FEDERAL COURT OF AUSTRALIA

Wang v Minister for Immigration & Multicultural Affairs [2000] FCA 1599

MIGRATION – protection visa – refugee – law prohibiting religious practice other than at registered religious institutions – whether a law of general application – whether punishment for religious practice at an unregistered institution is prosecution or persecution – whether, for the purposes of the Convention, religion includes its practice in a like-minded community – role of international human rights Conventions in interpretation of the Refugees' Convention – whether fear of persecution based on an intention to practice religion at an unregistered institution in the future can constitute a well-founded fear of persecution.

WORDS AND PHRASES - *"Religion"*

Migration Act 1958 (Cth) s476(1)

Chokov v Minister for Immigration and Multicultural Affairs [1999] FCA 823 – cited
Minister for Immigration and Multicultural Affairs v Zheng [2000] FCA 50 – not followed
Tang v Minister for Immigration and Multicultural Affairs [2000] FCA 985 – not followed
Applicant A v Minister for Immigration and Multicultural Affairs (1997) 190 CLR 225 – considered
Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 170 ALR 553
Zolfagharkani v Canada (Minister of Employment and Immigration (1993) 3 F.C 540 - cited
Chang v INS 119 F3d 1055 (3d circuit, 1997) – cited
Namitabar v Canada (Minister of Employment & Immigration) (1994) 2 F.C. 42 – cited
Fathi-Rad v Canada (1994) 77 F.T.R 41 – cited
Bastanipour v INS 980 F.2d 1129 (7th circuit, 1992) – cited
Okere v Minister for Immigration and Multicultural Affairs (1998), 157 ALR 678 – considered
Fosu v Canada (Minister of Employment and Immigration)(1994) 90 FTR 182 – cited
Irripugge v Canada (Minister of Citizenship and Immigration)(2000) 94 A.C.W.S. 3d 733 - cited
Minister for Immigration and Multicultural Affairs v Mohammed (2000) 98 FCR 405 – applied
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 – cited
Mohammed v Minister for Immigration and Multicultural Affairs [1999] FCA 868 – applied
Danian v Secretary of State for the Home Department [2000] Imm AR 96 - considered
Secretary of State for the Home Department v Ahmed [2000] 1 NLR 1 – considered
The Little Company of St Mary (SA) Incorporated v The Commonwealth (1942) 66 CLR 368 – cited
Nguyen v Nguyen (1990) 169 CLR 245 – cited

WANG v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS
N490 of 2000

JUDGES: **WILCOX, GRAY and MERKEL JJ**
DATE: **10 NOVEMBER 2000**
PLACE: **SYDNEY**

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALESDISTRICT REGISTRY **N 490 OF 2000**

BETWEEN:	**JI DONG WANG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGE:	**WILCOX, GRAY AND MERKEL JJ**
DATE OF ORDER:	**10 NOVEMBER 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the trial judge and the decision of the Refugee Review Tribunal be set aside.
3. The matter be remitted to the Refugee Review Tribunal to be determined in accordance with law.
4. In the event there is a dispute over the constitution of the Refugee Review Tribunal that is to determine the matter the parties have liberty to apply on that issue.
5. The respondent pay the appellant's taxed costs of the proceeding and of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALESDISTRICT REGISTRY **N 490 OF 2000**

BETWEEN:	**JI DONG WANG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGE:	**WILCOX, GRAY AND MERKEL JJ**
DATE:	**10 NOVEMBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

WILCOX J:

1 I have had the advantage of reading in draft form the reasons for judgment of Merkel J. Subject to one reservation, which I believe to be immaterial to the result, I agree with them.

2 My reservation concerns the legitimacy of having regard to Article 18 of the *Universal Declaration of Human Rights 1948* ("the Universal Declaration") in determining the meaning of "religion" for the purposes of Article 1A(2) of the *Convention relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* ("the Convention on Refugees").

3 As Merkel J notes, in *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225 at 296-297, Kirby J said the definition of "refugee" "is … to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights … and the International Covenant on Civil and Political Rights …". However, that was only a passing comment; the point his Honour was making was that "the law actually invoked" in that case "is that of an Australian statute". Moreover, his Honour dissented in that case. None of the other members of the Court – not even Brennan CJ, who joined Kirby J in dissent - dealt with the

relationship (if any) between the Convention on Refugees and the Universal Declaration.

4 The relevance of other international instruments to the interpretation of the Convention on Refugees is an issue of general importance. It may be critical to the determination of other cases. It was not fully explored in the present case. Accordingly, I prefer at this time to express no view about that matter.

5 I regard my reservation as immaterial to the result because, as it seems to me, the concept of "religion", in Article 1A(2) of the Convention on Refugees, anyway includes the element of manifestation or practice of a religious faith in community with others. This element is inherent in the ordinary meaning of the word. For example, the first two definitions of the word in the Macquarie Dictionary are:

> *"1. the quest for the values of the ideal life, involving three phases, the ideal,* ***the practices for attaining the values of the ideal****, and the theology or world view relating the quest to the environing universe.*
>
> ***a particular system*** *in which the quest for the ideal life has been embodied."* [Emphasis added]

6 The Shorter Oxford English Dictionary gives the following relevant definitions of religion:

> *"Action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power;* ***the exercise or practice of rites or observances*** *implying this; A particular* ***system of faith and worship****."* [Emphasis added]

7 Some religious rites may be privately practised by individual believers; but the major world religions, at least, also require or encourage their adherents to participate in communal rites or practices. Most Christian denominations, for example, require or encourage adherents to attend Mass or Holy Communion. Muslims are expected to attend prayers, especially on Fridays.

8 The form and content of communal rites and practices is often a matter of enormous importance to adherents of a particular faith, as is their system of governance. Many wars have been fought, and many people martyred, because of disagreements on such matters.

9 In relation to the Christian Church, the history of the Reformation shows that, in country after country, matters of practice and governance were generally the first flashpoints

of dissent from Rome; differences in doctrine tended to come later. For many (perhaps most) victims of the Spanish Inquisition, for example, the issue was not theological doctrine, but papal supremacy. Consider, also, the later development of non-conformist denominations, such as the Methodist and Congregational Churches, as breakaways from the Church of England.

10 As it seems to me, in this case the Tribunal adopted an unduly narrow interpretation of the word "religion". As Merkel J points out, the Tribunal posed for itself the appropriate question: "whether the treatment (Mr Wang) has faced in China was persecutory or whether he could expect to face persecution if he returned there in the future". However, the Tribunal never answered that question; instead it transposed the critical question into "whether the applicant has been or would be deprived of his right to worship by acceding to the government regulations". That substitution might have been acceptable if the word "worship" had been accorded its full meaning, so as to include participation by Mr Wang in communal religious rites that were acceptable to him in form, and performed by people to whom he had no objection. But the Tribunal did not apply the word in that way. Mr Wang told the Tribunal member that "he could not attend government-sanctioned churches because they were unable to teach all the necessary doctrines and because the State controlled the church. He could not worship faithfully in a registered church which was there to serve the purposes of the Communist Party". The Tribunal member did not express doubt about Mr Wang's sincerity in making those claims, but found "he would be able to resume his religious practices and beliefs, subject to some state controls but insufficient to deprive him of his right to religious freedom". What type of "religious" freedom is it, that limits the practice of communal rites to a service conducted by State-approved persons who substitute government propaganda for elements of theological doctrine?

11 I agree with Merkel J that, in the particular circumstances of this case, it seems to be not inappropriate for the matter to be determined on remittal to the Tribunal, by the member whose decision is under review. Indeed, for the reasons expressed by both his Honour and Gray J, that would seem to be the desirable course.

12 However, there may be some reason, not known to us, why the previous member cannot, or should not, deal with the matter. So I do not think the Court should name a formal order, at least at this stage, concerning the constitution of the Tribunal on remittal.

