

071541878 [2007] RRTA 311 (19 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071541878

DIAC REFERENCE(S):

COUNTRY OF REFERENCE: People's Republic of China (PRC)

TRIBUNAL MEMBER: Ms Philippa McIntosh

DATE DECISION SIGNED: 19 December 2007

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the Applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The Applicant, who claims to be a citizen of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the Applicant of the decision and his review rights by letter dated [date]

The delegate refused the visa application on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The Applicant applied to the Tribunal on [date] for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the Applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

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

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204

CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

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

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

CLAIMS AND EVIDENCE

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

The Applicant appeared before the Tribunal on [date] to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

The Applicant was represented in relation to the review by his registered migration agent. At the Tribunal hearing another representative of the firm was present. A barrister was also present at the applicant's request.

According to Departmental records the Applicant arrived in Australia on a visitor visa. As noted above, he lodged his application for the protection visa on [date].

Submissions to the Department

The Applicant claimed to fear persecution in China because of his involvement in Falungong practice in Australia since [year] and his participation in various protest activities critical of the Chinese government since then.

He claimed that he was from [city] in Shandong province in China.

According to biographical details provided by him on the protection visa application forms (which were completed with the assistance of a "student from China") he was [age]. He had left China legally on [date], using a passport issued without difficulty on his part in Shandong. He had had five years of education in China. From [year] to [year] he had lived at a single address in [city] in Shandong province. From [year] to [year] he was employed in an office job, and was dismissed, after which he listed no further employment.

His wife, child, mother and brother all remained in China.

In a statement written by him in Chinese, which had been translated by an accredited translator, he stated that his brother in China had been involved in the 1989 student movement and sent to a "labour reform camp" for "disturbing social order and socialist stability". His brother was then dismissed from his job. That brother's wife had divorced him and he had become depressed and remained unemployed after his release. He had no home or job, and had suffered brainwashing in detention so seemed to be a different person. His brother then became a Falungong practitioner, before Falungong was banned, and it helped him become productive and happy. He studied a trade, opening a shop in the applicant's name. His life improved. However the government cracked down on Falungong and after July 1999 his brother was again in trouble, was investigated and interrogated, was sent to a brainwashing class, and was unable to find work. His business licence was cancelled. At that time the authorities discovered that the business licence was in the applicant's name and the applicant was summoned to the local police station to give them information about his brother's illegal activities with Falungong. He denied all knowledge of this. However he

himself was subsequently dismissed from his job on the ground that he "sympathised with evil cult" and refused to cooperate with the government in its effort to crack down on evil cult activities. His workplace cited a regulation in support of their decision to dismiss him. He lost his income and the family had to rely on his wife's income. The family struggled.

He said he was denied all means to make a living just because his brother was a Falungong practitioner. He considered that the authorities had deprived him of his fundamental rights so his only choice for survival was to go to a Western democracy like Australia. He said it was unlikely his brother would be able to do this as he had served his term and would have trouble getting a passport.

He said he himself never practised Falungong in China.

He also claimed that his mother had suffered during the Cultural Revolution because she was married to the son of a landlord. Because of her experiences she helped the applicant borrow money from people and sold various belongings to pay for his journey.

He said that he had no friends or relatives in Australia, did not understand much English and knew nothing about the local laws. Because of his own sad experiences in China he was sceptical about newspaper stories. Time passed fast and he became an illegal migrant. He tried to earn as much money as possible to help his family. To avoid being detained he moved house quite often and had little contact with his family. He felt that he was under great pressure, shouldering the hopes of his whole family, and was on the verge of a mental breakdown. He lost weight and could not sleep.

In [month/year] he met a Falungong practitioner in Australia, who loaned him Zhuan Falun and Falungong videotapes, and taught him "five sets of exercise for practice". From [month/year] he went to Falungong gatherings in [suburb], after which he continued to do so once or twice a week, although initially because he was illegal he rarely took part in group practice in public. He also later heard that there were Chinese spies and agents among practitioners and he worried for his loved ones. He also claimed to have been involved in sit-ins by Falungong adherents outside the PRC Consulate in Sydney, the purpose of this being to make PRC nationals entering the Consulate aware of the persecution of Falungong adherents in China. He claimed he had attended a protest by Falungong practitioners outside the Chinese consulate in [month/year]. He submitted photographs to the Department in support of this claim.

He also submitted a photograph [dated], showing him carrying a banner in Chinatown stating [slogan].

He was interviewed by the delegate on [date] (unrepresented by a migration adviser at that stage). He told the delegate that he had not reached the level at which the Falungong exercises could be done. He said he had seen them done at the place where he studied, and had seen them on videos. He said he could not recall the names of the five main exercises, but described the Falungong principles.

The delegate noted that he had entered the Consulate on a date after the protest, to obtain a replacement of his expired passport. He was granted a Chinese Travel Document (not a passport) by the Chinese consulate general in Sydney on [date]. The delegate noted evidence that evidence of lawful stay in the country would normally be required by the issuing

authorities and, as by then he had been illegally in Australia for several years, that may explain why he was not issued with a new passport.

