic in China has never attended the official church. In this situation, genuine Catholics have to take risk of being subjected to persecution by the PRC authorities while they insisted on their religious practices at Roman Catholic Church; and Roman Catholic Church has inevitably become an underground church.
10. [Mr 1] was a victim of persecution. He had previously been regarded as a major activist of Roman Catholic Church in Fujian; and later on, he was arrested by the Public Security Bureau ("PSB"); and then he was imprisoned in a labour camp in [city 1] for [many] years. He was released around the middle of [year], but decided to remain in Xinjiang.

11. While I met [Mr 1] in [town A], he actually continued his religious practice under the Roman Catholic Church in that area. In order to avoid attention of the PRC authorities, [Mr 1] disguised himself as a labourer and mixed together with many of drifting people in Xinjiang; and secretly spread Gospel to the local area.

12. I was deeply moved by [Mr 1] persisting in the belief of Roman Catholicism. During the period from [date], [Mr 1] and I stayed together every day and night at the [place of business]. He made me understand a lot even if he had never gone to the university; and particularly he brought me into the bosom of my Lord.

13. In [date], I persuaded my [family member] to appoint [Mr 1] as [a member of staff at company A]; and he worked as my assistant on the surface, but actually, he led me to spread Gospel in Xinjiang Area.

14. During the period from [date to date], [Mr 1] and I spent most of time in [town B]. It was very cold season in Xinjiang, and we could not undertake any [work] during that period. Mostly, we [were involved in sales]. So, both [Mr 1] and I took this opportunity to spread Gospel in [town B], and especially, we organised religious training classes, which we called as "Catechumen class". The Catechumen class was normally taken 3 or 4 weeks, and had 10 or 20 new believers. [Mr 1] arranged some fathers or priests or sisters including those who secretly entered China from the overseas, to give new believers' training. I was in charge of finding a safety place for the Catechumen class, and organised people to attend the training smoothly. Sometimes, priests and sisters asked me to send them to other underground Catholic groups as well. [Mr 1] and I had successfully organised 3 Catechumen classes.

15. As I have mentioned above, I started applying for admission to [university] as an international student for a Master course from early in [year], which was initially required by my [family member]. [Mr 1] also strongly encouraged me to do so after he knew it; and he said that it was a valuable chance for me to approach genuine Catholicism in the overseas. Moreover, he really expected that I could provide him more Catholic information and materials from the overseas if I were to study in Australia.

16. In [date], I was sent by [company A] take [project] in [town C], and [Mr 1] also went there together with me. On one hand, both of us organised some [workmen] to undertake the project; and on the other hand, we took this opportunity to spread Gospel in [town C] area. Particularly, during [date], both [Mr 1] and I used 7-day public holiday to organise another Catechumen class. During that class, [Mr 1] had arranged 1 priest and 1 sister, who were from the overseas, to give religious training to 15 new believers.

17. I, however, had to leave [town C] shortly after the training class even though the project was still in processing, because I got my [type of] visa to Australia. I asked [Mr 1] to look after the project for me in [town C]; and then returned to [town B] in order to make some preparation for go to the overseas.

18. On [date], I met [Mr 1] for the last time while I returned to the [project] in [town C] to say goodbye to him. He encouraged me to study hard in the overseas, and to actively participate in religious activities in Australian Catholic Church. He wanted

me to learn more and more about from the overseas churches; and expected me to provide him more and more information and materials from the overseas to China.

19. On [date], I arrived in Shanghai; and I intended to leave Shanghai for Sydney on [date]. Unexpectedly, about 6:00 am in the morning of [date], 6 plainclothes police of the NSB broke into my room in a small hotel in Shanghai. They said that I had been suspected to get involved in the movement of "overthrowing the Communist government". They did not show me any documents issued from the court or from the public procurators; and did not give me any chances to explain. They put me into a minibus, and took me to Hongqiao airport in Shanghai directly. After we arrived in the airport of [town B], we were picked up by 3 jeeps; and then those jeeps went to [city 1] straight away. In the end, I was detained in an unknown place in [city 1].

20. At that time, I really did not know what had happened to me exactly; and I thought that I might have been kidnapped by someone who were actually not from the NSB but who might be from "Mafia" in order to get some money. However, while I was interrogated by them in a dark room with only one light, I realised that they were from the NSB. They showed me the photo of [Mr 1], and told me that [Mr 1] had already been arrested by the NSB, because he had been suspected to "collude with" overseas "anti-Communist religious organisations" to organise "illegal" activities with the aim of overthrowing Communist government. The NSB wanted me to give detailed information about how I had gotten to know [Mr 1] and what I had done with him and who we had contacted with; and especially, the NSB wanted me to tell them how [Mr 1] had contacted with the overseas religious organisations.