13 I support the orders proposed by Merkel J.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 10 November 2000

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N490 OF 2000**

BETWEEN:	**JI DONG WANG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGES:	**WILCOX, GRAY and MERKEL JJ**
DATE:	**10 NOVEMBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

GRAY J:

14 This is an appeal from a judgment of a single judge of the Federal Court of Australia, who dismissed an application by the appellant for review of a decision of the Refugee Review Tribunal ("the RRT") affirming a decision of a delegate of the respondent to refuse to grant the appellant a protection visa. I have had the advantage of reading in draft form the reasons for judgment of Wilcox J and the reasons for judgment of Merkel J.

15 The nature of the appellant's claim to be entitled to a protection visa is set out in the reasons for judgment of Merkel J. It is unnecessary for me to set out these details again. The RRT made several findings of fact favourable to the appellant. It found that the appellant is outside his country of nationality, the People's Republic of China. It said that the appellant:

> *"provided sufficient information on his beliefs and activities for it to be feasible that he has a rudimentary knowledge of the Christian faith and that he spent some time as a member of an unregistered congregation which itself was part of the Protestant Church. The Tribunal also accepts that since his arrival in Australia he has continued to practise his faith as a member of the Chinese Presbyterian Church."*

16 I have some doubt as to the correctness of the approach of the RRT to this finding of fact. The RRT receives many applications from persons who seek protection visas, claiming well-founded fear of being persecuted by reason of religion. It is inconceivable that every member of the RRT is properly equipped to assess each such applicant on the basis of the

applicant's knowledge of the faith that he or she professes. Religion is a matter of conscientious belief, professed adherence and practice. The RRT seems to have approached the issue on the basis that the appellant had to satisfy the RRT that he was possessed of a specific level of doctrinal knowledge to justify being regarded as a Christian. It is not appropriate for the RRT to take on the role of arbiter of doctrine with respect to any religion. Compare *Mashayekhi v Minister for Immigration & Multicultural Affairs* [2000] FCA 321, (2000) 97 FCR 381, at [11] – [16]. Nevertheless, what the RRT said in the present case amounts to a finding that the appellant has a conscientious belief ("his faith"), is a professed adherent of a recognised body of religion ("the Protestant Church") and has engaged ("as a member of an unregistered congregation") and continues to engage ("as a member of the Chinese Presbyterian Church") in the practice of his religion.

17 The RRT also said:

> *"The Tribunal has considered the applicant's claim that he may have been detained five times during December 1995 and October 1996 because the authorities wanted him to stop attending unregistered religious meetings. The Tribunal accepts that this was a stiff penalty…."*

18 In my view, this amounts to a finding accepting the appellant's claim that he had been persecuted because of the practice of his religion in the People's Republic of China in the year and a half prior to his arrival in Australia. In any event, the RRT did not reject the appellant's claim that he had been persecuted during that time, by reason of the practice of his religion. It did not find that his account of what had happened to him lacked credibility. In characterising what had happened to the appellant as a "stiff penalty", the RRT did not reach a conclusion that what had happened to the appellant did not amount to persecution.

19 I agree with Merkel J's conclusion that the RRT appeared to accept the genuineness of the intention of the appellant to practice his religious faith at an unregistered church if he should return to the People's Republic of China. In my view, it is implicit in the reasoning of the RRT that it reached the view that, if the appellant were to be returned to the People's Republic of China and to carry out his intention of practising his religion at an unregistered church, he would suffer persecution. The RRT took the view that the appellant could avoid this persecution by not carrying out his intention, and instead by practising his religion at a registered church. In following its path to this conclusion, the RRT erred in law, within the meaning of s 476(1)(e) of the *Migration Act 1958* (Cth) ("the Migration Act"). The error

involved an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the RRT.

20 On the issues of law, I agree with the reasons for judgment of Merkel J. I agree with what his Honour has to say about laws of general application. For the reasons that his Honour has set out, the laws of the People's Republic of China prohibiting religious practice other than by five officially recognised religions and regulating the practice of those religions by requiring that they be registered are not laws of general application. I agree with what his Honour has said about persecution by reason of religion, including the relevance of Art 18 of the *Universal Declaration of Human Rights 1948* and Art 18(1) of the *International Covenant on Civil and Political Rights*. I agree with what Merkel J has said about persecution by reason of future conduct and with his views about the decision of the Full Court in *Minister for Immigration & Multicultural Affairs v Zheng* [2000] FCA 50. I also agree with what his Honour has said about costs.

21 Having reached the conclusions that it reached in favour of the appellant, the RRT was obliged to answer the question whether there was a real chance that, if he were returned to the People's Republic of China, the appellant would suffer persecution as a result of carrying out his intention to continue practising his religion in the way that he had, as a member of the congregation of an unregistered church. If it had reached a conclusion favourable to the appellant on this question, the RRT would have been bound to hold that the appellant was entitled to a protection visa.

22 Both Wilcox J and Merkel J have taken the view that the appropriate way to deal with this matter is to set aside the orders of the trial judge and to substitute for those orders an order setting aside the decision of the RRT and remitting the matter to the RRT to be determined in accordance with law. Unlike their Honours, I would add a direction that, for the purpose of dealing with the remitted matter, the RRT be constituted by the member who made the decision set aside.

23 For the purposes of these reasons for judgment, I assume that s 481(1)(b) of the Migration Act empowers the Court to make an order in terms that a matter be remitted to the RRT, as distinct from the particular member of the RRT who made the decision. I take the view that, in the circumstances of the present case, the RRT should not be reconstituted for

the purpose of giving further consideration to the appellant's application. Indeed reconstitution of the RRT might have the effect of disadvantaging the appellant unnecessarily.

24 As I have said, the vice of the RRT's decision in the present case was to fail to take the step which, in the circumstances, it was required to take of making explicit its implicit finding that there is a real chance that the appellant will be subjected to persecution if he is returned to the People's Republic of China and carries out his intention of practising his religion in the way in which he wishes to practice it. There is no suggestion that the member who constituted the RRT is likely to approach the making of an explicit finding on that issue in anything other than an appropriate way. It has not been suggested that the member dealt unfairly with the case, from the point of view of either the appellant or the respondent. The member simply failed to answer the correct question and thereby made an error of law. There is no suggestion that the appellant or the respondent, or any member of the public, would reasonably lack confidence in the ability of the member who constituted the RRT to resume dealing with the matter on a proper basis.

25 If the RRT were to be reconstituted, there is a danger that the appellant might lose the benefit of the favourable findings of fact to which I have referred. There is a risk that a differently constituted RRT might take a different view as to the appellant's credit, or as to the weight of the evidence, and arrive at findings of fact that would be unfavourable to him. If that were to occur, the appellant would be deprived of the fruits of his successful appeal and the result would be unjust to him.

26 The Court has been informed by the RRT that its practice is for a matter remitted to the RRT by the Court to be allocated for hearing by a member other than the member who made the decision which has successfully been reviewed. See *Demir v Minister for Immigration & Multicultural Affairs* [1998] FCA 1308 at 25. For the reasons I have given, I am of the view that this practice should not be followed in the present case. A specific direction is necessary to ensure that the practice is not followed.

27 In my view, justice to the appellant can only be done by setting aside the decision of the RRT and making an order referring the matter to which the decision relates to the RRT constituted by the member who made the decision set aside, for further consideration

according to law. In the ordinary course, I would expect that the RRT, constituted by the member who has already dealt with the matter, would make an express finding that accords with its implicit finding and hold that, in consequence, the appellant is entitled to a protection visa.