The Tribunal hearing

In oral evidence the Applicant stated that his immediate family remained in China. He and his wife had divorced in [month/year] because he was doing Falungong in Australia. It had affected her, although she had supported his doing the practice. He explained that she had proposed a divorce because the Public Security Bureau (PSB) were calling her to come and see them all the time. He said that she and his child were living together in the capital of his province, as were his immediate family. He said that he had no other siblings.

He said that he had had no contact with his wife or child since the divorce. He undertook to submit documentary evidence to the Tribunal of the divorce (and subsequently did so, see below).

As to whether he had sent them any money prior to the divorce, he said that he had not. I asked him why he had said in his written claims to the Department that he had come to Australia for the purpose of supporting them. He did not dispute this but responded that he had not sent them any money because he had had language problems when he arrived and had gone through trauma in China. He had been working casual jobs, and these paid enough only to support him. He was currently unemployed.

He said that when he last heard from his wife she had lost her factory job in [month/year]. He said he did not know why she had lost her job.

Of his brother's employment history, he said that his brother's last job had been in [year] when his brother had worked for [organisation]. I asked him if his brother had ever had any other job, and he said that his brother had also worked in the applicant's company, which the applicant had run in the 1990s. His brother had worked for him throughout that time, and had had no paid employment after that. His brother's wife, who worked in a textile factory and later in cleaning jobs, had supported him.

The applicant said that he himself had been living with his wife until his departure from China. Of his employment history, he said that he had been granted a business licence in [month/year] (he subsequently provided evidence of this, see below). His brother had lost his job and in [year] the applicant had started a business, which he ran till [date], after which he earned no income. I asked him to explain why, on the protection visa application form, he had written that he was working in a clerical job throughout the 1990s. He agreed that he had worked there, saying that he had run the business and worked as a clerk in the city (he subsequently submitted documentary evidence of his employment in the clerical position, see below). China had opened up and people could have two jobs. However in [month/year] he had lost both his jobs.

As to if he had written notification of his dismissal from his clerical job, he said that it had just been announced at a meeting. I told him that I understood dismissals would normally be notified in writing, and he responded that he just had not been issued with one.

Of his brother's problems, he said that in 1989 his brother had been arrested. The applicant did not know exactly why but knew that it related to students. His brother had been employed at that time in an office. His brother had been detained for [term] at [prison]. Family members

were not allowed to visit him. He was charged with supporting the student movement, but the applicant did not know the specific charge.

His brother later took up the practice of Falungong and as a result had some problems in 1999 when it was banned. His brother was summoned by the local PSB. The family subsequently found out that he had been deprived of food and had been tortured during his period of detention. After his release he had to report to the PSB every day to pressure him to give up Falungong, but he did not agree to do so. As for the consequences of his lack of compliance, the applicant reiterated that his brother had had to report to the PSB every day and was still doing so at the time the applicant left China. He said that he had lost contact with his brother at that point and did not know anything about him. The applicant's family had told him they did not know what happened to his brother after the applicant left China.

In evidence the applicant submitted copies of medical records, with translations, relating to injuries to a person who he claimed was his brother's wife. They were from various medical facilities in [province] and were dated. They referred to surgery done on the woman, and contained the diagnosis. These reports did not refer to the cause of the [condition/injury]. The applicant said that his mother had sent him these materials. As to how they were relevant to the present application, he claimed that his sister-in-law had been summoned by the PSB and injured by police officers. His mother had told him that his sister-in-law had been called to the PSB because she was a Falungong practitioner, and that his brother had also continued Falungong practice. She had told the applicant that his sister-in-law must have been called because his brother was avoiding police checks. The applicant claimed that his mother understood that his brother was now either in jail or in brainwashing classes.

The applicant said that his mother was not a Falungong practitioner.

As to why the applicant could not get a job after being dismissed from his clerical job, he said that it was because of what had happened to his brother. He had lost his clerical job and his business licence had been suspended because of his brother's Falungong links. After his brother's arrest in [month/year], the PSB had asked the applicant to tell them what other Falungong practitioners his brother knew. The applicant was not a Falungong practitioner and gave no information, in part because he did not know many practitioners and in part because those he knew he considered to be good people. He said that he had not looked for any jobs after that. That would have been "impossible", because if he had applied employers would see that he had been dismissed from his last job and that his business licence had been suspended because he had breached regulations, such as disturbing public security.

As to whether the PSB had suspected him of being a Falungong practitioner himself, he said that he did not know, but that they had said he supported an evil cult. I asked him whether they had simply questioned him, to which he responded that he had been detained. He described his detention. He said that in [months/year] the temperature had reached approximately 40°. He had been left outside for many hours, handcuffed and without clothes or water, and suspended so that his toes just touched the ground. He had intermittently lost consciousness. He had been detained for a term at the local PSB, by police and a special unit which monitored Falungong, whose name he did not know. He had been released after paying a stated amount. He had had medical treatment after going home, primarily for psychological damage, sunburn and the effects of food and water deprivation.

