

**1202241 [2012] RRTA 605 (12 July 2012)**

**DECISION RECORD**

<b>RRT CASE NUMBER:</b>	1202241
<b>DIAC REFERENCE(S):</b>	CLF2011/195995
<b>COUNTRY OF REFERENCE:</b>	China (PRC)
<b>TRIBUNAL MEMBER:</b>	Kirsten Young
<b>DATE:</b>	12 July 2012
<b>PLACE OF DECISION:</b>	Melbourne
<b>DECISION:</b>	The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC) applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2011.
3. The delegate refused to grant the visa [in] February 2012, and the applicant applied to the Tribunal for review of that decision.

### RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

#### Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.
6. 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.
7. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZF DV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. 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.

### **Complementary protection criterion**

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **CLAIMS AND EVIDENCE**

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

### **Protection Visa Application**

#### *Application Form*

20. According to the information provided in his application for a protection visa, the applicant is a Chinese national born in Urumqi, Xinjiang, China, in [date deleted: s.431(2)]. He claims to be an adherent of Falun Dafa. He had 19 years of education in China. He resided at a single address in Urumqi Xinjiang from [year deleted: s.431(2)] – 2006. He claimed to have been in a de facto relationship that began in 2009 in Hobart.
21. The applicant departed China legally, using a passport issued in his own name. He entered Australia on a student visa [in] November 2006. He returned to China in 2007 to see his parents.
22. In response to questions relating to his reasons for claiming to be a refugee, the applicant refers to his written statement.

#### *Written statement*

23. In a written statement attached to his application for a protection visa, the applicant provided the following additional details.

- He saw lots of unfair treatment against the Uighur during his childhood in China. Since childhood he was interested in unknown things like the great universe, birth, death, but his parents were in the army and did not talk about such things because religion was banned by the Chinese Communist Party (CCP).
- After arriving in Hobart in 2006 to study he met another student called [Mr A], with whom he discussed religions and Buddhist scriptures. Based on these discussions, he became interested in Falun Dafa.
- [Mr A] became a Christian and wanted him to join him. He went to church a few times but his English was not good and he could not understand, so he gave up.
- In 2009, [Mr A] became a Falun Dafa practitioner and gave the applicant a copy of Zhuan Falun, the Falun Dafa bible.
- In 2009, [Mr A] suggested he apply for a protection visa so he could stay in Australia and so they could spread Falun Dafa together. However, the applicant decided not to apply for a protection visa because he had just begun to cultivate Falun Dafa and was not a good practitioner at the time. He decided instead to apply for a dependent visa with his fiancé and continue to cultivate Falun Dafa with [Mr A].
- After one year of cultivation he felt totally different ‘on my body and spirit’ and felt lots of mysterious phenomena when practising.
- In China, Falun Dafa is banned because the Chinese Communist Party consider it an evil cult. Falun Dafa practitioners are persecuted in China.
- If he remains in Australia, he can do something more about Falun Dafa and help people to know the truth about the Chinese Communist Party. People in Australia can practise their religion without persecution. He wants to stay because of this religious freedom.

#### *Other evidence*

- Bundle of photographs of: applicant and two other practitioners performing Falun Gong exercise behind banner saying “Falun Dafa”, applicant handing out Falun Gong pamphlets in busy city street; applicant distributing pamphlets in residential mailboxes.
- Two pamphlets: one for Shen Yuan performance; the other regarding mistreatment of Falun Gong practitioners in China.

#### *Departmental Interview*

24. The applicant was interviewed by a delegate of the Minister [in] February 2012 . The Tribunal has listened to the audio recording of the interview. In the interview the applicant elaborated on his written claims and gave evidence that was materially consistent with evidence he presented at the Tribunal hearing and the documentary material contained in the Department’s file.

#### **Application for Review**

25. [In] May 2012, the Tribunal received a letter from the applicant enclosing the following additional materials in support of his protection visa application.

(i) Statement signed by [Mr A] which stated as follows:

...

I have already known [the applicant] for 5 years and we first met in late 2006. [The applicant] came to Tasmania as a student and we lived in one house so we met each other. In 2006, I was a student too and have not started to cultivate Falun Dafa yet, but that time I'm already a Christian. So I start introducing Christianity to [the applicant], he is interested in religion but never fully become a Christian, but we still talk a lot about religion, history and politics. In 2009, I formally became a Falun Dafa practitioner and introduced Falun Dafa to [the applicant] in late 2009. I gave [the applicant] a "Zhuan Falun" to read, he found me after he finished reading and he said he want to cultivate Falun Dafa. In the beginning, he is not like a Falun Dafa practitioner at all, but after I told him a lot about Falun Dafa and cultivation he start to change and more like a Falun Dafa practitioner. We talk about cultivation and Falun Dafa, and we never get tired of these topics. [The applicant] is making progress in Falun Dafa cultivating. In 2010, [the applicant] was graduated from [institution] and changed his visa as a dependent visa with his girlfriend. In 2011, I moved to Melbourne and [the applicant] was still in Tasmania, a few months later, [the applicant] called me and said he was broken up with his girlfriend, he said that with his cultivation, he have more and more differences with his girlfriend, his girlfriend was thinking about money all the time and [the applicant] was cultivating and pay attention to spiritual ascension, he no longer interested in money. Finally, [the applicant]'s girlfriend was gone with another guy. [The applicant] was sad but finally decided to apply for an Australian protection visa.