28 For these reasons, I would order that the orders made by the trial judge on 26 April 2000 be set aside and that there be substituted for them an order that the decision of the RRT made on 10 December 1999 be quashed and the matter the subject of that decision be referred back to the RRT, constituted by the member who made the decision on 10 December 1999, for further consideration according to law. I would also order that the respondent pay the appellant's costs of this appeal and of the application for review of the RRT's decision.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 10 November 2000

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 490 OF 2000**

BETWEEN:	**JI DONG WANG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **RESPONDENT**
JUDGE:	**WILCOX, GRAY AND MERKEL JJ**
DATE:	**10 NOVEMBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MERKEL J:

Introduction

29 The appellant, a citizen of the People's Republic of China, applied for a protection visa after his arrival in Australia on 7 May 1997. After a delegate of the respondent refused his application the appellant applied to the Refugee Review Tribunal ("the RRT") to review the delegate's decision. The RRT affirmed the decision of the delegate. The appellant then applied to the Court, under s 476(1) of the *Migration Act 1958* (Cth) ("the Act"), to review the decision of the RRT. The trial judge dismissed the application for review. The appellant appealed to a Full Court against the decision of the trial judge.

30 The application by the appellant for a protection visa was based upon his claim that he is a refugee within the meaning of Art 1A(2) of the *Convention relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* ("the Convention"). The appellant claims that he is a refugee as he is outside China, the country of his nationality, and is unwilling to return to it because of a well founded fear of being persecuted by reason of the practice of his religion as a Protestant Christian at a church which is not registered in accordance with the requirements of the law of China.

31 The RRT concluded that, as the appellant can practice his religious beliefs as a Protestant Christian in China at churches which are registered as official churches, as required under the law of China, any punishment or mistreatment of him by the authorities

for practicing his religious beliefs at an unregistered church would not constitute persecution "for reasons of religion" for the purposes of the Convention. The RRT appeared to regard the appellant as fearing the consequences of violating a generally applicable law prohibiting the practice of religion at an unregistered church, rather than persecution because of his religion.

32 The trial judge expressed concerns at the reasoning of the RRT but concluded that giving effect to those concerns would intrude upon a consideration of the merits of the application for a protection visa. Accordingly, his Honour dismissed the application for review with costs.

33 The appeal raises the question of whether a person's fear of practising religion in a manner rendered unlawful by the laws of that person's country of nationality is a fear of persecution by reason of the person's religion *or* by reason of the person having broken the law. Of course, if the fear is for both reasons then the fact that only one of the reasons is a Convention reason is sufficient to attract the protection of the Convention: see for example *Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823 at [29]-[30] and the cases referred to therein.

The RRT's decision

34 The appellant's claims were as follows. He and members of his family were practising Christians and in 1988 they began to attend a church in Jiangsu that was not registered with the Government. The appellant attended church regularly and joined in prayer with fellow members and would sometimes read the Bible to them. The appellant also attended meetings of a religious association once a month in Jiangsu. Shortly before Christmas 1995 the appellant was detained by the Public Service Bureau ("PSB") when he was attending a religious meeting. He was held in a cell for four days and was "constantly questioned and…was beaten". At the end of the four days he was released. Over the next six months on a number of occasions the appellant's shop was broken into and items in it were damaged. He reported the incidents to the police but was told that he was "under investigation" and that the police did not want to assist him in connection with the break-ins. On 20 October 1996, after attending a religious meeting at a fellow member's home, the

appellant was again arrested and interrogated. He was attacked by two officers and, as a result, woke up in the No 2 People's Hospital of Changzhou City. Three fellow members were imprisoned and were still in jail at the date of the decision of the RRT. Between December 1995 and October 1996 the appellant was twice detained by the PSB, for several days each time, and questioned about his religious beliefs. In November 1996 the PSB closed the church the appellant attended, although it was later opened as a registered church.

35 In spite of warnings that if he persisted in his religious practices he would be detained again, the appellant met secretly with fellow members for prayer. In 1996 officers of the Religious Affairs Bureau came to the appellant's shop and told him that his church was not approved and if he continued to attend it he would be imprisoned. The first break-in at his shop had occurred the day after he was given this warning.

36 In May 1997 the appellant decided to leave China because the PSB threatened to arrest him if he continued to print and distribute Bibles which he had been distributing from his shop. His stock of Bibles had been confiscated. The appellant was able to leave China after a passport had been arranged for him for "a large fee". Since arriving in Australia the appellant has been regularly attending the Chinese Presbyterian Church every Sunday and he was baptised on 22 February 1998.

37 The RRT found that the appellant had sufficient information about his beliefs and activities for it to be "feasible" that he had "a rudimentary knowledge of the Christian faith". It also found that the appellant had spent some time as a member of an unregistered congregation which was part of the Protestant Church. The RRT also accepted that in Australia the appellant has continued to practice his faith as a member of the Chinese Presbyterian Church. The RRT stated that the appellant's detention and mistreatment by the authorities was a "stiff penalty" but noted that he had been released each time without being prosecuted.

38 The RRT accepted that "[i]n some local areas, the government has enacted its control [over religious practice] as old-style repression and prohibition" but stated that this is not government policy, which is that religions and religious groups are to be tolerated "if they acknowledge government regulations". The RRT, quoting from the Human Rights Watch/Asia Report on the State Control of Religion in China (1997) ("the Human Rights

Watch Report on Religion") explained the regulatory regime as follows:

> *"Government control is exercised primarily through a registration process administered by the State Council's Religious Affairs Bureau through which the government monitors membership in religious organisations, locations of meetings, selection of clergy, publication of religious materials, and funding for religious organisations. Failure to register can result in the imposition of fines, seizure of property, razing of 'illegal' religious structures, forcible dispersal of religious gatherings, and, occasionally, short term detention…*
>
> *While long-term imprisonment, violence, and physical abuse by security forces against religious activities still occur, they appear to be less frequent than they were at the time of the first Human Rights Watch study of religion in China in 1992. In 1997, we found isolated cases but no evidence of widespread or systematic brutality. When reports of these harsher measures do surface, they are increasingly denounced by the central government officials as examples of the excesses of local officials and their failure to implement policy directives correctly."*

39 The RRT did not consider that the requirement of registration of churches or the control of printing and distribution of religious material was persecutory of people of religious persuasion.

40 The RRT posed for itself the question of whether the appellant had been or would be deprived of his right to worship by acceding to the government regulations. It answered the question in the negative, being satisfied that the appellant could practise as a Protestant Christian in China at an official church. The RRT noted a growth in registered Protestants, the fact that the government continues to approve the printing of Bibles, and the fact that many Protestants move between official and unofficial churches.

The trial judge's decision

41 After summarising the decision of the RRT as set out above, the trial judge observed that while the RRT accepted the appellant's evidence concerning his detentions between December 1995 and October 1996, it did not expressly answer the question it posed for itself, namely, whether that treatment was persecutory on the grounds of religion. His Honour stated that the RRT's reasoning is found in the following two paragraphs:

> *"The Tribunal is satisfied … that the applicant could practise as a Protestant*

> *Christian in China. It notes that many Protestants move between the official and unofficial churches. It also notes that there is a growth in registered Protestants and a corresponding growth in the demand for Bibles. Moreover it also notes that the government continues to approve the printing of Bibles. The Tribunal did not find that the applicant held any significant belief which would prevent him from participating in worship services where these 'flexible' arrangements were in place.'*
>
> *'The Tribunal is satisfied that, given the applicant's level of understanding of his Protestant faith and the growth of links between the official and the unofficial Protestant Churches in China, he would be able to resume his religious practices and beliefs, subject to some state controls but insufficient to deprive him of his right to religious freedom. The Tribunal is not persuaded that he is a person wanted by the authorities and that he faces persecution from them. He was given permission to leave China well after his religious activities became known. The Tribunal is satisfied that the applicant would not face persecution in the future on account of his religion.'"*

42 The trial judge concluded that it was reasonably clear that the RRT's reasoning was that, even assuming in the appellant's favour that he was detained as mentioned and that there was a real chance that if he were to return to China his experience would be repeated, this would not constitute persecution "for reasons of … religion". Rather, it would constitute the enforcement of a system of regulation of church governance that was not persecutory for religious reasons.