21. Firstly, I never think that both [Mr 1] and I have done anything to "overthrow the Communist government"; and secondly, I have already become a devote Catholic and cannot betray my Lord and I cannot betray [Mr 1] as well as many of other genuine Catholics. Therefore, I firmly refused to provide any information to the NSB; instead, I told them that what they had done to me was definitely illegal; and I would sue them if I had a chance. My attitude made those polices at the NSB very upset. They mistreated me, tortured me and put me into a dirty and dark room without any windows for one month. However, I refused to co-operate with them from the beginning to the end. Finally, I was sent to a quarry in [city 1] with the excuse that my brain should be well brushed through labour.

22. From [date] to [date], I was punished at that quarry in [city 1] for nearly one and half years. During that period, I was physically and mentally mistreated, and I had to work more than 10 hours every day. Also, I was not allowed to contact with my families.

23. Since my sudden missing on [date], my whole families, including my [family members] and my [family members], were deeply shocked. They tried every means to look for me. They put the advertisements on the newspapers or internet or some public places in the street, but they received nothing about me. They also reported my missing to the Public Security Bureau ("PSB"), urging the PSB to have a thorough investigation about it. However, the PSB refused to offer my families any helps. My whole families have been tortured by the diaster for one and half years, and all of them were nearly mad!

24. I thought that I might not have any chance to leave that quarry any more in my life, because I felt that I had already been forgotten by the NSB. I was told by one of labourers at that quarry that almost all of the people at the quarry had been wrongly taken or wrongly treated by the NSB, and some of them had already spent more than 10 years. They have completely been forgotten by the world.

25. However, I believed in my Lord, and believe that I would be saved by my Lord eventually. Therefore, I never ever stopped praying in the night; and I never ever gave up my hope in my life.

26. On [date], I occasionally saved a security guard at the quarry in an unexpected accident; and it was Christmas, and I thought that everything was actually arranged by the Lord. That security guard was deeply moved while I took risk of my life to save him; and he decided to help me. I did not know exactly what he had done for me, but with his help, I was allowed to return to [town B] on [date]. However, I had to comply with three conditions: 1) I had to promise in writing never ever to expose what had happened to me during one and half years period; and 2) I had to promise in writing never ever to get involved in Roman Catholic Church; and 3) I had to report to the NSB as long as I got any information in relation to illegal activities of Roman Catholic Church.

27. I got everything back from that security guard. Unexpectedly, I found that my passport had also been included in those things which had previously confiscated by the NSB. I could not explain why the passport had not been taken away or cancelled by the NSB, but I believe that it must be arranged by my Lord. So, I have a chance to leave the country in order to escape further persecution by the NSB; and my families, who were so excited while who had found me eventually, tried every means to send me to the overseas as soon as possible.

28. However, in the meantime, I found myself that I had to start serving my Lord again, because I was in fact saved by my Lord. Then, I secretly contacted the priests and sisters and I was asked to help to organise Ash mass and prepared for Lent. On Ash [date], I took a sister to attend the Ash mass in [town B]. After that, I was arranged by the underground church to go to Fujian in order to contact some members there. I spent a short time in Fujian. On [date], I was informed by my [family members], who were in Xinjiang at that time, that some police from the NSB came to my [family members'] home, asking where I had been; and in order to turn the police to a wrong direction, my parents told them that I had been on a business trip in Gansu Province. Thanks Lord, I had already been granted a [type of] visa to Australia. So, I departed China to Australia on [date] immediately.

29. I have been subjected to persecution by the PRC authorities only owing to my religious belief and practice under Roman Catholic Church. Especially, I have been the victim of NSB, which is the cruellest national security authority in China. I really cannot forget what I have experienced in that terrible quarry, which is a hell in the modern society; and at that quarry, I have been mistreated, tortured and persecuted.

30. I believe that I have saved by my Lord, and I will and must devote everything of my life to my Lord, and I will and must spread the Gospel to people as more as possible.

31. In Australia, I have actively participated in religious practices in Australian Catholic Church.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from Father 1 and Father 2. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by his registered migration agent, but she did not attend the hearing.

The applicant told the Tribunal that the representative read back to him his application and attached statutory declaration in Mandarin. He confirmed that the information contained in those documents was true and correct and that he did not have any changes to make. In relation to his current address, the applicant told the Tribunal that he moved to another suburb recently.