I asked him if he had had any further contact with the PSB after that, to which he said "not really", but that on National Day and other significant days, and unanticipated days when

Falungong practitioners were involved in some incident, he had been required to report to the PSB. He said that he was required to do that because if someone in one's family practised Falungong, one was required to tell the police whatever one knew. He said that he was the only person in his family who had to report to the police like this, and that that was because his brother had worked for him.

He reiterated that he had not applied for jobs because if he had showed his résumé employers would see that he had been dismissed. However he then said that he had applied for some jobs.

Noting that some of his oral evidence appeared to be expressed in vague terms, I asked him what effect his treatment by the PSB was having on him currently. He responded he was trying to be calm but that he felt strong fear, particularly during interviews, because of his experiences at the police station. He said that although he had wanted to have treatment in Australia he also felt reluctant to communicate with other people.

He agreed that he had come to Australia on a visitor visa on [date] He said he had not known anyone when he arrived in Australia I asked him what his plan for the future had been at that point, to which he responded that he wanted to escape from the daily reports, questioning, interviews and persecution. I asked him why he had previously indicated that he was not required to report to police on a daily basis. He responded that any time Falungong practitioners had problems he could be called on. One never knew when this could happen. I asked if he meant that it had happened, or that he had simply feared it might happen, to which he responded "I think they did that". He claimed that each time he went to the PSB they had made him stand or squat. They had also told people like him to slap or strike each other. This was typical of the treatment he experienced on the days he was called to the police station. As to whether the police had ever searched his home, he said they had not.

As to when his brother had married his present wife, he said that they had married over 20 years ago. I asked him why, in his written submissions to the Department, he had written that his brother's wife divorced him after 1989. He then claimed that she had divorced him to avoid trouble, and that she was not now his wife legally, but still took care of him. I asked him why, when I had described her as his brother's present wife, he had not corrected this. He responded that it was because he believed they were still like husband and wife, and were still living together. I put to him that he had earlier told me of his understanding from his mother that his brother was now in prison or attending brainwashing classes. He reiterated that he believed they were still together, but said that his mother had told him that his brother sometimes went to his wife's family's home in the same province. Otherwise he thought he still lived at home with his wife.

He said that his mother had only ever had given him information about the situation by telephone, not in letters.

I told him that I understood he had been issued with a PRC travel document in [month/year], and asked him why he had applied to renew his passport at that time. He responded that he needed a valid ID, and also that in order to protect his wife from being involved in his troubles he needed to authorise his mother to act on his behalf in relation to the divorce. As to why the latter required him to have a travel document, he said that he had asked the Consulate to help him get the letter of authority for his mother. He had showed the staff his passport, as a result of which they had noted that it had expired and had told him he needed a new travel document before they could help him with the requisite letter. They had

subsequently abided by this undertaking, giving him a letter to send to his mother. I told him that it seemed that the Consulate staff had been helpful, and he said "not really" as they had told him he would need a valid identity document in order to get the letter, so he had agreed. I suggested to him that this seemed fair enough. He said it was not, as they had told him he was a Falungong practitioner and would have to renounce Falungong and, if he went back to China, report to the local PSB. He had therefore signed a document at the Consulate renouncing his belief in Falungong. I asked him why he had not simply denied any involvement with Falungong, given that he had only been connected with it at all for a few months. He responded that he had been participating in protests outside the Consulate every week, so they knew of that. He also stated that at that time he had not considered himself to be a Falungong practitioner and that the Consulate had simply assumed it.

I told him that I proposed to put to him information that might be the reason, or part of the reason, for concluding that the application should be refused. I told him that he could choose to respond orally, either immediately, after a short break, or at a resumed hearing, or alternatively in writing. If he elected to take up the latter option he should advise the Tribunal how long he might need to do this, and I would consider if that was a reasonable period.

I told him that the fact that he was willing to go to the Consulate and apply for a new travel document could indicate that he had no fear in relation to the Chinese authorities, and had not been participating in protest activities outside the Consulate. He responded that he had gone to the Consulate for the reasons he had already given, because he wanted to protect his wife. He had had to authorise someone to deal with his divorce. He had been very frightened before entering the Consulate.

He stated that he had not told the Departmental delegate during his recent interview that he had conceded to the Consulate and he was a Falungong practitioner. I told him that I could infer from his failure to mention this significant fact to the delegate that the claim was untrue that he had been asked about Falungong during his contact with the Consulate. He responded that during his interview with the delegate his mind had become totally blank. It was his first experience of such an interview, he did not have a migration agent at that time, and he had suddenly felt a strong fear because of his experience in the PSB.