43 The trial judge stated the RRT refused the appellant's claim because inter alia:

- he was able to practise his faith as a Protestant Christian in an official church; and
- if he were to resume worshipping in an unregistered church, difficulties that he might again encounter with the authorities would be due to the enforcement of the regime of governmental control over the organisation of religious institutions, not the inhibition of his religious beliefs and practices.

44 The trial judge regarded as indistinguishable the recent decision of a Full Court in *Minister for Immigration & Multicultural Affairs v Zheng* [2000] FCA 50 in which the Court considered the question of whether the requirement that Catholic churches in China be registered constitutes persecution. Hill J, delivering the leading judgment, stated at [41]-[43]:

> *"For my part I am prepared to accept that the prohibition legally to practise one's religion could, and probably would, constitute persecution on religious grounds for the purposes of the Convention. But did the Tribunal find that Mr Zheng was prohibited from practising his religion?*

There was evidence before the Tribunal which was accepted by it that, while problems were encountered by members of the underground Catholic church, there was not prohibition upon Catholics practising their religion. The fact that religious congregations were required to register was not itself persecution as the Tribunal held. The Tribunal was of the view that there was no doctrinal difference in religious practice between the underground church on the one hand and the open registered Catholic church on the other. The difference between them lay only in the need for registration, what the Tribunal referred to as 'the governance of the church'. *Put another way, the country information showed that the recognised or patriotic Catholic church was required to be self-supporting and self-propagating with choice of bishops being left to Chinese authorities rather than the Vatican but the underlying religious faith was the same.*

In my view it was open to the Tribunal to reach the conclusion it did on the evidence before it and it follows that the decision of the Tribunal discloses no reviewable error."

Whitlam and Carr JJ agreed.

45 The trial judge stated his conclusions as follows:

"36. I can see no reason for distinguishing this case from Zheng in the relevant respect. In both cases the RRT distinguished between the Christian religion (in Zheng Roman Catholic and in the present case Protestant) and church organisation and administration. According to the distinction, it is not persecution on grounds of religion to make and enforce laws prohibiting congregational worship elsewhere than at 'registered' or 'official' or 'patriotic' churches, the clergy of which have been appointed by the Chinese Government.

37. The Full Court in Zheng held that the RRT had been entitled to rely on that distinction on the evidence before it. I am bound to follow Zheng for what the Full Court decided. Although its decision was founded on the evidence that was before the RRT in that case and therefore does not require a particular result in this case, it is important that the Full Court implicitly accepted the validity for the purpose of the Convention definition of the general distinction just mentioned. I should follow the Full Court in this respect. There was evidence before the RRT in the present case on which it was entitled to make the same distinction.

38. Contrary to Mr Wang's submission, the RRT did address the question, albeit only implicitly, what would happen to him if he were to resume worship in the underground church. It accepted that he may well be again detained, reprimanded and released, but thought that this would not be persecution on grounds of religion, but would be the legitimate enforcement of a system of regulation of public religious assembly that is consistent with the Convention. In my respectful opinion, the RRT's approach in the present case is consistent with that taken by the RRT, and found acceptable by the Full Court, in Zheng.

39. Notwithstanding this result, I question the general distinction between 'religion' and the governance of religious institutions. The distinction

seems to treat 'religion' in the Convention sense as necessarily and in all cases limited to matters of personal faith and of doctrine and as not having a congregational, community or corporate aspect. I doubt the correctness of this view. My concern is reflected in the following passage from the Human Rights Watch/Asia October 1997 Report on the State Control of Religion in China, which was before the RRT in the present case:

> 'for Chinese officials, religious belief is a personal, individual act, and they distinguish between personal worship and participation in organized religious activities. It is the latter that they go to great lengths to control, not the former. The whole concept of religious freedom, however, involves not only freedom of the individual to believe but to manifest that belief in community with others.'

40. The kind of difficulty to which I refer is indicated by the following passage from a statutory declaration by Mr Wang's wife that was before the RRT:

> 'I have attended a registered church as well as an unregistered church. I noticed that the differences between the two churches were as follows:
>
> 1) In the registered church the minister after reading a bible spoke about communism and how we must not allow our religious beliefs to override communist ideologies.
> 2) At the registered church officers of the PSB were present.'

41. Finally, the difficulty referred to is inherent in Mr Wang's claim, as described by the RRT, that he 'could not worship faithfully in a registered church which was there to serve the purposes of the Communist party', a claim that the RRT must be taken to have rejected.

42. If I were to give effect to my concerns, however, I would intrude upon a consideration of the merits of Mr Wang's application for a protection visa. Having regard to the RRT's findings of fact and the Full Court decision in Zheng, I think Mr Wang has not established either of the grounds of review on which he relies."

The appeal

46 The appellant relied upon a number of grounds which were refined in the course of argument. In substance, the appellant contended that the RRT failed to address his claim of having a well founded fear of persecution for reasons of religion. Rather, so he said, it addressed the quite separate question of whether, under the laws of China, the appellant was prohibited from practising his faith as a Protestant Christian. It was submitted that in addressing the second question rather than the first, the RRT erred in law. Further, the second question was said to be irrelevant as it related to the practice by the appellant of his

religion, in a registered Protestant Church, which is different to the manner in which he intends, and is entitled, to practice his religion. Thus, it was submitted that the RRT fell into error in addressing questions relating to the nature and extent of state control of religion, rather than whether the practice by the appellant in China of his religious beliefs in the manner to which he was entitled justified his claim of a well founded fear of "persecution for reasons of religion" if he were to return to China.

47 Counsel for the appellant submitted that *Zheng* was a decision on its own facts and the primary judge erred in treating it as an authority that was binding upon him. It is to be noted that the observations of Hill J in *Zheng* were based on the conclusion of the RRT that there was "***no*** doctrinal difference in religious practice between the underground Church on the one hand and the open registered Church on the other" and that the "difference between them lay ***only*** in the need for registration" (emphasis added). In the present case there was said to be abundant evidentiary material, which was either accepted or not rejected by the RRT, which presented a different view, to that acted upon by the Full Court in *Zheng*, of the nature and extent of government control and regulation of the religious activity in which the appellant wished to engage in China.

48 The Minister disputed the appellant's contentions and submitted that no error of law had been made by the RRT or the primary judge. In particular, the Minister contended that the RRT, as the tribunal of fact, found that the fear of the appellant was to be properly characterised as a fear of the consequences of breaching a law of general application rather than a fear of religious persecution. It was said that that finding of fact was plainly open on the evidence or material before the RRT and, therefore, could not be the subject of review for error of law under Pt 8 of the Act. The Minister also submitted that the primary judge was correct in regarding himself as bound by the observations of Hill J in *Zheng* and that the appellant's approach was an impermissible intrusion on the RRT's findings of fact and amounted to an appeal on the merits. It was also pointed out that in *Tang v Minister for Immigration and Multicultural Affairs* [2000] FCA 985 Branson J, applying *Zheng*, also upheld a decision by the RRT that the appellant, a Chinese Catholic, would not suffer persecution in China by reason of her religion and had no reason to fear that she would suffer harm on her return if she practiced her religion by attending an official, rather than an underground, church. It is to be noted that, as did the trial judge in the present case, her Honour at [19]-[20] expressed reservations about the distinction drawn in *Zheng* between the

"governance of a church" and "underlying religious faith".

49 Although the submissions raise the question of whether conduct of a claimant that is unlawful under a general law can, as a consequence, fall outside the protection of Art 1A(2) of the Convention, the RRT did not appear to consider or refer to case law on that question.