The Tribunal asked the applicant when he first consulted his migration agent. He said that he went looking for an agent earlier this year. He wanted to see the agent straight away but they were not available at that time and he ended up seeing them around a week later.

The Tribunal asked the applicant why he feared persecution if he should return to China. He said he would be persecuted by the PSB because of his religious beliefs. He did not believe he would be safe anywhere in China and the reason he would be persecuted was because he was a member of the underground Roman Catholic Church. The Communist party does not approve of the underground church as they believe that the Pope is interfering in China's domestic affairs.

As to whether the police are looking for him at this present time, the applicant said he believed they were. He said that he has been regularly ringing his family members since he arrived here in Australia and that he last rang on last Sunday. They said that the PSB had been to their home on the Friday before and had told his family members not to say anything inappropriate and to tell him not to say anything inappropriate here. He said that they knew everything about what has been occurring overseas with him.

The Tribunal asked whether it was only on the basis of his religious beliefs that he was making his claim for refugee status. He said that he and his family have been accused of the crime of supporting independence in Xinjiang Province. He said that Xinjiang was a multi-ethnic province and that they thought he was supporting independence because he had been in contact with a Country A priest. He said he was tortured in regards this contact. He said his actions in China were purely for religious reasons, not political. He confirmed that this contact was raised with him when he was in detention.

The Tribunal asked the applicant about his family and his work in China. He confirmed that his family members are still living in China and that his other relation lives in Australia. He also confirmed that he was born in Fujian Province and moved to Xinjiang after finishing studies in year. He said his family members moved to town B in the mid 1980's and he lived in Fujian Province with his family member for schooling purposes.

The Tribunal then asked the applicant about his religious activities in China. The Tribunal asked about Mr 1. He said that Mr 1 was recruited for his family members business in date and from then on they had worked closely together. He confirmed that he arranged for Mr 1 to be formally employed by his family members company in date. He confirmed that he and Mr 1 would talk about religion very often and would share their outlook on life and their past experiences.

The applicant said that he was baptised in date by two priests; one was a country A priest and the other was Father 3 from Fijian Province.

The applicant confirmed that his responsibility was to organise the venue and security and materials for three of their preaching sessions. He said that he was baptised at the first session and that he did preach in the second and third sessions he organised. He said that the venue for the first preaching sessions was in an old house belonging to him. He said that other people would organise preaching sessions as well. He said they did not have preaching sessions all the time. They were concentrated in a certain month of the year and around the time of the Chinese New Year and in May in town C. He said that people have more time to study religion in winter. He confirmed that there was no church building as such.

The Tribunal asked more about the preaching classes. He said that they had 'question and answer' sessions on the important precepts of the church and would share their understanding of God. They would also talk about their feelings after they became believers. After the classes, priests would come to baptise people. He said that the priests would only come at the end so were not always at the preaching classes. He said that he, Mr 1 and the priest (or monk) were always present. As to who attended these preaching classes, he said that the leaders would only attend. They had to be careful, so they would pick who would attend from those people they could trust. They had to be people willing to be baptised.

The Tribunal asked the applicant whether he had had any exposure to religion before talking to Mr 1. He said that before that time he was an atheist. The Tribunal asked whether he had ever attended a registered Catholic Church service. He said he would not do this as they do not recognize the Pope. The Tribunal asked whether he had seen or heard from Mr 1 since. He said he last saw him on date.

The Tribunal expressed surprise that the applicant would be running 'question and answer' sessions on the precepts of the Catholic religion given his little experience and knowledge of Catholicism. The applicant said that in his work he had seen the dark side of officials and corruption and had seen how workers had worked and had not been paid and that only those with power would get work. He said he was lost and confused and believed in atheism and that after death there was nothing. He said there was a great change in him after he accepted his religion. He said that he was with Mr 1 'day and night' and learned a lot from him and that he could share his knowledge and love of God as a witness.

The Tribunal then asked the applicant about his arrest and detention in year. The Tribunal asked him how the police knew that he was in Shanghai about to leave Australia. He said he did not know how they knew this but that he had booked into the Hotel with a card and then had paid with his credit card. He thought he must have

been under surveillance for some time. He said he had arrived in Shanghai by plane from town B. He said he was arrested by six police and that four escorted him back by plane to town B. He believed they were from the State Security Bureau. As to what the charge was, he said three things - he was participating in an illegal church, he supported the Pope and also independence for Xinjiang.