A few days ago, [the applicant] called me and he said there is a hearing about his protection visa application, he asked me to come and be his witness and I accepted. Now I'd like to say something about [the applicant] and his Falun Dafa cultivation. [The applicant] was a good person when we first met but not good enough to be a practitioner. After I introduced Falun Dafa to him, he gradually dropped his old point of view and concept about our world, life and so on. [The applicant] can follow the principle of "Truthfulness, Compassion, Tolerance" in his daily life. Every time when we talk, I can feel [the applicant] is making progress all the time. [The applicant] told me when his girlfriend left him, he neither quarrel nor fight with her, he did not ask anything from her.

Based on all above, although [the applicant] is a junior among lots of Falun Dafa practitioners, but he is really trying hard all the time to be a good practitioner, and he is making progress fast especially after he broken up with his girlfriend, I think that is because he no longer has that barrier which is his girlfriend on his road of Falun Dafa cultivation. In conclusion, I'm sure [the applicant] is a genuine Falun Dafa practitioner".

(ii) Bundle of photographs taken [in] May showing the applicant and five other practitioners in a park doing Falun Gong exercises behind a table with a Faun Dafa sign/posters, celebrating World Falun Dafa Day.

### *The Hearing*

26. The applicant appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's witness, [Mr A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
27. The applicant confirmed that he completed his protection visa application himself, and did not wish to make any changes to it. He stated that he lived in Urumqi, Xinjiang in China and received 12 years education in China. His father and mother and all of his relatives were still residing in China. His father was a military officer, and when he was younger was involved in military intelligence. Later his father withdrew from the military and was working as a political advisor for a military department. His mother was the chief of nursing of a military hospital in Urumqi. The applicant stated that he was in regular weekly contact with his parents.

28. The applicant confirmed that he was a practitioner of Falun Gong (FG) and that he feared persecution because of his religion. He stated that he practised Falun Gong because it was recommended to him by his friend, [Mr A]. At first his friend had tried to advise him to join the Christian church but he was not interested in it, but later on the same friend introduced him to Falun Gong. He had been very interested in Chinese traditional religions such as Buddhism and Taoism since childhood so he was easily interested in Falun Gong.
29. The applicant said that his friend [Mr A] gave him the spiritual text of Falun Gong, the law of wheels, and at first he told him to look at that. The applicant found this very attractive and started to devote himself to it. He found everything in the spiritual text to be true, and that it could also help to cure illness. He said that he used to have migraines and they had gone since practising Falun Gong.
30. The applicant said that Falun Gong was not only a religion cultivating the physical but it also cultivated spiritual improvement. In China, there were people who were not good who had low ethical standards. Since he started practising Falun Gong he had discovered the virtues in daily life that helped him to be a better man. The basics of Falun Gong were truthfulness, compassion, and forbearance, and teach us to live an honest life and to do real good to others and be nice to them. If there were any conflicts we should use forbearance to deal with the issues. If there was competition we should use forbearance instead of fighting. In the modern world, people were too materialistic and their status was their main priority in life. But Master Li taught that fame, money and interest only for yourself must be abandoned and we should be more considerate for others and think of them when dealing with issues.
31. Asked how he applied the tenets of truth, compassion and forbearance in his daily life, the applicant said that before he practised Falun Gong he would lie in order to protect his interest, without considering others. Since he started practising Falun Gong, as the basics were truthfulness and that he should not be aggressive in fighting for his own interest, he would not do things only to benefit himself and which might hurt others. The Falun Gong path stated that if one did this there would be lots of difficulties ahead but not to do so would gradually make you a better human being. Master Li teaches that to live is not about things, money and self-interest. As human beings we come from another space and the current state here is only the pathway to return to our destination, and we should not be tempted by money and fame and other issues and we should abandon those unvirtuous things.
32. Asked how his life had changed from practising Falun Gong, the applicant said that a lot of changes had taken place in his life from practising Falun Gong. The biggest change was that he used to smoke and drink and now he had quit both. He also said that when he was dealing with people in the past he used to put his own interests as the priority and that this caused damage to others, but since he started his Falun Gong practise he put others as the priority and would be more considerate. He used to have many things going around in his head but as he went on with his practise he found that less things troubled him, and his thoughts had been purified, and his interest in status and money were being eliminated from practising Falun Gong. When he was growing up, his father and mother taught him that he had to go into business and make lots of money when he grew up. But Master Li had taught him that he should give up these notions, so he had, and now he was focussed on just living life.
33. The applicant said that he started practising Falun Gong at the end of 2009, some three years after his arrival in Australia. He became interested in Falun Gong through his friend, [Mr A]. He confirmed that he was a non-believer when he arrived in Australia. Asked how his interest evolved in Falun Gong, he said that when he was in China he was already curious about