Laws of general application

50 The High Court first discussed this issue in *Applicant A v Minister for Immigration and Multicultural Affairs* (1997) 190 CLR 225. The applicants in *Applicant A* were citizens of the PRC, were married and had a baby who was born in Australia. They lodged applications for protection visas on the basis that they did not agree with China's One Child Policy and, because they had one child already, risked the policy being enforced against them by sterilisation if need be if they returned to China. The couple claimed to have a well-founded fear of persecution on the ground of their membership of a particular social group, namely all PRC citizens who had one child and who did not agree with the One Child Policy or who will be coerced or forced into being sterilised by reason of the policy. The applicants were successful before the RRT and before the primary judge but not before the Full Court or the High Court. Dawson J (at 244-245) approved the comments of the Full Court (Beaumont, Hill and Heery JJ) (1995) 57 FCR 309 at 319:

> *" . . . a country might have laws of general application which punish severely, perhaps even with the death penalty, conduct which would not be criminal at all in Australia. The enforcement of such laws would doubtless be persecution, but without more it would not be persecution for one of the reasons stated in the Convention"*.

51 His Honour (at 243) added:

> *"[w]here a persecutory law or practice applies to all members of society it cannot create a particular social group consisting of all those who bring themselves within its terms"*.

52 Brennan CJ also discussed the relationship between breach of laws of general application and persecution for a Convention reason. His Honour (at 233) stated:

> *"…the feared persecution must be discriminatory. . . . The persecution must be 'for reasons of' one of those categories. . . . The qualification also excludes*

> *persecution which is no more than punishment of a non-discriminatory kind for contravention of a criminal law of general application. Such laws are not discriminatory and punishment that is non-discriminatory cannot stamp the contravener with the mark of 'refugee'."*

53 McHugh J (at 258) stated:

> *"Conduct will not constitute persecution, however, if it is appropriate and adapted to achieving some legitimate object of the country of the refugee. A legitimate object will ordinarily be an object whose pursuit is required in order to protect or promote the general welfare of the State and its citizens. The enforcement of a generally applicable criminal law does not ordinarily constitute persecution."*

54 His Honour (at 259) elaborated on this point, stating that it is "[o]nly in exceptional cases ... that a sanction aimed at persons for reasons of race, religion or nationality will be an appropriate means for achieving [some] legitimate government object and not amount to persecution".

55 The High Court also considered the issue of laws of general application in *Chen Shi Hai v Minister for Immigration and Multicultural Affair* (2000) 170 ALR 553. The applicant in *Chen* was a three and a half year old third child of Chinese parents born out of wedlock. The Court unanimously found that the applicant belonged to a particular social group, colloquially known as "black children", and would be persecuted for that reason if he returned to China. The majority of the Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) observed at 558 that the Full Court had defined "laws of general application" as laws and policies "directed to the whole population". In determining whether the laws or practices in question were laws of general application, their Honours noted at 558:

> *"Laws or policies which target or apply only to a particular section of the population are not properly described as laws or policies of general application. Certainly, laws which target or impact adversely upon a particular class or group – for example, 'black children', as distinct from children generally - cannot properly be described in that way."*

56 Further, their Honours commented at 559:

> *"To say that, ordinarily, a law of general application is not discriminatory is not to deny that general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination."*

57 Thus, the majority found that "black children" could constitute a social group for the

purposes of the Convention. Their Honours further found that "black children" are treated differently in China and that this different treatment amounted to persecution.

58 Kirby J, in a concurring judgment, stated at 571:

> *"The mere fact that the law is a criminal law or one of general application in a particular society does not withdraw from those who have a well-founded fear of being persecuted, the protection of the Convention definition. The Nazi State in Germany was generally a Rechtsstaat. Laws of general application in such a State can sometimes be the instruments which reinforce and give effect to the antecedent persecution and help to define the persecuted and to occasion their urgent search for foreign refuge."*

59 Kirby J also warned:

> *"Care must, in any case, be taken against blindly assuming that because a law is one of general application it can play no part in identifying, consolidating and motivating a particular social group as one falling within the protection of the Convention."*

60 In *Applicant A* the court was concerned with the circumstances in which a contravention of a law of general application can *create* a social group for the purposes of the Convention. A different issue arises where a court is concerned with the discriminatory impact of a law on members of a pre-existing group. Even where such laws are of general application, as was observed by the majority in *Chen* at 559, "general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily".

61 Putting to one side the question of onus or burden of proof, Canadian courts have approached this issue in a broadly similar manner. As a general proposition, the Canadian courts have held that although government enforcement of an ordinary law of general application is probably prosecution, rather than persecution, it is open to a claimant to show that the laws are either inherently, or for some other reason, persecutory in relation to a Convention ground: see *Zolfagharkhani v Canada (Minister of Employment and Immigration* (1993) 3 F.C 540 at 552 per MacGuigan J.

62 The issue has also been considered in US cases. In *Chang v INS* 119 F. 3d 1055 (3d circuit, 1997) the majority of the United States Court of Appeal, Third Circuit, observed at 1060-1061:

> *"Nothing in the statute or legislative history suggests, however, that fear of prosecution under laws of general applicability may never provide the basis for asylum or withholding of deportation. To the contrary, the statute provides protection for those who fear persecution or threats to life and freedom 'on account of' a number of factors, including religion and political opinion, without distinguishing between persecution disguised as 'under law' and persecution not so disguised. As the Second Circuit cautioned, in a case concerning illegal departure from Yugoslavia, 'the memory of Hitler's atrocities and of the legal system he corrupted to serve his purposes ... are still too fresh for us to suppose that physical persecution may not bear the nihil obstet. of a 'recognized judicial system.' ' Sovich v. Esperdy, 319 F.2d 21, 27 (2d Cir. 1963). The language of the statute makes no exceptions for 'generally applied' laws; if the law itself is based on one of the enumerated factors and if the punishment under that law is sufficiently extreme to constitute persecution, [it] may provide the basis for asylum or withholding of deportation even if the law is 'generally' applicable."*

63 While, generally, punishment for breach of a criminal law of general application will not constitute persecution for a Convention reason, the proposition contended for by the Minister that prosecution under generally applicable laws cannot amount to persecution for a Convention reason is erroneous. Before such a conclusion can be reached in a particular case the circumstances of the individual concerned must be considered. That consideration will usually occur in the context of an inquiry into the nature of the law, the motives behind the law, whether the law is selectively or discriminatorily enforced or impacts differently on different people. Further, where the punishment is disproportionately severe, that can result in the enforcement of the law in that case being persecutory for a Convention reason: see *Namitabar v Canada (Minister of Employment & Immigration)* (1994) 2 Can. F.C. 42 and *Fathi-Rad v. Canada (Secretary of State)* (1994) 77 F.T.R. 41.

64 In the present case the RRT gave only scant attention to the above matters. In inquiring into the nature of the laws in question I would have expected the RRT to have specified, in greater detail than it did, the source and detail of the laws and the penalties that attend their breach.

65 A law that targets or applies to persons by reason of their political opinions, religion, race or membership of a pre-existing social group, is not properly described as a law of general application. Such laws "target or apply only to a particular section of the population": see *Chen* at 558. In *Bastanipour v INS* 980 F.2d 1129 (7th Circuit, 1992) the United States Court of Appeal, Seventh Circuit, while accepting the distinction between persecution and prosecution stated (at 1132) that the laws under consideration were laws on

apostasy and:

> *"Christians, like members of other religious groups, are a protected class and we must consider whether Bastanipour has a well-founded fear of persecution on account of his Christianity."*

66 Consequently, a law regulating the practice of religion, requiring that it be practised or observed in a particular way or targeting or applying only to persons practicing religion, is not a law of "general application". Thus, a fear of prosecution or punishment by the authorities for the breach of such laws can, of itself, give rise to a well-founded fear of persecution for a Convention reason.