The applicant said that there was no arrest warrant and that he was not taken to court. He said there was no paperwork as to his detention. He said he was kept by the police from date to date and after that he was sent to a 'rehabilitation through labour' camp which was a quarry.

The Tribunal asked further about his detention. He said that he was kept for over one month in a dark room alone. He said he was forced to sit on a chair and not allowed to touch the floor with his feet. This was so they could hit him and he would fall off the chair. He said they also put a motorcycle helmet on his head and hit it with a stick. He said he fainted a number of times and that they would also throw cold water on him to wake him up. He said that initially, this torture occurred several times a day, but gradually grew less frequent. He said he would not betray his church and they said he was stubborn and that they would send him to a camp and this would change his thinking.

The Tribunal asked about the incident where he saved a guard's life. He said that in the camp, most of the guards would hit them but there was one guard who did not do this. His name was Mr 2. He said that in date, a car had skidded and Mr 2 had been saved by him. On date, Mr 2 said he would help the applicant and the leader Mr 3 sent for him. He said that the applicant had been successful in reforming his thinking and had good results in three classes. The applicant said he looked at Mr 2 as he found it odd as he had not attended *any* classes. Mr 2 nodded and gestured. He said that he was released on the grounds that he signed his agreement to three conditions, as noted in his protection visa application statement.

The Tribunal asked about the second condition: that he not participate in the Roman Catholic Church any more. He agreed that he signed this and said that he was very scared and fearful of life in the camp and wanted to get out. He agreed that he joined his church again after he left the camp. He said that in the camp he was tormented but he gave himself to Christ.

As to how he got his passport back, the applicant said that he was given a bag back when he left the camp and his passport was in this where he had left it. He said this was the work of God. The Tribunal said that if it was not the work of God then it was an unusual and even perhaps unlikely event. He said that these were the facts and that he had sworn to tell the truth before the Tribunal and before God.

The applicant confirmed that he was released from the camp on date. His other relative who had come over from Australia, applied for an Australian visa for him and his family. Initially, the whole family was going to leave China to relax and were going to come on a visit to Australia. They were going to come here for Easter.

The applicant said he collected his visa from the Australian Embassy on a Monday. The Tribunal said the visa was granted on date and asked why he did not leave China

as soon as he got the visa if he was at risk of persecution. He said that he had tasks to do for the underground church. He had to help with the Ash Wednesday arrangements and also go to Fujian to contact a priest to come to Xinjiang to preach. After he had done this, the whole family were to come to Australia as visitors. He said that he was in Fujian Province when he heard from his family members that the police had been to their house. They had searched his room and asked where he was. His family members had said he was elsewhere on business. When he heard this, he asked his other relative to arrange the first flight to Australia for him. This was the next day in the evening. He flew from Fujian Province to Shanghai and because of the speed with which he had to leave China, his family members did not come even though they had a visa.

The Tribunal asked how he managed to leave China if the authorities were looking for him. He said that he knew that as an ex-prisoner he would be discriminated against but had not thought much about this until he heard the police were looking for him. He knew that if he was on a 'wanted list' he would not be able to leave China and that was why he left in such a hurry. He said he did not know how the lists work and that maybe the police did not pay attention and that his family members had lied about his whereabouts and he thanked God.

As to his church attendance in Australia, the applicant said that he attended church in suburb B with Father 2 on Sundays at 11:30 a.m. for mass and on Friday evenings for Bible reading. He said he attended church at suburb C with Father 1 on Saturday evenings at 6 p.m. He confirmed that he started at both of these churches within a week of arriving in Australia.

The Tribunal then talked to Father 2. He said that he had been away when the applicant had first attended his church and had returned in date to find him part of the congregation. He confirmed that the applicant attended church every Sunday and Bible studies on Fridays. He said that the applicant was committed to the church and had the body language of a committed Catholic. He could not comment on the applicant's knowledge of Catholicism as he had not had any conversations with him on this. He said he had read the applicant's Statutory Declaration and found it to be a credible course of events. He stated that the applicant's relative also attended his church. He spoke with some knowledge on the tensions between China and the Vatican.

The Tribunal then spoke to Father 1. He confirmed that the applicant had first attended his church around seven or eight months ago. As to how he knew this, he said there was not a vast number at his church and that the applicant's relative had introduced him when he first arrived. He confirmed that the applicant attends church every week and is devout in his practice as a communicant and participates in the full sacramental life of the Church. He said he was influenced to believe the applicant's claims by the applicant's relative and their commitment to Catholicism and as someone who had attended his church for many years. He said they had asked him to attend the Tribunal on the applicant's behalf.