I noted that he had been without a valid visa in Australia for some years when he decided to apply for the protection visa in [month/year]. I asked him why he had decided to lodge the application at that particular time. He responded that when he arrived in Australia he had been fearful of what the PSB had done to him, such as the interrogation and torture. I asked him why, if so, he had delayed seeking protection for so long. He responded that there was the language barrier and he did not know the legal system. Initially he had just wanted to get away and get a job. Later he had gained more knowledge, and had become aware that fellow Falungong adherents had lodged applications.

I asked him why he had chosen to take up the practice of Falungong when he did, knowing, as he had claimed, that there were informers working for the Chinese authorities in Australia and that his brother had suffered because of his own practice. He responded that he had not done any Falungong practice before because of his knowledge of the persecution of practitioners in China. However he had been drawn to it because he had met a practitioner from his province and had some fellow feeling because they were from the same town. At that time he was depressed and unwell. He had no one else here so felt very close to her, so had told her what had happened to him and his brother. She had talked with him about Falungong practitioners, and why they had continued to practise, as his brother had, despite

their persecution. She had taught him, saying that Falungong would help not only his mental but also his physical health. He said that since then he had been learning from her, and had begun doing Falungong exercises in the following year.

I told him that I could infer that he took up Falungong activities in Australia solely in order to enhance his application for protection visa, and that he was not a genuine Falungong practitioner. He stated that he did not know about protection visas when he took up Falungong, and had not taken it up in order to get a visa. He said that if he had wished he could have claimed he had been a practitioner in China, but had not done so.

I told him that according to the delegate he had not been familiar with the names of the basic Falungong exercises and seemed to know little about Falungong principles when he was interviewed. I put to him that this did not appear to be consistent with his claim to be an adherent of Falungong. He responded that he was very nervous and fearful during the interview and had not understood the purpose of the questions. He agreed that he had not alerted the delegate to the fact that he was having difficulty focusing on her questions and was nervous, saying that he had not known how to conduct himself.

I asked him a number of questions about Falungong theory and practice, all of which he answered readily and with apparent familiarity.

As to why he had told the delegate he had not started doing the exercises at the time of the interview, he said that he could not recall. He had told her one had to study first and then practise it.

Of his fears for the future, he said that he had been persecuted in the past but, because of his activities in Australia, the danger of further persecution was multiplied.

asked that the Tribunal not make a decision until enquiries had been made about obtaining evidence from the applicant's family members, and a copy of the letter from the Consulate which the applicant claimed to have signed. I advised him that the Tribunal was not seeking documents from these sources, but nevertheless agreed not to make a decision for 21 days in order that any further materials to be submitted.

The Tribunal was adjourned on the understanding that, if no further questions became apparent that may need to be put to the applicant, no further hearing would be held. If that were the Tribunal's intention after considering all the evidence, the applicant would be advised accordingly. In the event, as this decision is favourable to the applicant, the Tribunal did not so advise him.

On [date] the representative provided a submission and nine attachments. The attachments (of which items f) to i) were in English, items in Chinese a) and d) were translated by an accredited translator, and items b), c) and e) were translated by an unidentified person). They were as follows:

- a) The applicant's certificate of graduation in [a trade] (certified copy of original document);
- b) certificate, naming the applicant, relating to opening a bank account (certified copy), relating to the opening of the business;

- c) the applicant's resident registration card (certified copy). It showed his work unit and his job;
- d) divorce certificate recording the applicant's divorce from his wife, (certified copy);
- e) a brief letter (without envelope) purporting to be from the applicant's mother (certified copy). She stated that before he divorced, the police had come to go home several times and had taken away all his possessions. She also stated that his sister-in-law had had another medical procedure The author had sold "her house" because it was "more important to save her life". The sister-in-law was recovering although her mind was not stable, but "at least she could survive";
- f) a statement from a witness, asserting that s/he was a Fa Lun Dafa follower in Australia, and that the author and the applicant had got to know each other at the "Fa Lun Dafa Learning Place" at [suburb] (the author did not state when). They have often studied and practised together;
- g) a statement from another practitioner, providing full contact details. The author stated that she had met the Applicant in [month/year]and after chatting had learned that they came from the same province in China. She realised the applicant was very depressed at that time, so had suggested that he take up the practice of Falungong to help his mood and also to keep fit. She said that later on she had "always" met him at Falungong practice in [suburb] every Friday, and at another practice venue.
- h) A statement from another witness, which provided full contact details for the author. S/he stated that she had witnessed the applicant going "to the gate of Chinese Consulate Sydney to spread kind thoughts to protest the persecutions that the Chinese government made to the Falun Gong practitioners" on a number of occasions as listed.
- i) A detailed report from a registered psychologist about the applicant. The history given to him by the applicant about his experiences in China was consistent with that given by the applicant to this Tribunal. The psychologist stated that a friend (the author of the letter at item g) above) accompanied the applicant to the psychological assessment, and apparently acted as interpreter during it. The psychologist conducted tests for depression and anxiety, on the basis of which he found that the applicant was suffering from "a serious level of depressed mood, which could be dangerous if he is forced to leave Australia, as I believe that he can become suicidal which is a mental health concern. It would appear that his practising in Falun Gong principles has had some positive effect on his level of depressed mood ...". He also found that the applicant was suffering from "extreme anxiety or panic". He diagnosed the applicant as having a particular condition, listing typical symptoms which included memory problems. He expressed the opinion that the treatment of the applicant's brother and his own interrogation by police were the primary sources of his trauma. He also expressed the opinion that the applicant "must have had a Major Depressive Episode when he was being discriminated, persecuted and tormented by the local police in China". His Depression was in partial remission because of his practice of the Falungong philosophy.