religions and when he travelled as a young man he would visit the local Tao or Buddhist temples. But his family were members of the Communist Party and the military so there was not an environment for cultivation of any religious interest on his part. Now that he was overseas the opportunity to cultivate this interest had arisen. His friend [Mr A] was a close friend, and they sometimes talked about religious knowledge and history and teachings and through these interactions he gradually built up his interest to make the shift to becoming religious himself.

34. He said that the key for practising Falun Gong was to practise xinxing, which was inner intelligence. In our daily life this means to be a good person and be nice to people around you and to have a good attitude towards life and against materialism. This was the main cultivation of Falun Gong. He said that he also read the spiritual text, the law of the wheel, once a day. He did the physical practice once a week, but this was not the key part of practising Falun Gong. He said that he practised at his home.
35. Asked about the Falun Gong exercises, he said that there were five sets of exercises, and he named them correctly. Asked to explain their importance, he said that our body would raise energies in ourselves and that we have to absorb these energies through gong and practising and exercise, otherwise these energies might be a barrier for us to improve spiritually. Even though the Master said that the exercises were not the most important part of Falun Gong practice, they were still important. Falun Gong combined physical cultivation and inner peace or spiritual cultivation, to convert the energies into a higher substance within ourselves. As a result, Falun Gong practitioners should also look much younger than their age. Buddhism did not have specified exercises, but Taoism did. To practitioners, if they did not practise they would not have enough energy to move up to another level, which could be compared to Christians who did inner work to get to heaven.
36. Asked if he practised Falun Gong publically, the applicant said that he had practised publically in Melbourne and in Hobart, which was shown in the pictures he had presented to the Department and Tribunal. Asked how he practised publically in Hobart, he said that the practitioners gathered together and did exercises and handed out publications to the public. Asked how often he had done this, he said that as there were not many practitioners in Hobart they did not have as many activities as in Melbourne so they might get together once every couple of months. Asked how long he had been engaging in this kind of activity, he said for about one year. Asked to confirm whether he was saying that for one year he had been handing out brochures to the public once every couple of months, he clarified that he was not. He said that he participated in activities arranged on Falun Gong day and he also participated in some activities in Melbourne as well, but public Falun Gong activities in Hobart were quite rare so most practitioners practised at home.
37. Asked what he was referring to when earlier he had said practised publically every couple of months, he said that when he started to participate in Hobart gatherings, other practitioners told him they would gather once every couple of months. However, they rarely contacted him. When he did find out there would be activities on Falun Gong day he did attend that event. However, Master Li taught that cultivation could be done at home and that going to gatherings was not a compulsory part of practising Falun Gong. As the number of practitioners in Hobart was quite limited, every time they would gather there were different faces. He went to them about half a year ago and after that he had been very occupied by his weekend work, and perhaps later he would be able to do more.