67 The RRT, quoting from the Human Rights Watch Report on Religion, briefly outlined details of the Chinese laws requiring registration of religious groups. The Report stated that:

> *"[The government] has narrowed the criteria it uses for identifying 'authentic' religious groups, distinguishing between the five officially-recognized religions – Buddhism, Daoism, Catholicism, Protestantism, and Islam – and cults or sects practicing 'feudal superstition.' As illegal entities with no claim to protection, the latter are subject to a distinct set of penalties."*

68 Thus the Chinese laws in question appear to prohibit religious practice other than by "authentic" religious groups (that is, the five officially recognised religions) and regulate the practice of religion by those groups by requiring that they be registered in accordance with Chinese law. Plainly, such laws are not laws of general application as that term has been used in the cases.

Persecution by reason of religion

(a) In community with others

69 The present case is concerned with the appellant's fear of the consequences of practising his religion as a Protestant Christian in community with others at an unofficial church, if he returns to China. As I shall explain, for the purposes of the Convention, the courts have generally taken a broad view of what constitutes the practice of religion.

70 The fact that persecution as a result of religious practice might occur indirectly

through a government regulatory regime does not result in it falling outside the protection of the Convention. In *Okere v Minister for Immigration and Multicultural Affairs* (1998) 157 ALR 678 at 681 Branson J observed:

> *"History supports the view that religious persecution often takes 'indirect' forms. To take only one well-known example, few would question that Sir Thomas More was executed for reason of his religion albeit that his attainder was based on his refusal to take the Succession Oath in a form which acknowledged Henry VIII as head of the Church of England."*

71 Further, religious practice has not been treated as being confined to personal religious worship. In *Fosu v Canada (Minister of Employment and Immigration)* (1994) 90 FTR 182 the Federal Court Trial Division was concerned with a ban by the Ghanaian Government on some activities of Jehovah's Witnesses on the ground that they lead to social disruption. The Refugee Division had determined that the restriction on Jehovah's Witness religious activities by the Ghanaian government did not, under the circumstances, amount to persecution because there was no evidence that Jehovah Witness' could not individually pray to God or study the gospel. The Court found that the decision unduly limited the concept of religious practice by confining it to "praying to God or studying the Bible" and stated at 184-185:

> *"…it seems that persecution of the practice of religion can take various forms, such as a prohibition on worshipping in public or private, giving or receiving religious instruction or the implementation of serious discriminatory policies against persons on account of the practice of their religion."*

72 The court concluded that the prohibition against Jehovah's Witnesses meeting to practice their religion could amount to persecution, and referred the matter back to be reconsidered. See also *Irripugge v Canada (Minister of Citizenship and Immigration)* (2000) 94 A.C.W.S. 3d 733.

73 Further, as was observed by the trial judge at [39] of his reasons, while religion is primarily a manifestation of a personal faith and of doctrine it also has a congregational or community aspect. His Honour's view is consistent with Art 18 of the *Universal Declaration of Human Rights 1948* ("the Universal Declaration") which states:

> *"Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or* ***in community with others*** *and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."* [Emphasis added]

74 Article 18(1) of the *International Covenant on Civil and Political Rights* is to similar

effect. M. Nowak in *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) (at 312-314), after observing that freedom of religion is considered part of the "basic rights of communication" among individuals in a community, continued:

> *"Because basic rights of communication protect not merely the individual's spiritual existence but [also] communication of spiritual subject matter to the world at large and defence of a conviction in public, they are also termed* 'community rights'. *This means that in order to exercise these rights effectively – in particular, the freedoms of association, assembly, trade unions and religion – the individual requires a like-minded community. This* collective character *is particularly stressed in Art. 18(1) with the words 'individually or in community with others'… This means that religious societies as juridical persons are also entitled to a subjective right to the exercise of their belief…"*

75 Although primacy is to be given to the written text of the Convention, the context, object and purpose of the Convention is also to be considered: see *Applicant A* (at 254) per McHugh J. More specifically, Kirby J (at 296-297) observed that the term "refugee" in the Convention:

> *"is, in turn, to be understood as written against the background of international human rights law, including as reflected or expressed in the Universal Declaration of Human Rights (esp Arts 3, 5 and 16) and the International Covenant on Civil and Political Rights (esp Arts 7, 23)."*

76 In Minister for Immigration & Multicultural Affairs v Mohammed (2000) 98 FCR 405 French J stated at 421:

> *77 "Given the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from whom they are seeking protection."*

78 See also Omar v Minister for Immigration and Multicultural Affairs [2000] FCA 1430 at [35].

79 The approach of going beyond the strict interpretation of the text of the Convention is consistent "with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if a court was required to construe exclusively domestic legislation": see *Applicant A* at 255 per McHugh J. See also *Shipping Corp. of India Ltd v. Gamlen Chemical Co. Asia Pty Ltd* (1980) 147 CLR 142 at 159 per Mason and

Wilson JJ; *Chan v. Minister for Immigration and Ethnic Affairs* (1989), 169 CLR 379 at 412-413 per Gaudron J; *Buchanan & Co. v. Babco Ltd* [1978] AC 141 at 152.

80 The Preamble to the Convention refers to the Universal Declaration as "[affirming] the principle that human beings shall enjoy fundamental rights and freedoms without discrimination" and states that an object of the Convention is to "assure refugees the widest possible exercise of these fundamental rights and freedoms".

81 Accordingly, it is appropriate to consider Art 18 of the Universal Declaration and the objects of the Convention in interpreting Art 1A(2). When regard is had to those matters it is clear that there are two elements to the concept of religion for the purposes of Art 1A(2): the first is as a manifestation or practice of personal faith or doctrine, and the second is the manifestation or practice of that faith or doctrine in a like-minded community. I would add that that interpretation is consistent with the commonly understood meaning of religion as including its practice in or with a like-minded community.

(b) Persecution by reason of future conduct

82 In the present case the claimant's fear is based on past persecution by reason of his religious practice and also upon future conduct, namely the intended practice of his religion at an unofficial church in community with others after his return to China. In determining whether there is a "real chance" of persecution for a Convention reason, evidence as to past events of such persecution is often the best evidence as to what is likely to occur in the future: see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574-575. However where, as in the present case, the fear is also based on conduct in which a claimant intends to engage upon return to the country of nationality, a question arises as to whether the claimant ought to desist from engaging in that conduct (in the present case, by practising religion at an official rather than an unofficial church) and thereby not create the circumstance that will give rise to the fear of being persecuted.

83 A number of cases have considered the question of whether a claimant ought to desist from engaging in conduct that will create the circumstance that results in that person's fear of

persecution for a Convention reason. In *Mohammed v Minister for Immigration & Multicultural Affairs* [1999] FCA 868 at [28] Lee J stated that recognition of refugee status (in that case, *sur place*) cannot be denied to a person because the person's voluntary acts in Australia have created a real risk that the person will suffer persecution occasioning serious harm if returned to the country of nationality. On appeal in *Minister for Immigration & Multicultural Affairs v Mohammed* (2000) 98 FCR 405, a Full Court, by majority, upheld the decision of Lee J, holding that it was an error for the RRT to regard the question whether the claimant "acting solely out of desire to put himself in a position where he could claim to be endangered" as determinative of the question of whether that person was a refugee: see Spender J at 409 and French J (at 419-422). French J at 419-420 stated that the question to be answered, for example in the case of a political refugee, always remains the same: is there, at the time of determination of refugee status, a well-founded fear of political persecution? See also Spender J at 408.