Evidence from other sources

The practice/philosophy known as Falungong was founded in 1992 in China by Li Hongzhi, known to his followers as Master Li. Falungong is based on the traditional Chinese cultivation system known as qigong, but is novel in its blending of qigong with elements of Buddhist and Taoist philosophy. Other terms such as Falun Dafa and Falungong are used in relation to the movement. The term Falun Dafa is preferred by practitioners themselves to refer to the overarching philosophy and practice (UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April). Falungong promotes salvationist and apocalyptic teachings in addition to its qigong elements. Despite its own protestations to the contrary, it also has a well-organised and technologically sophisticated following and has deliberately chosen a policy of confrontation with authorities (Human Rights Watch 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; Chang, M.H. 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, pp. 14-24, 91-95).

Falungong first came to the attention of PRC authorities after demonstrations by its adherents in April 1999 in Tianjin, and later that month outside the Zhongnanhai in Beijing. The initial government crackdown against it began in late July 1999, when a number of government Departments implemented restrictive measures against the movement, banning it and issuing an arrest order for Li Hongzhi. The movement was declared an “evil cult” and outlawed in October 1999 (Chang, 2004, pp.8-10; UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April).

From July 1999 on, Falungong protests were countered by police roundups in which thousands of practitioners were detained in police lockups and makeshift facilities for short-term "reeducation". The crackdown was accompanied by a coordinated media campaign by China's public institutions, highlighting the alleged dangers of Falungong and attempting to justify the crackdown. From July 1999 until the end of 1999 a “legal infrastructure” to counter Falungong was erected: the banning of CCP members, civil servants and members of the military taking part in Falungong activities; the introduction of restrictions on legal officers representing Falungong practitioners and a circular calling for confiscation and destruction of all publications related to Falungong. Falungong internet sites also came under attack.

By October 2000, a year after the "evil cult" regulations went into effect, the government was demonstrating less and less tolerance for rank-and-file practitioners who continued to defy the government by participating in protest rallies. Instead of sending them back to their hometowns for "transformation", they were immediately detained.

Reports suggest that a series of increasingly restrictive measures was implemented during 2001. Such measures included the utilisation of more severe sentences, allegedly incorporating the use of psychiatric institutions to detain and “re-educate” Falungong practitioners; an increase in systematic and state-sanctioned violence against Falungong practitioners; an escalated propaganda campaign against Falungong, repeatedly reinforcing the government's message that the group was an “evil cult” which posed a threat to Chinese society; and the utilization of state institutions such as the police and universities to combat Falungong. Reports suggest that PRC authorities also attempted to restrict the movement of suspected Falungong practitioners within China, to prevent the international press from covering the activities of the Falungong movement, and launching an offensive against the internet structure underpinning the effectiveness of the Falungong organisation in China

The measures employed by PRC authorities during 2001 were met with some degree of success: by late 2001 many reports were suggesting that Falungong had been effectively

suppressed as an active and visible organisation within China. The success of these measures also necessitated a change in the conduct of the Falungong organisation in China itself. While there has been a dramatic abatement in the visibility of Falungong activities within China, there were increasing reports highlighting demonstrations in China by foreign followers of Falungong. These demonstrations had been met with strong resistance from PRC authorities, with the arrest, temporary detention and expulsion of foreign Falungong adherents commonly reported (Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; UK Home Office, 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April; Pomfret, J. and Pan, P. P. 2001, 'Torture is Breaking Falun Gong', *Washington Post*, 5 August).

The US State Department has more recently said as follows of the treatment of practitioners:

Since the crackdown on Falun Gong began in 1999, estimates of the numbers of Falun Gong adherents who died in custody due to torture, abuse, and neglect ranged from several hundred to a few thousand ... UN Special Rapporteur Nowak reported in March that Falun Gong practitioners accounted for 66 percent of victims of alleged torture while in government custody. (2007, Country Reports on Human Rights Practices – 2006, released by the Bureau of Democracy, Human Rights, and Labor, 6 March 2007).