38. Asked how many times he was involved in public Falun Gong activities involving exercises and distributing brochures in Hobart, he said that he did this once [in] May with others, and that when he was alone sometimes he would hand out the pamphlets himself. He said he did this by delivering pamphlets in his neighbourhood about four or five times. When he was in Melbourne he also handed out pamphlets with others, as shown in the photos he had presented. In relation to the event held [in] May at the Salamanca market in Hobart to celebrate Master Li's birthday, the practitioners set up tables and laid out posters and while some practitioners did exercises others handed out pamphlets to passers-by. This was represented in the photographs that he had submitted to the Tribunal. The applicant said that he did the exercises with the other practitioners and then he helped them to hand out pamphlets. He had only been involved in one activity like this in Hobart.
39. Apart from these activities, he also got together with other Falun Gong practitioners in Hobart to learn the law. The law learning sessions were on Fridays. He would go to a fellow practitioner's house and they would learn Falun Gong law by reading out paragraphs together. The sessions were held at the house of [Mr B] who lived in Hobart. He started going to these sessions about 2 years or so, and would have attended about 50 – 60 of these sessions in 2 years. The group also practised exercises together at a Sunday morning session but as it was far from his home he rarely went and preferred to do the exercises by himself at home.
40. The Tribunal put to the applicant that the DIAC delegate was concerned that he did not know [Mr B]'s address or any substantial details of what this group or its members were involved in. The applicant said that the question about [Mr B]'s address seemed a bit strange to him, as they would drive there so it was not necessary to know the address, all they needed to know was how to get there. His house was far away from where he lived and he only went there once every week or two.
41. The applicant confirmed that the photos submitted to the Tribunal were the same as those submitted to DIAC, and that some were taken outside the Chinese consulate in Melbourne. He said that they did exercises on the pavement opposite the Chinese consulate in November 2011. There were about 4 –5 people participating in the event, including himself and [Mr A]. They had a Falun Gong sign there and they handed-out pamphlets and newspapers. He was involved in roughly 5 similar activities during the week or so that he was in Melbourne.
42. The Tribunal noted that the DIAC delegate was concerned about the timing of the applicant's Melbourne activities, which took place shortly after he lodged his protection visa application, and that it could be considered that he engaged in the activities in order to strengthen his application. The applicant was asked if he could explain the timing. He said that part of the reason for his Melbourne activities was indeed his protection visa application. He applied for the protection visa on [Mr A]'s advice, who also advised that it would be better to get more evidence to support his claims by coming to Melbourne. He also said it would be a good opportunity to go out and meet more Falun Gong practitioners.
43. The Tribunal explained that it had to consider under s.91R(3) whether the applicant may have engaged in conduct in Australia solely for the purposes of strengthening his refugee claim and if so, it must disregard it. The applicant said that the activities he participated in were not solely for the protection visa application as he could have applied for this 2 years earlier. The main reason for participating in these events was to have more contacts and to get to know more people within the Falun Gong community, as in future he may go to Melbourne. [Mr A] had wanted him to accompany him for a long time but he could not, then after he lodged the application he was single so only then could he make the trip.

44. The applicant said that he had not yet told his parents about his Falun Gong practice. He said he would let them know soon, but the process could not be rushed as his parents had been members of the Communist Party for years. He had started to talk to them about Falun Gong, but it would be too much for them to know yet that he was a practitioner. He contacted his parents once a week and sometimes he would send them news from the Falun Gong website about the persecution of practitioners by the Communist Party in China. Asked how his parents reacted to this, he said that his mother was more open than his father, who had been working for the military environment for forty years so it was not so easy for him to accept. At the beginning they were quite concerned about the reasons the applicant was sending them such material but the applicant felt he had to as Falun Gong law taught followers that everything they say must be the truth. He thought he could see that the material was having an effect on his parents. Asked whether he was putting his parents in danger by sending this kind of material to them, he said that he was quite scared at the beginning but he had no choice other than to do it. He had been watching to see whether there might be any signs of persecution but for now there had been nothing more than the line being cut off. As his parents were now retired he thought any potential monitoring would be a more relaxed than before. The Tribunal asked if the applicant could provide copies of some of the messages he had sent to his parents, to which he agreed.
45. Asked if he had told any of his friends that he was a practitioner, he said that apart from his friends who were practitioners themselves, he had told his ex-girlfriend. He had not yet told other friends as he wanted to avoid trouble. The international student circle was very communicative and if word spread and he returned to China his parents could also be in trouble. He said that he would eventually tell them the truth but for the time being he had talked to them about the evils of the Communist Party and that Falun Gong is not an evil cult as claimed by the party. He said that as many students had been educated by the CP he had to take it slowly, as there was a Chinese students union. The applicant confirmed that he was a member of the Communist Youth and the Pioneers as a child, but that he had never applied for party membership and he had withdrawn from these two organisations since coming to Australia. He officially withdrew when he started to practise FG, [in] February 2010, through FG website, and they issued him with a certificate.
46. The applicant said that he feared returning to China because the communist party was conducting large-scale persecution of Falun Gong practitioners and the social atmosphere in China was very bad for practitioners. In addition, his home town was Xinjiang, which was a conflict zone so the control of authorities there was much tighter than elsewhere in China, so if he ever returned it would be a sure thing that persecution would happen. He feared that he could be put into detention and he could also be tortured. What he was really afraid of was that his parents would be harmed because of him. He said that he probably would continue to practise Falun Gong if he returned.
47. Asked how important activities to propagate or spread the Falun Gong message were to him, the applicant said that according to Falun Gong law, cultivation was largely dependent on the person themselves and how good they could be and high they could get. However, in relation to saving other people, it was all about compassion, which was derived from Buddhism. As you cultivate yourself, it becomes harder to see others suffering, so you need to help them with their troubles. This aspect of Falun Gong was all part of the compassion that its adherents have for others, and was an important part of it.
48. The Tribunal then heard from the applicant's witness. The witness said that he could prove that the applicant was a genuine Falun Gong practitioner. He was the person who gave the

applicant the book of the law of the wheel at the end of 2009 and he could see that the applicant was very interested in the book. In the next year they also started doing Falun Gong exercises together.