84 Most recently, in *Omar*, the Full Court held that the likely *future* conduct of a Somali national, who feared that he would be persecuted if he returned to Somalia as he was a committed intellectual who would speak out against the local militias, could give rise to a well founded fear of persecution on Convention grounds. After reviewing the authorities, including *Mohammed*, the Court stated at [38] that:

> *"the recent cases in England and in this Court stand for the proposition that possible future conduct, including a so-called 'spontaneous voluntary expression of political opinion', can provide an acceptable basis for a presently existing and well-founded fear of persecution for a Convention reason."*

85 The Court added at [39] that there is nothing fanciful about the idea of persons with strong religious or political convictions having a fear of persecution founded upon "apprehensions of what they may do and what may happen to them if they come face to face with repression". Thus, the Court at [42] stated that an assumption that a person with a strongly held religious belief should act reasonably, and compromise that belief to avoid persecution, would be contrary to the humanitarian objects of the Convention.

86 The decision of Lee J in *Mohammed* was also cited with approval in *Danian v Secretary of State for the Home Department* [2000] Imm AR 96 at 119-120. The Court of Appeal in *Danian* held that in all asylum cases there is ultimately a single question to be

asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then the claimant is entitled to asylum. In *Mohammed* and *Danian* that entitlement was held not to be forfeited because the risk arises from the claimant's own conduct, however unreasonable.

87 In *Secretary of State for the Home Department v Ahmed* [2000] 1 NLR 1 (which was also cited with approval in *Omar* at [36] and [37]) the question was whether a Pakistani Ahmadi had a well founded fear of persecution on religious grounds although the applicant had never in fact been charged with any offence under Pakistani law. Rather, he claimed that his behaviour upon return in speaking out and spreading the Ahmadi faith would attract the hostility of those amongst whom he lived and cause the authorities to prosecute him under an ordinance directed toward suppressing preaching by Ahmadis. Simon Brown LJ (with whom the other members of the Court of Appeal agreed) stated:

> *"it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would not refrain from such activities – if, in other words it is established that he would in fact act unreasonably – he is not entitled to refugee status. In my judgment the cases do not support the latter proposition and, indeed, were they to do so, they would clearly be inconsistent with [Danian]."*

88 *Omar*, *Mohammed*, *Danian* and *Ahmed* are authority for the following propositions:

- the question must always be whether the appellant has a well founded fear of being persecuted for a Convention reason;

- the Convention, in seeking to protect fundamental rights and freedoms of individuals does not superimpose upon that protection a requirement that it is only available in respect of those rights and freedoms which are exercised reasonably.

89 Of course, whether past conduct, or the proposed future conduct, is accepted by the fact finding tribunal as being genuinely in pursuit of a claimant's political or religious beliefs or convictions is a separate question. If it is not, the claimed fear of persecution for a Convention reason may be found not to be genuine or well founded and, as a consequence, the claimant will fall outside the protection of the Convention. Thus, conduct engaged in for the purpose of claiming the protection of the Convention or deliberate conduct to create the

risk of persecution claimed to be feared, although not disqualifying factors, may be indicators that the subjective fear does not exist or is not well-founded: see *Mohammed* at 407 per Spender J and at 420 per French J.

90 However, as persecution can occur by reason of an imputed political or religious belief, the genuineness (or lack thereof) of a religious or political belief is not always determinative. As was observed (at 120) by Brooke LJ in *Danian*, referring to the decision in *Bastanipour*:

> *"In that case the court held that the central question was not whether an Iranian national's conversion (while in prison) from Islam to Christianity was sincere or genuine: rather, it was a question of how the purported conversion would be viewed by the authorities in Iran."*

91 Accordingly, although the RRT might have to determine, as a question of fact, the genuineness of a claimant's political or religious beliefs and convictions as a step in determining whether the claimed fear of persecution is for a Convention reason and, if so, whether it is well founded, it is not entitled to reject the claim because it regards it as unreasonable or unnecessary for the claimant to practice those beliefs or convictions.

Reasoning on the appeal

92 The RRT, in finding that the appellant had suffered a "stiff penalty" as a result of having been detained and mistreated by the authorities on account of his religious practices and activities as a Protestant Christian at an unregistered church, must be taken to have substantially accepted the appellant's version of events that led him to fear further religious persecution for the same reasons on his return. However, the RRT also found that the authorities will tolerate the practice by the appellant of his religion provided it accords with government regulations that required that religious activities be practiced only at churches registered according to Chinese law. Thus, although the registration process is administered by a Government Bureau through which the government "monitors membership in religious organisations, locations of meetings selection of clergy, publication of religious materials and funding for religious activities" and failure to register can result in fines, requisition of property and "forcible dispersal of religious gatherings, and, occasionally short term

detention" the RRT stated that "registration as such" is not of itself persecutory of people of religious persuasion. The RRT equated the laws requiring registration with laws in Australia pursuant to which "buildings require permits", and noted that "local government and other planning agencies do not always accede to requests for such permits".

93 The RRT found that the appellant did not hold any "significant belief" that would prevent him from acceding to government regulations and practising as a Protestant Christian in China by participating in religious worship services at a registered Church. Accordingly, it concluded that the appellant would not face persecution in the future on account of his religion as "he would be able to resume his religious practice and beliefs, subject to some state controls but insufficient to deprive him of his right to religious freedom".

94 Early in its reasons the RRT posed the question for it as:

> *"whether the treatment [the appellant] has faced in China was persecutory or whether he could expect to face persecution if he returned there in the future."*

95 Plainly, the RRT was using "persecution" in the sense of persecution for a Convention reason. As was observed by the trial Judge, although the RRT posed the question it was required to answer, it did not answer that question. His Honour considered that the RRT implicitly answered the question by concluding that enforcement of a system of regulation of church governance in China, which involved government control of religion through the registration process, was not "of itself" persecutory, therefore enforcement of that system against the appellant does not constitute persecution of him by reason of religion.

96 In my view the RRT did not answer the question it posed for itself. Rather, it answered the separate question of whether the laws regulating religious practice were persecutory. The answer to the latter question might, in some cases, constitute an implicit answer to the former question if the laws in question were laws of general application. However, as explained above, they were not.

97 The appellant's claim was that his fear of persecution by reason of *his* religious practice was well founded. It was not determinative of that claim for the RRT to conclude, as it did, that as the laws regulating religious practice were not persecutory, enforcement of those laws against the appellant could not constitute persecution. The RRT's approach was

erroneous as a fear of prosecution, punishment or mistreatment for breaching those laws was capable of constituting a well founded fear of persecution for a Convention reason. Whether in the appellant's case it does constitute such a fear was a matter required to be, but was not, addressed as a result of the RRT's erroneous approach.

98 The RRT also concluded that, as the appellant can practice his religion on his return to China at a registered church, any consequences flowing from the intended practice of his religion at an unregistered church is not persecution by reason of religion. The RRT's reasoning appears to have been that as the appellant can practice his religious faith at a registered church it is unnecessary for the appellant to practice his religious faith at an unregistered church. Thus, if he practices at an unregistered church his voluntary acts, rather that those of the authorities, will be the cause of the persecution feared by him.

99 However, as was made clear in *Omar*, *Mohammed*, *Danian* and *Ahmed*, the fact that the appellant has brought into existence, or intends to bring into existence, the circumstances that give rise to the fear of persecution by an unnecessary, or even an unreasonable, voluntary act may be relevant to predict what may happen and to the genuineness of a claimant's claimed beliefs and convictions that are said to give rise to a fear of persecution for a Convention reason, but are not determinative of whether the fear is well founded. As explained above, the question which the RRT posed, but did not answer, must always be whether the claimant has a well founded fear of persecution for a Convention reason. If that question is answered in the affirmative the protection of the Convention is not forfeited or lost by a determination that the fear has arisen as a result of unnecessary, or even unreasonable, conduct by the claimant. It is therefore not forfeited or lost by a determination that the appellant could exercise his religious practices and beliefs in a manner, and at a church, that is different from the manner and church in which he intends and wishes to practice his religion.