Father 1 said that he had had conversations with the applicant through the applicant's relative but that he was not in a position to give an opinion on the applicant's knowledge of Catholicism.

Father 1 also recalled that the applicant's relative had told him at the time that the applicant was expected in Australia in year but did not arrive and that the family had suspected foul play and had contacted the police in Shanghai. He said the next thing he knew was that the applicant's relative was telling him in 2007 that the applicant was arriving in Australia. He also talked knowledgeably about the tensions between the Vatican and China.

The Tribunal asked Father 1 whether he had read the applicant's Statutory Declaration. He said he had. He gave the Tribunal a letter in which he had stated that that he was convinced that the applicant was a member of the underground church in China and that he had no reason to believe that he is anything other than a very sincere and committed man.

As neither Father 2 or Father 1 could comment on the applicant's knowledge of Catholicism, the Tribunal tested the applicant by asking what was the original Sin. He said this arose with Adam and Eve and that they ate the Apple which was the forbidden fruit. As to what Jesus' role was in regards the original Sin, the applicant said that he led us, as the sacrificial lamb, to rid us of our sins. He said that prior to Jesus, nobody could go to heaven and that in the past, souls could only stay in one place and could not get to heaven.

INDEPENDENT COUNTRY INFORMATION

The *United States Department of State Country Reports on Human Rights Practices for 2005*, which was released on 8 March 2006 included the following relevant information about religious freedom:

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

...government's respect for religious freedom remained poor, although the extent of religious freedom continued to vary widely within the country. Freedom to participate in officially sanctioned religious activity continued to increase in most areas. Religious activity grew not only among the five main religions, but also among Korean Christians, Russian Orthodox, and folk religions. Bibles and other religious texts were available in most parts of the country. At the same time, crackdowns against unregistered Protestants and Catholics, Muslim Uighurs, and Tibetan Buddhists continued. The government continued its repression of groups that it determined to be "cults" and of the Falun Gong movement in particular.

...religious venues were required to register with the State Administration for Religious Affairs (SARA) or its provincial or local offices (known as Religious

Affairs Bureaus (RABs). SARA and the RABs were responsible for monitoring and judging whether religious activity was "normal" and therefore lawful. SARA and the CCP's united front work department provided policy guidance and supervision over implementation of government regulations on religious activity.

March 1, new regulations governing religious affairs came into effect. Officials said the regulations were an attempt to bring regulatory practices governing religious affairs within a legal framework. Unlike previous regulations, the new regulations protect the rights of registered religious groups, under certain conditions, to possess property, publish literature, train and approve clergy, and collect donations. Analysts and some government officials said the new regulations would create greater space for lawful religious activity by groups not affiliated with the five main religions. However, critics stated the new regulations merely codify past practices and give authorities broad discretion to define which religious activities are permissible.

...government permitted legal emigration and foreign travel for most citizens. Most citizens could obtain passports, although those whom the government deemed threats, including religious leaders, political dissidents, and some ethnic minority members continued to have difficulty obtaining passports

The report also included the following relevant information about the situation in the Peoples Republic of China, and in particular, in Xinjiang Uighur Autonomous Region:

...reports stated that authorities confiscated illegal religious publications in Xinjiang. The Xinjiang People's Publication House was the only publisher allowed to print Muslim literature.

...government began moving away from the two track school systems that used either standard Chinese or the local minority language towards a new system that will require schools to teach both standard Chinese and local minority languages or to teach standard Chinese only. Graduates of minority language schools generally needed intensive Chinese study before they could handle course work at a Chinese language university. The dominant position of standard Chinese in government, commerce and academia put graduates of minority language schools at a disadvantage.

...celebrations marking the 50th anniversary of the founding of the Xinjiang Autonomous Region, authorities emphasised the need to 'strike hard' against these three evils [of religious extremism, splittism, and terrorism] and made numerous arrests, according to state-run media.... Uigurs were sentenced to long prison terms and many were executed on charges of separatism.

...a previous 'strike hard' campaign, which officially concluded in 2003, authorities stated that they prosecuted more than three thousand cases in Xinjiang ...broke up 22 groups engaged in what it claimed were separatist and terrorist activities and meted out 50 death sentences to those charged with separatist acts.

of publications or audiovisual materials discussing independence or other sensitive subjects was not permitted. According to reports, possession of such materials resulted in lengthy prison sentences.