49. The fifth exercise was very hard to practise but the applicant could already do this in about five months after he first started. It was very difficult to achieve this in such a short period of time and could not have been achieved without a great deal of practice. The applicant told him that he practised at night time on the floor and that he could feel a stream from his heart. This part of the teaching was that it was the primary level of practising. The witness said that he thought that the applicant was stronger than he was in many areas, as the applicant read a lot about practitioner's reflections on their practise every night and then shared it with him. The applicant was also very interested in the teachings of the law of the wheel and sometimes the applicant would tell him how to get rid of material temptations, and in this aspect the applicant was far more advanced than him. He would always incorporate the teachings into Buddhist and Taoist stories and would help the witness to get to know some of the ideas.
50. As the applicant did not have a lot of income and the witness was in a better financial situation, he could travel to Melbourne and Adelaide to engage in local Falun Gong events in those places. But the applicant had also been in a relationship where he had a lot of commitments and he felt he could not free himself to travel. When the witness stayed in Sydney and Melbourne they would always communicate on-line about the cultivation and practise of Falun Gong, and they would also share the reflections of their fellow practitioners over the internet. The applicant also told him what he had seen with the "eye", and through the witness' communication with other fellow colleagues he knew that what the applicant had said he had seen was similar to what others had seen.
51. In Melbourne and Sydney there were a lot of fellow practitioners who were like the applicant who did not have much time to join public gatherings, as they had children or for other reasons, but still conducted their practice at home in private. He did not think that not being out in public would really affect his practice anyway, as this could be done at home. The applicant had been a smoker for more than ten years but he quit after six months once he started engaging with Falun Gong. When the applicant first arrived in Australia he would gamble but he had also quit that, and he had also heavily cut down on eating and drinking temptations. These were all evidence that he was a genuine practitioner of Falun Gong. Smoking was a very strong attachment and without a strong will from Falun Gong, to cut it, it would be very hard for normal people to stop. The applicant showed no interest in money or acquiring gadgets like mobile phones, and this was very genuine. The witness thought that only those who were "outside society" could reach that level.
52. He said that the applicant approached him in January – February of 2010 and asked him to teach him how to do the exercises. He did this two or three times, and some other practitioners practised with him as well. They also had a video recording from their Master which they shared with each other but for some postures the applicant needed to practise with others to better understand them. He had been present with the applicant in Melbourne last year when he helped them to promote a performance in Melbourne and handed out pamphlets. They also went to the Chinese consulate to exercise.
53. Asked by the Tribunal if there was any other form of serious or significant harm he feared he would face if he returned to China that had not been discussed yet, the applicant said that his concern is that he would end up in the same situation as other fellow practitioners in China. He was concerned that he was handing out pamphlets at the market in Hobart and the Chinese

student union might have a record, and at the consulate he might have been recorded, so the danger on return to China was clear. He feared they might stop him at the airport and his parents would not know where he was and he might disappear. He believed that he would definitely be persecuted, it would just be a question of the severity.

54. The Tribunal said that it would now like to put to the applicant some of its concerns about his evidence and possible adverse information for his comment. In relation to s.91R(3), which had been discussed earlier, the Tribunal put to the applicant that it might be difficult to accept that someone with his background as the son of an army commander and a member of the Communist Youth party and pioneers, would become so easily interested in Falun Gong after arriving in Australia. Indeed the DIAC officer found his actions had been motivated for the sole purpose of strengthening his refugee claim. The applicant said that even though he came from a family with a strong political and military background, he still grew up in a very flexible environment at home. He was not interested in the teachings of the Communist Party throughout his schooling. He also witnessed many misdoings by the party in his society such as the persecution of the Uighurs, and having seen their suffering he did not believe party teachings. In terms of his arrival in Australia, even though he had a history of interest in Buddhism, he did not immediately convert when [Mr A] told me about it. He spent time gradually building up his interest and gradually decided that he wanted to be involved. He had now been practising for two years and could genuinely say that he was a genuine practitioner and that his self-cultivation had risen to a level where he was qualified to apply for immigration status on this basis.
55. The Tribunal also noted that the credibility of his claims was in issue. DIAC did not believe that he was a genuine Falun Gong practitioner due to his lack of knowledge of the exercises and a lack of evidence supporting his claims to be a practitioner. The applicant said that much of his DIAC interview did not focus on his Falun Gong practice. More than half of the interview was spent talking about other issues, and during the rest he was not asked about the core issues of Falun Gong. His witness had talked at the hearing about the core issues of his practise, whereas with DIAC he was not given the opportunity to express himself properly on these issues.
56. The Tribunal also observed that spreading the word and 'saving people' was an essential part of Falun Gong practice, and that the fact that the applicant had not told his parents or friends that he was a practitioner seemed to be at odds with this important part of Falun Gong teachings. The applicant said that with people who had grown up in a Communist Party environment, if you just walked up and let them know you were a Falun Gong practitioner the first reaction would be that they would not want to have contact with you, and then it would never be possible to save them. The way we do it was to let them know the truth and facts about Falun Gong in a gradual way in order to save them.
57. The Tribunal also noted that another concern of the delegate was the timing of the lodgement of his protection visa application shortly after he broke up with his girlfriend on whom his immigration status depended. The applicant said that he stayed with his girlfriend to try and teach her to give up on her attachment to wealth and status and that he continued to do this even at the time when [Mr A] asked him to move to Melbourne. He said that he had been practising Falun Gong for almost 3 years and had experienced significant changes in his life. DIAC denied his application as they did not think he was genuine, but that was nonsense. He had communications with his fellow practitioners and had been through self-cultivation for such a long period, even though he did not participate in many public activities he worked on