Relatives of practitioners

The Immigration and Refugee Board of Canada (IRBC) has provided advice on the harassment of family members of known Falungong adherents (IRBC, *CHN37941.E, China: Whether there is evidence that the Public Security Bureau (PSB) is harassing (i.e. arresting, interrogating, demanding self-criticism) the family members of known Falun Gong practitioners; if so, whether the PSB is performing these actions in order to obtain information about the practitioner, the organization, and/or other members*, 10 January; Immigration and Refugee Board of Canada 2002, *CHN40474.E – China: Update to CHN37941.E of 10 January 2002 on the harassment of family members of Falun Gong practitioners by the Public Security Bureau*, 27 November). The reports cited are predominantly sourced from Falungong information and resource centres.

The US Department of State's Country Reports on Human Rights Practices – China (includes Tibet, Hong Kong, and Macau) – 2003 notes in respect of relatives of dissidents generally:

Authorities also harassed relatives of dissidents and monitored their activities. Security personnel kept close watch on relatives of prominent dissidents, particularly during sensitive periods. For example, security personnel followed the family members of political prisoners to meetings with Western reporters and diplomats. Dissidents and their family members routinely were warned not to speak with the foreign press. Police sometimes detained the relatives of dissidents (US Department of State 2004, *Country Reports on Human Rights Practices – China (includes Tibet, Hong Kong, and Macau) – 2003*, February 25, Section 1f.).

Specifically in respect of Falungong adherents the US State Department, in its 2001 *International Religious Freedom Report*, noted that the PRC had intensified its campaign to repress Falungong followers in early 2001, as the PRC authorities were frustrated by their lack of progress in eradicating the organisation and, particularly, in minimising its public manifestations such as public group exercises and highly visible demonstrations. The report stated in this respect that:

The tactic used most frequently by the Central Government against Falun Gong practitioners has been to make local officials, family members, and employers of known practitioners responsible for preventing Falun Gong activities by individuals (US Department of State 2001, section II).

The Human Rights Watch report, *Dangerous Meditation: China's Campaign Against Falungong*, similarly details the progression of the PRC Government's campaign against the Falungong movement in late 2000 and during 2001:

The most significant changes came after a Central Work Conference (a meeting of high Party officials from all over China called by the Party Central Committee) in mid-February 2001, when President Jiang told provincial and municipal Party officials to strengthen local control over Falungong practitioners. The plan called for the immediate formation of local "anti-cult task forces" and similar units in universities, state enterprises, and social organizations to augment the "610 office" (named for the date of its founding), which reportedly had been directing the crackdown since June 10, 1999, and the "propaganda work office, which was in charge of the media campaign." It ordered local officials to detain active practitioners and to make certain that families and employers guaranteed the isolation of those unwilling to formally recant (Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign Against Falungong*, January (released 7 Feb 2002), 'Section III – Defiance and Response' – Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign Against Falungong*, January).

And continues:

[B]ehind the scenes, China's leaders continued to enforce the "responsibility system," whereby "all levels of government leaders, police, neighborhood cadres, work units and family members must receive punishment" if a practitioner reaches Beijing to protest. The tactic made it possible to keep Falungong from making international headlines and allowed local authorities to continue to persecute believers with little chance of eyewitness international coverage (Human Rights Watch, 2002, 'Section III – Defiance and Response' – Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign Against Falungong*).

A report on the Australian Falun Dafa Information Centre website states:

Over one hundred million Falun Gong practitioners and several hundred millions family members of practitioners have been living under pressure and fear for several years. Institutes at different levels in the Party and in the government, the army, schools at different levels, scientific research institutes, news media, business enterprises, public security offices, courts, the Procuratorate [a unique legal system in China dealing with government employees and Party members], prisons, detention centers, forced labor camps, and even prisoners or detainees in detention centers and forced labor camps, have all been forced to take part in the persecution and become accomplices either willingly or unwillingly, committing crimes of all different levels of depravity ('The Complete Illegality of the Jiang Regime's Persecution of Falun Gong' 2002, The Australian Falun Dafa Information Centre web site, undated, p.1 – <http://www.falunau.org/illegalpersecution.htm> – accessed 16 July 2004).

The report continues:

If a practitioner and his family members were killed because of his belief in Falun Gong, then their distant relatives may not even dare to take a look at their corpse or inquire about the cause of their deaths 2002, The Australian Falun Dafa Information Centre web site, undated, p8).

A December 2002 report on the Falun Dafa information centre website details the case of a woman tortured to death and subsequent threats to her family. The report claims "County Committee Secretary Zhao Xinchao and 610 Office Chief Wang Genting issued official orders to cut off Ms. Kang's family members' wages and in an attempt to prevent them from taking any action regarding Kang's case" ('Woman Dies in Police Custody While on Hunger Strike to Protest the Illegal Detention' 2002, Falun Dafa information centre website, 3 December – <http://faluninfo.net/DisplayAnArticlePrint.asp?ID=6706> – 18 June 2003). Another article describes the plight of children of practitioners, who may be left without guardians, detained with their parents, or tortured to death ('Representative of the Worldwide Organization for Women Condemns the Persecution of Falun Gong Practitioners' Families and Children' 2004, Clearwisdom website, 24 August, <http://www.clearwisdom.net/emh/articles/2004/8/24/51686p.html> – accessed 7 September 2004).