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a national of the Peoples Republic of China. This is based on the Chinese passport on the Department's file which is the same name as that used in the protection visa application of the applicant.

The applicant claims to fear serious harm from the Chinese authorities should he return to China. This arises from his claimed underground Roman Catholic religious practice in China. He states he was arrested, detained and tortured in the past and will be in the future.

Independent country information supports the view that those who practice in underground, non State recognized, Catholic churches in China may be at risk of persecution for their religious beliefs. Further, the Tribunal accepts that the degree of tension in the Xinjiang Province because of separatist pressures is such that any person with beliefs contrary to the Chinese State may find themselves also accused of 'splittism' and supporting separatists, thus heightening the risk of persecution.

The Tribunal was of the view that if the applicant was found to be a credible witness it would accept the claims relating to his religious practice, and further, in light of the independent country information, accept that the subsequent persecution claimed by him by the Chinese authorities was truthful and that this would amount to persecution under the Refugee Convention.

The Tribunal found the applicant's evidence on the whole to be coherent, consistent and detailed. The Tribunal accepted his evidence as to how he became an underground Catholic, the work he did as a Catholic in Xinjiang, how he was detained in Shanghai and returned to Xinjiang province by the police, that he was sent to a labour camp in a quarry there, that he was freed after he saved the life of a guard, that he was accidentally returned his passport, that he did some further work for his church, came to the attention of the authorities again and had to suddenly flee China for Australia. The Tribunal also accepts that he has been a practising Catholic while in Australia.

The Tribunal did have some doubts about the applicant's evidence as to how he was freed from the labour camp and accidentally returned his passport. The Tribunal found it difficult to accept that he would be freed for saving a guard's life and surprising that his Chinese passport should have been left untouched in his bag from the time of his arrest to the time of his release from the labour camp. The Tribunal raised the latter with the applicant and he claimed that this 'was the work of God'. While the Tribunal does not necessarily accept this explanation, it does accept that while unlikely, what happened was not impossible. Taking into account that the Tribunal found his evidence credible generally, it is prepared to put its doubts to one side and accept that these events did occur as the applicant described.

There is also other evidence which supports the conclusion that the applicant is telling the truth about his claims of persecution.

The Tribunal accepts that the applicant had also been to Australia previously. The Tribunal considers that if he was just looking for an opportunity to apply for a protection visa, he could have done so then. The Tribunal also accepts that the applicant was granted a further visa for Australia in year but did not use that visa. Again, this would have been another opportunity for a person to apply for a protection visa. These two findings lend support to the credibility of the applicant's claims.

The Tribunal also found the evidence of Fathers 1 and 2 to be supportive of the applicant's claim. While neither could give their impressions of the applicant's knowledge of Catholicism, the Tribunal did ask the applicant a religious question and he gave a detailed response without hesitation, satisfying the Tribunal. Further, Father 2 said the applicant had the 'body language' of a committed Catholic. The Tribunal considers that this is something that the applicant would have had to learn over some time and accepts that he would have started to learn this before he came to Australia. This is consistent with a finding that he was a practising Catholic in China.

Father 1 also gave evidence about his prior knowledge of the applicant that the Tribunal found particularly convincing. He said he was told in year that the applicant was going to come to Australia but that he suddenly disappeared and the family thought he had come to grief in Shanghai. He said the next thing he knew the applicant was coming to Australia in year. This evidence is consistent with the applicant's evidence that he was about to come to Australia to study when he was arrested in Shanghai and returned to Xinjiang. The Tribunal considers that it is unlikely that the applicant's relative would create such a story in year, just to assist the applicant's claim for a protection visa at the present time.

As to whether the applicant could live elsewhere in China and not be subject to persecution, in the Tribunal's view, the risk of serious harm to the applicant extends to the entire country of China, because the Chinese Government has highly centralised elements and the security authorities have a national structure, although with considerable local autonomy. The applicant would be readily identifiable by authorities on return and in the Tribunal's view would probably be of interest to authorities, no matter where in the country he attempted to reside.

There is no material which indicates that the applicant has any right of residence in any third country, being only a citizen of China and currently physically in Australia.

Thus, the applicant's fear of persecution as a member of the underground Roman Catholic Church is well-founded should he return to China, based on his past actions and experiences as a Catholic while in Xinjiang and his actions and experiences here in Australia as a practising Catholic, both now and in the foreseeable future.

Having considered all the applicant's claims, the Tribunal concludes that the applicant does have a well-founded fear of being persecuted for a Convention reason should he return to China, both now and in the foreseeable future.

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.