self-cultivation. He did not lodge his application at the beginning until he felt that he was a real practitioner.

### Independent Country Information

58. In a report released in February 2002 Human Rights Watch stated in relation to the persecution of Falun Gong practitioners in China that:
- ‘Chinese government persecution has not been limited to key organizers, big-time publishers, major distributors, or small-scale proselytizers. It has been directed against scores of low profile practitioners - rank and file followers - willing to publicly defend Falungong. Penalties for this latter group have typically been lighter, but its members have been subjected to grave mental and physical abuse including torture and mistreatment. At the start of the crackdown, most detained protesters were held for only a few days of “reeducation,” in part because the government appears to have misjudged the depth of commitment, in part because there were insufficient permanent facilities for long-term incarceration of tens of thousands of practitioners. As it became evident that dismantling Falungong could not be accomplished quickly, and as demonstrations became daily occurrences, officials apparently grew impatient with briefly detained practitioners who, as soon as they were released, rejoined public protests in Tiananmen Square. In October 2000, China’s policy changed. Instead of the Public Security Bureau rounding up protestors and escorting them home or detaining them for a few days or weeks, “relevant Beijing departments...decided to practice a ‘close style management’ on stubborn Falungong members.” In the hope of facilitating the permanent “transformation” of identified “recidivists,” such individuals were to be immediately sentenced administratively to reeducation through labor, in some cases for as long as three years.’ (Human Rights Watch, *Dangerous Meditation - China’s Campaign Against Falungong*, February 2002, Chapter V, ‘Falungong in Custody: Competing Accounts’ - ‘Reeducation through Labor; Transformation Centers’)
59. Recent reports do not draw a great distinction between the targeting of Falun Dafa leaders and common practitioners by the Chinese authorities. On 20 May 2011 and 6 April 2011, the Department of Foreign Affairs and Trade (DFAT) advised the tribunals that Chinese authorities no longer focus primarily on Falun Dafa leaders, but are increasingly targeting common practitioners. The advice from 20 May 2011 states:
- [A]long with like-minded missions and human rights contacts, we consider that Chinese authorities no longer focus primarily on Falun Gong [Dafa] leaders who promote the movement but also on private practitioners... [w]hile precise information on cases is difficult to obtain, we assess that the authorities now place greater emphasis on how readily Falun Gong [Dafa] practitioners confess their crime and denounce their practice rather than their role in Falun Gong. (DIAC Country Information Service 2011, *Country Information Report No. 11/28 – Falun Gong Update Clarification*, (sourced from DFAT advice of 20 May 2011); DIAC Country Information Service 2011, *Country Information Report No. 11/28 – Falun Gong Update Clarification*, (sourced from DFAT advice of 20 May 2011).
60. In addition to the above DFAT advice, Human Rights Watch notes that private practice of Falun Dafa at home is ‘dangerous’ when it is brought to the attention of the police or Chinese Party officials. (Human Rights Watch 2002, *Dangerous Meditation: China’s Campaign against Falungong*, January, p. 44). In 2005, a spokesperson from the Falun Dafa Information Centre, Gail Rachlin, advised the Immigration and Refugee Board of Canada that although it is possible to practice Falun Dafa in private, concealing one’s beliefs and daily practice from relatives or neighbors is difficult (Immigration and Refugee Board of Canada 2005, *CHN100726.EX – China: Situation of Falun Gong Practitioners and Treatment by State Authorities (2001-2005)*, 31 October.) In 2011 the US Department of State reported that in certain areas of

China, neighborhood groups were reportedly instructed to report on Falun Dafa members and monetary rewards were offered to citizens who informed on practitioners. (US Department of State 2011, *July – December, 2010 International Religious Freedom Report: China (includes Tibet, Hong Kong, Macau)*, 13 September)