100 In the present case the RRT did not find that the appellant is not genuine in his intention to practice his religion at an unregistered church or that his wish to do so is merely a pretext for claiming refugee status. Rather, the RRT appeared to accept the genuineness of the intention of the appellant to practice his religious faith at an unregistered church, but that acceptance was to no avail as it found he could practice his religious faith at a registered church.

101 Further, the RRT considered the religious practices, beliefs and freedom of the appellant solely by reference to the first element of religion as that word is to be interpreted in Art 1A(2), being the personal manifestation or practice of religious faith and doctrine. The RRT erred in law in failing to regard the second element, being the manifestation or practice of that faith or doctrine in community with others, as falling within Art 1A(2). The RRT posed for itself the question of "whether the applicant has been or would be deprived of his right to worship by acceding to the government regulations". By answering that question in the affirmative by saying he can practice as a Protestant Christian at a registered church it is plain that the RRT, erroneously, was disregarding the community or congregational element of religious practice. As a result of the RRT's erroneous approach it did not consider whether persecution of the appellant by reason of his past and intended practice of his religion at an unregistered church, being the practice of his religion in a like-minded community, constituted persecution for reasons of religion.

102 Further, the RRT's erroneous approach in interpreting "religion" in Art 1A(2) was also a factor that led it to regard the Chinese laws in question as analogous to town planning laws and to then conclude that enforcement of the Chinese laws against the appellant for practising his religion at an unregistered church was not "persecution" by reason of the appellant's religious practice.

103 For the above reasons I have concluded that the trial judge's concerns about the RRT's decision were well founded but his Honour erred in not concluding that the reason for his concerns were the errors of law to which I have referred. The errors are reviewable errors under Pt 8 of the Act as they involve an incorrect interpretation of the applicable law (s 476(1)(e)); an incorrect application of the law to the facts found by the RRT (s 476(1)(e)); and a failure by the RRT to apply itself to the question prescribed by law (*Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) SR (NSW) 416 at 420 and ss 476(1)(b) and 476(1)(c)).

104 I am also of the view that his Honour erred in concluding that he was bound to follow *Zheng*. The Full Court decision in *Zheng* was based on the finding of fact by the RRT that the essential differences between registered and unregistered churches related not to religious belief or practices but to "the governance of the church" and that the government regulation of the church was not persecutory. The Full Court concluded that as the RRT found there

was no difference in religious practice between the two churches it was open to the RRT to conclude, as a matter of fact, that the claimant's fear of persecution, based on his wish to attend an unregistered church, was not for reasons of his religion.

105 The evidence and material before the RRT in the present case, which was not rejected by the RRT, points to significant differences between practicing religion at an unregistered and a registered Protestant Church. The trial judge pointed out that the Human Rights Watch Report on Religion, upon which the RRT relied and from which it quoted in its reasons, and other material before the RRT, including that from the appellant and his wife, pointed to significant differences between, and consequences following from, the practicing of *religion* by the appellant at an official and an unofficial churches. As explained above the practice of religion is not to be confined to its doctrinal aspects. Thus, it is fairly clear that there were significant differences between the material that was before the RRT in *Zheng* and the material that was before the RRT in the present case.

106 The Human Rights Watch Report on Religion explained the basis for the differences as follows:

> *"Every important Chinese leader and religious official has stressed that no one in China is prosecuted for his or her religious beliefs but rather for suspected criminal acts. Tightening of control over religion, they maintain, has come only at the expense of illegal groups and illegal activities. There are two problems with that argument, however. One is that refusal to register and submit to the kind of intrusive monitoring outlined above is precisely what renders an organization illegal. The second is that for Chinese officials, religious belief is a personal individual act, and they distinguish between personal worship and participation in organized religious activities. It is the latter that they go to great lengths to control, not the former. The whole concept of religious freedom, however, involves not only freedom of the individual to believe but to manifest that belief in community with others.*
>
> *The government's argument that its control of religion is strictly in accordance with the law is not new; it argues the same when confronted with protests over its treatment of political dissent. But several elements of its policy on religion have changed. While lessening its reliance on arrests and detention, the government is enforcing requirements on registration more strictly than ever before."*

107 While I accept that, as in *Zheng*, the RRT must be taken to have found that the appellant has no significant religious belief that would prevent him from practicing as a Protestant Christian at a registered church, it does not follow that it also found that there is *no* difference, as far as the appellant was concerned, between practicing *religion*, as that term is

to be interpreted in Art 1A(2), at a registered and an unregistered church.

108 It follows from the foregoing that *Zheng* was a decision based on facts and material that, in part, overlapped with, but were distinct from, those before the RRT in the present case. The issue for the Court in *Zheng* was a question of fact, being whether the finding of the RRT that Mr Zheng was not prohibited from practicing his religion was open on the material before it. In *The Little Company of St Mary (SA) Incorporated v The Commonwealth* (1942) 66 CLR 368 at 378-379 Latham CJ observed that while it was open to a trial judge to be assisted by a precedent on a question of law, "on a question of fact precedents are not authority". Thus, although the trial judge observed, correctly in my view, that *Zheng* did not require a particular result in the present case, he was incorrect in his conclusion that nevertheless he was *bound* to apply or follow *Zheng*.

109 In any event, *Zheng* is not only a decision on a question of fact, but the Court in *Zheng* did not consider, let alone address, the issues of law arising in the present case cf: *Minister for Immigration and Multicultural Affairs v Li* [2000] FCA 1456 at [81]-[82]. In fairness to the Full Court in *Zheng*, those issues of law did not appear to have been raised or argued.

110 For the above reasons I have concluded that the trial judge erred in concluding that *Zheng* was an authority that he was bound to follow with the consequence that the review sought by the appellant must fail. For the same reasons I do not regard the decision in *Zheng* as a previous authority which should lead this Full Court to dismiss the appeal. If, contrary to my view, *Zheng* is authority for the proposition that church governance by registration, as such, is not persecutory as explained above, that does not resolve the issues arising for determination in the present matter.

111 Further if, contrary to my view, *Zheng* is an authority that is inconsistent with my decision on the issues of law arising on the present appeal, for the reasons I have given I am clearly satisfied that *Zheng* was wrongly decided on those issues: see *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-270.

Conclusion

112 I have concluded that the appeal is to be allowed, the orders of the trial judge and the decision of the RRT are to be set aside and in lieu thereof it be ordered that the matter be remitted to the RRT to be determined in accordance with law. Although the Court has power to direct that the matter be heard by a differently constituted RRT, that direction may not be appropriate in the present case as to do so might deprive the appellant of findings that were favourable to the outcome of his application. However, I would also desist from directing that the matter be referred back to the RRT constituted by the member who made the decision the subject of the review as there may be circumstances, including a view by the appellant that that was not appropriate, that ought to be considered before that course is ordered. In the circumstances it is appropriate to reserve liberty to apply on the issue of the constitution of the RRT that is to determine the outcome of the appellant's application for a protection visa.

113 The Minister contended that, in the event the appellant succeeds, there should be no order as to costs, as the main issues argued on appeal were not raised before the RRT or the trial judge. While there is some substance in that contention in respect of some of the issues, overall I have concluded that the complexity of, and the interrelationship between, the various issues is such that it is not appropriate to depart from the usual order of costs following the event. Accordingly, the Minister is to pay the appellant's costs of and incidental to the proceeding and of the appeal.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 10 November 2000

Counsel for the Appellant: JM Atkin

Solicitor for the Appellant:	Coroneos & Company
Counsel for the Respondent:	T Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	14 August 2000
Date of Judgment:	10 November 2000