Falungong practitioners themselves have documented the forms of mistreatment suffered by practitioners from the time of the first arrests in China in July 1999. These publications contain personal accounts provided by practitioners in China via phone calls, emails, faxes and so on. One publication claims:

some workplaces have warned people that they may be fired or their jobs may be changed if they are unable to prevent their family members from practicing Falun Gong (Falun Gong, *A Report on Extensive and Severe Human Rights Violations in the Suppression of Falun Gong in the People's Republic of China*, Compiled and Edited by Falun Gong Practitioners, March 2000, Book 1: The Report (from 1999 to March 2000), Part I: Summary from <http://hrreport.truewisdom.net> p.12)

Book 2 (1999-2000) includes a chapter on “Social and Economic Coercion”, which includes a number of personal accounts detailing instances where the employment status of Falungong practitioners has been undermined. The report includes the case of practitioners’ family members not allowed to be hired, promoted or recruited by the army (Falun Gong, *A Report on Extensive and Severe Human Rights Violations in the Suppression of Falun Gong in the People's Republic of China*, Compiled and Edited by Falun Gong Practitioners, March 2000, Book 2: Supplement: List of Cases, 4.1.9 p124 – <http://hrreport.truewisdom.net>).

Another article details local officials and riot police visiting the home of a practitioner and pressuring her family members to publicly condemn the Falun Dafa founder (‘Family of a Falun Dafa Practitioner Takes a Stand Against Falsifying Evidence’ 2004, Clearwisdom website, 29 August, <http://www.clearwisdom.net/emh/articles/2004/8/29/51858p.html>-accessed 7 September 2004).

Human Rights Watch provide a list of the laws and regulation used to crack down on Falungong. Although there are no specific laws and regulations used to repress Falungong family members, the report notes the laws formed “part of a broader system of social control in China (Human Rights Watch 2002, *Dangerous Meditation: China's Campaign Against Falungong*, Appendix II).

A 2003 paper by the IRBC quotes a representative of the Falun Dafa Association of Canada (FDAC) who reported that she had “heard/read quite a number of stories [where] supporters, especially family members were persecuted due to their support to Falun Gong, or simply because they are family members” ... According to the representative, these non-practitioners may be “interrogated, arrested, beaten, removed from their jobs, demoted, or refused bonuses” ... The examples she provided related to people who had published information on the internet criticizing the Chinese authorities (IRBC 2003, *CHN42185.E – China: Situation of people who do not practice Falun Gong, but who oppose the government's policy of labelling the group a cult and who encourage others to learn about Falun Gong (2001-2003)*, 2 December).

The same IRBC paper reports on family members of practitioners who are not practitioners themselves. The report states:

- At a 2003 press conference in Canada, Wang Yuzhi, a Falun Gong practitioner, claimed his family members in China have been abducted and arrested because of his involvement in the Falun Gong and his public statements against the Chinese administration (Clearwisdom 19 Apr. 2003).
- Another article describes the story of Ming Li, a Falun Gong practitioner, and her non-practicing daughter, who reportedly was detained several times by police because of her mother's involvement in the group (Clearwisdom 11 Nov. 2003). According to the mother's testimony, although she and her daughter were re-united in the United States in 2003, for the previous three years the police in Guangzhou City had refused to issue the daughter a passport

because of Jiang Zemin's alleged policy that "Falun Gong practitioner's relatives are not allowed to go abroad" (ibid.).

- A 10 May 2001 *Wall Street Journal* article posted on the Clearwisdom Website documents the plight of Zhang Xueling who was sentenced to three years without trial in a labor camp after she made repeated, unsuccessful attempts to have the police authorities confess to torturing to death her mother, a Falun Gong practitioner, and to issue a death certificate. Although initially a non-practitioner, Zhang Xueling eventually became a member of the Falun Gong (*Wall Street Journal* 10 May 2001). (IRBC 2003, CHN42185.E – China: Situation of people who do not practice Falun Gong, but who oppose the government's policy of labelling the group a cult and who encourage others to learn about Falun Gong (2001-2003), 2 December).

In 2007 the IRBC said that

In 8 June 2007 correspondence, a representative of the Falun Dafa Association of Canada stated that

[the Chinese] authorities use ... family members as "hostages" to force [Falun Gong] practitioners to give up the practice. If practitioners do not cooperate with the authorities, their family members are subject to punishment as well. ... The punishment includes harassment by the police (random visit by police to the home), arbitrary interrogation, losing [a] job, losing [the] chance of promotion, losing [a] pension/state housing, etc.

The Representative further noted that there have been cases of arrests of family members of Falun Gong practitioners ...