61. The report does not identify which areas this occurs in. Further, in its most recent annual report from 2010, the Falun Dafa Information Centre stated that during 2009:

Among the documented cases, most victims were arrested on the basis of their being known to the authorities as Falun Gong practitioners, even if this identity consisted of studying Falun Gong tenets and practicing its meditation exercises in the privacy of their homes. In many cases, adherents were abducted after they were found possessing Falun Gong books and related materials, either during door-to-door searches by security agents or upon being stopped on the street (Falun Dafa Information Centre 2010, *2010 Annual Report*, 25 April, Section 1 – Part 1: Falun Gong Persecution and Activism in 2009)

62. In its *International Religious Freedom Report 2012* in relation to China the US State Department said that:

‘The Chinese government continued its thirteen-year campaign to eradicate Falun Gong activity and pressure practitioners to renounce their beliefs. China maintains an extrajudicial security apparatus, the 6-10 office, to stamp out Falun Gong activities and created specialized facilities known as ‘transformation through reeducation centers’ to force practitioners to renounce their beliefs. Over the past decade, the government has carried out an unprecedented campaign against the Falun Gong, imprisoning large numbers of practitioners and torturing and abusing them in detention. Practitioners who do not renounce their beliefs are subject to torture, including credible reports of deaths in custody and the use of psychiatric experiments. In the year before the Olympic Games, police waged a concerted campaign to harass and detain known Falun Gong practitioners and brutally suppressed their activities. That campaign continued in the past year with specific emphasis on ‘transforming’ practitioners through coercive means in special detention facilities or in re-education through labor centers (RTL). Falun Gong adherents report, and official Chinese government statements confirm, long-term and arbitrary arrests, forced renunciations of faith, and torture in detention....’

It is difficult to determine how many Falun Gong practitioners are in detention because they are most often incarcerated in RTL camps and mental health institutions. However, in its 2011 Country Report on Human Rights Practices for China, the U.S. Department of State noted that Falun Gong adherents constituted at least half of the 250,000 officially recorded inmates in RTL camps. The UN Special Rapporteur on Torture reported that Falun Gong practitioners make up two-thirds of the alleged victims of torture in custody presented to him in China.

According the CECC, the government has increased efforts to ‘transform’ Falun Gong practitioners in recent years. The Falun Dafa Information Center (FDIC), using information gathered within China, estimated that 2,000 individuals were detained in the extralegal ‘transformation through re-education centers’ over the past two years, many in Hebei and Shandong provinces, but also in Shanghai and Beijing. As of December 2011, the CECC’s prisoner database lists 486 Falun Gong practitioners as currently serving prison sentences, though the actual number may be much higher. The FDIC also provides evidence that 53 Falun Gong practitioners died in custody in 2011.....

Numerous allegations of government-sanctioned organ harvesting and psychiatric experimentation also continue to surface. The UN Special Rapporteur on Torture has called for an independent investigation into these allegations. The Committee against Torture, a UN treaty-monitoring body, also called on the government during its 2008 review of China to conduct independent investigations to clarify discrepancies in statistics related to organ

transplants and allegations of torture of Falun Gong practitioners.’ (US State Department, *International Religious Freedom Report 2012* in relation to China pp148-149).

63. In advice provided in September 2006 the Australian Department of Foreign Affairs and Trade (DFAT) said that:

‘China continues to regard Falun Gong as an “evil cult”: a danger to Chinese people and state security. Falun Gong followers who are obvious in their practice, who seek to spread information or otherwise promote Falun Gong are likely to be detained and, particularly if they refuse to renounce the practice, placed in detention - usually in Re-education Through Labour facilities (administrative detention). The period of detention could be weeks or years, depending both on practitioners’ past actions and their willingness to repudiate their actions and recant their beliefs. Falun Gong followers who practise privately and do not make their beliefs known are less likely to face repercussions.

Since China banned Falun Gong in 1999, the international Falun Gong organisation has become more politicised and more vocal in its opposition to China’s Communist Party. If practitioners have played an active role in Falun Gong organisations overseas, the Chinese authorities are more likely to take an interest in their cases. For example, authorities might repeatedly interview people, keep them under surveillance and, particularly if authorities believe that the people remain active Falun Gong practitioners and are in contact with overseas Falun Gong groups, might detain them.’ (DFAT Country Information Report No. 06/53, dated 14 September 2006, CX161676).

## **FINDINGS AND REASONS**

64. As indicated to the applicant at the hearing, the Tribunal had concerns about some aspects of the applicant’s evidence. The Tribunal had difficulty accepting that the child of military parents who were staunch communists would have been interested in churches and religion from a young age, as the applicant claimed to be. It also had difficulty accepting that a young man from such a background would evince this interest through religious discussions with his friend, [Mr A], immediately after his arrival in Australia. The Tribunal does not accept the applicant’s evidence on these points.
65. The Tribunal also had the impression that the applicant attempted to exaggerate his claims to have practised Falun Gong publically. These claims ultimately were not borne out when the Tribunal tested his evidence. He admitted, for example, that he only attended one public Falun Gong event in Hobart and only for a short time. The Tribunal also observes that the applicant candidly admitted that one of the reasons behind the public Falun Gong activities that he engaged in while in Melbourne was a desire to provide evidence for his protection visa application. The Tribunal was also concerned about the seeming contradiction between the applicant’s claim to be committed to Falun Gong and the fact that he had not told any of his friends, other than his former girlfriend, or his family about this commitment.
66. Despite these reservations, the Tribunal accepts on the evidence before it that the applicant is a genuine Falun Gong practitioner. The applicant’s own evidence in this regard is corroborated by his witness, [Mr A], who is also a Falun Gong practitioner. The Tribunal accepts that the applicant is viewed by another Falun Gong practitioner as a genuine and committed Falun Gong practitioner.
67. The Tribunal considers it appropriate to give due weight to the evidence of another Falun Gong practitioner since he has known the applicant for some time and, being a Falun Gong practitioner himself, is in a better position than the Tribunal to make a judgment about

whether the applicant's commitment to Falun Gong is genuine or whether he has merely become involved in Falun Gong activities in Australia for the purpose of strengthening his claim to be a refugee. The Tribunal also considers it relevant in the present case that, as Driver FM stated in *SZGYT v Minister for Immigration & Anor* [2007] FMCA 883 at [12]:

'I prefer the interpretation of the words "engaged in" in s.91R(3) as meaning "carried on" rather than "commenced". There is logic in that interpretation. A person may commence a course of conduct in Australia for the purpose of enhancing their protection visa claims but nevertheless carry on that conduct for other reasons. In the case of religion they may over time become a genuine adherent. If a person commences engaging in a religious practice to support their protection visa claims but over time becomes a genuine adherent, in my view, s.91R(3) does not require that the conduct to be disregarded. The Tribunal remains able to consider whether, on a forward looking assessment, the person would suffer a real risk of harm in their country of origin.'

68. Even if the applicant initially became involved in Falun Gong activities in Australia for the purpose of strengthening his application for refugee status, the Tribunal accepts on the basis of the evidence before it, including the applicant's own oral evidence, that the applicant is now a genuine and committed Falun Gong practitioner. The Tribunal finds that he has engaged in the relevant conduct - his participation in Falun Gong activities in Australia - otherwise than for the purpose of strengthening his claim to be a refugee and that it is therefore not required to disregard his conduct in Australia in accordance with subsection 91R(3) of the Act.
69. The Tribunal accepts that the applicant's involvement in Falun Gong activities in Australia will place him at risk should he return to China now or in the reasonably foreseeable future. As referred to above, the Australian Department of Foreign Affairs and Trade has advised that, if Falun Gong practitioners have played an active role in Falun Gong organisations in Australia, the Chinese authorities are more likely to take an interest in their cases and might, for example, repeatedly interview them, keep them under surveillance and, particularly if the authorities believed that the people remained active Falun Gong practitioners and were in contact with overseas Falun Gong groups, might detain them (DFAT Country Information Report No. 06/53, dated 14 September 2006, CX161676).
70. Since the Tribunal accepts that the applicant is now a genuine adherent of Falun Gong, it accepts that if he returns to China now or in the reasonably foreseeable future he will wish to continue practising Falun Gong. As referred to above, the Chinese Government's repression of Falun Gong continues unabated and it extends to rank and file followers of Falun Gong who are not prepared to renounce their beliefs (US State Department, *International Religious Freedom Report 2012* in relation to China; Human Rights Watch, *Dangerous Meditation - China's Campaign Against Falungong*, February 2002, Chapter V, 'Falungong in Custody: Competing Accounts' - 'Reeducation through Labor Transformation Centers'). The Tribunal accepts that if the applicant were to return to China now or in the reasonably foreseeable future there is a real chance that he would be detained as a result of his involvement in Falun Gong activities in Australia or his continued practice of Falun Gong in China. The Tribunal considers that the persecution which the applicant fears clearly involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal also considers that the applicant's religion (his belief in Falun Gong) is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves



systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or intentional and involves his selective harassment for a Convention reason, namely his religion.

## **CONCLUSIONS**

71. For the reasons given above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his religion if he returns to China now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the Chinese government. 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 country other than his country of nationality. Accordingly, the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act. It follows that the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

## **DECISION**

72. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies paragraph 36(2)(a) of the Migration Act.