The United States (US)-based Falun Gong Human Rights Working Group (FGHRWG), an organization that publicizes "human rights violations against Falun Gong practitioners" ... similarly notes that the Chinese government "torments" family members of Falun Gong practitioners to pressure them to renounce the practice ... On its Website, the FGHRWG states that "brothers and sisters are fired from their jobs, elders are stripped of their retirement benefits, and children are expelled from school" ... (2007, IRBC, "China: Treatment of family members of Falun Gong practitioners by the Chinese authorities; situation of persons who unwittingly or knowingly assist Falun Gong practitioners (e.g., by allowing use or rental of property, offices, office equipment, vehicles, etc.); the treatment of such persons if they deny knowledge of having assisted Falun Gong practitioners, agree to cease such assistance, or denounce Falun Gong", CHN102560.E, 11 July).

FINDINGS AND REASONS

The Tribunal is satisfied, and finds, that the applicant is a national of the PRC.

Having had regard to his oral evidence, the documentary evidence submitted since the hearing, and in particular the recent report from the psychologist, I consider the applicant's oral account to the Tribunal at the hearing to be a truthful reflection of his history and circumstances in all key respects. His oral evidence, both to the Department and to this Tribunal, has at times been vague, and he did not tell the Department of his ill-treatment during his contact with the police. However in my view it would be unreasonable, given the psychologist's observations and diagnosis, to conclude that that vagueness and omission points to a lack of truthfulness. I have also had regard to the evidence from the other sources set out above (Human Rights Watch, 2002; UK Home Office, 2002; Pomfret and Pan 2001), which I consider reliable, indicating that the situation in the year in which the applicant left China, was one of intensifying state-sanctioned harsh treatment of people associated with Falungong. I further note the evidence from the US State Department (2001) that in that year the tactic used most frequently was to make (among others) family members responsible for the activities of relatives who were Falungong practitioners. The applicant's evidence about his own experiences was entirely consistent with this.

The Tribunal is satisfied that the applicant has a brother who has been subjected to very serious ill treatment and discrimination by the PRC authorities because of his political activism in 1989 and because of his subsequent involvement with the Falungong movement.

The Tribunal is satisfied, on the basis of the evidence from independent sources above, that Falungong was declared illegal in 1999.

The Tribunal is also satisfied that the applicant provided work for his brother and that he was suspected by the authorities of having information about his brother's activities or contacts in relation to Falungong. The Tribunal is satisfied that the applicant was subjected to several days of serious ill treatment, involving torture, because of these suspicions. The Tribunal is also satisfied that he lost both his business and his job for this reason, and that he had difficulty finding employment subsequently because of (broadly speaking) a political opinion imputed to him because of his brother's history with the authorities and his own difficulties with the authorities.

The Tribunal accepts that he left China because he found his position intolerable, a perception that may well have been exacerbated by his suffering from the psychological consequences of his ill-treatment in police custody.

It is the case that he did not formally seek protection in Australia for many years, indeed several years after his arrival in Australia. Such a long delay in seeking protection could well point to an absence of fear of harm in one's own country. However, relying on the psychologist's observations, I do not consider that it would be reasonable to draw such an inference in this particular case.

The precise present circumstances of the applicant's brother remain unknown to the applicant and to this Tribunal. However, I am satisfied that his brother, through his political activities in 1989, his subsequent involvement with Falungong, and his limited or no compliance with reporting conditions set down by the PSB, has shown a pattern of resistance to the authorities which has already had serious adverse effects on his own wife and, before that, on the present applicant.

On the basis of his evidence and the evidence from the psychologist, the Tribunal is satisfied that the applicant primarily took up the practice of Falungong in Australia recently because it gave him some relief from his psychological problems.

The Tribunal has accepted that he already has a poor record with the PSB, has already been subjected to very serious ill treatment by the police and has been subjected to discrimination in terms of employment because of a political opinion imputed to him arising from his links with his brother. Having regard to this history, the Tribunal must consider whether the applicant may be again detained and questioned by the PSB if he returns to China, on suspicion of having links with Falungong practitioners abroad or because of continuing suspicions about his brother's activities.

There is an element of unpredictability as to how he might be perceived by the authorities if he returned to China, and how harshly he might be treated. However, in the Tribunal's view, the chance is not remote that he may face detention and interrogation. Noting that he has already been subjected to treatment amounting to persecution during his only previous period of detention, accepting the possibility that his participation in Falungong activities in Australia may have come to the attention of the Chinese authorities, and having regard to

recent evidence from the US State Department (2007) that since 1999 up to several thousand Falungong adherents have died in custody due to torture, abuse and neglect, the Tribunal is satisfied that the applicant has a well-founded fear of serious harm by Public Security Bureau officers if he returns to China. That harm would occur for a combination of reasons enumerated in the Refugees Convention, being a political opinion imputed to him, either because of his own activities or because of his relationship with his brother, and his imputed membership of a particular social group "Falungong practitioners".

For the reasons set out above the Tribunal finds that the applicant has a well-founded fear of Convention-related persecution in the People's Republic of China.

CONCLUSIONS

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

DECISION

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

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act</i> 1958. Sealing Officers ID: PRRTIR</p>
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