

0803061 [2008] RRTA 309 (18 August 2008)

DECISION RECORD

RRT CASE NUMBER: 0803061
DIAC REFERENCE(S): CLF2007/5331
COUNTRY OF REFERENCE: China (PRC)
TRIBUNAL MEMBER: David Dobell
DATE DECISION SIGNED: 18 August 2008
PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. 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).
2. The applicant, who claims to be a citizen of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
3. The applicant sought review of the delegate's decision

RELEVANT LAW

4. Under s.65(1) of the Act, a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
5. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. 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'

7. 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.
8. 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.

9. 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.
10. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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.

16. 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

17. 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.

18. Attached to the applicant's protection visa application is the following statement:

My name is [Name]. My origin is [Town] China. I was born on [date]. I came to Australia holding a [type] visa.

All my family members are Falun Gong practitioners. Because the living conditions of my family are not good, both of my parents had bad health. They joined Falun Gong organization with the help of a friend of them. They practised very well and they insist on Falun Gong practice everyday. With their body getting stronger and stronger, our family became a happy family again. But happy days did not last long, it was not long before China began to strike Falun Gong hardily. Our happy life suffered a lot.

In the second half year of 1998, Falun Gong was defined as an evil organization by the government. Chinese government started striking Falun Gong hardily, thousands of Falun Gong practitioners were forced to be detained and reeducated by labor. My parents were detained for [period of time], when they were released, as their daughter, when I saw that they were [injured] and their bodies were full of [injuries]. My heart was grief stricken. My mother held my hand and told me to go abroad and flee from the disaster, she said to me I could stay in China any more otherwise I would be tortured to death. When I saw my parents' eyes, I couldn't bear to leave them in china and went abroad by myself. I was suffering the torture day after day. When I encountered this disaster, my boyfriend asked me to part because he was afraid that his family would be involved in this trouble. Later, one of my friends introduced me to meet my current husband. I went to [place] after I married him. Because my families practised Falun Gong before, I was discriminated by my husband and he often [injured] me, he even had an affair. This hurt me heavily and gave me a great strike. Later, my parents tried any way to send me to other countries. They spent all their save and helped me apply for the Australian [type] visa. Therefore, I fled away from China finally.

During my stay in Australia as a [Chinese citizen], I wanted to apply for refugee status. I can enjoy free life here forever. I searched on the internet and knew that Australia is a country which respects human rights. I really hope that my application should be approved by Australian government.

19. Information deleted in accordance with s431 of the migration Act as this information could identify the applicant.
20. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from friends of the applicant. 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 her registered migration agent, who attended the Tribunal hearing.
21. The Tribunal made a copy of the applicant's passport and placed this on the Tribunal's file. At the hearing, the applicant gave the Tribunal the following documents:

- A statement of a witness, undated
 - A 12 page statement of the applicant, with attachments, which were a series of photographs, all containing the applicant at Falun Gong and related events and a copy of a newspaper clipping
 - A dated statement of the applicant's father
 - A dated statement of the applicant's mother
 - A dated statement of a friend of the applicant's parents
22. The Tribunal has not reproduced the applicant's statement here due to its length. It provides detailed evidence under various headings.
 23. The Tribunal first asked the applicant how long she was in a transit country for. At first she said a few days and then said it was a slightly shorter period. She said she arrived in the transit country and then arrived in Australia a few days later.
 24. The Tribunal then asked the applicant whether she had assistance in completing her protection visa application forms. She at first said she did it herself with the help of a translator, but when the Form C was shown to her, she said that the boyfriend of a friend had helped her with this. She said that he did not read its contents back to her in her language. The Tribunal then got the applicant to read out aloud her original statement in Chinese.
 25. After reading out approximately half of the statement, the Tribunal asked the applicant to stop and observed that the English version appeared to be much the same as the Chinese version and asked whether its entire contents were true and correct. The applicant said that there were some errors in it as she was pressed for time in writing the statement.
 26. As to these errors, the applicant said that it was not the year stated, but a few months later the following year, that her parents began Falun Gong. She could not recall the month they began. She said that when she had gone to work in a nearby village, her parents had not started Falun Gong at that time.
 27. The applicant also said that it was not as stated that her parents were detained for. She said it was a much shorter period of time. She said that she was not living at home at that time as she was still working in the nearby village. As to why she had said the much longer period, she said her friend's boyfriend had said they should exaggerate a bit because that would give her a higher chance of success. The Tribunal asked her when she found out the exact time they had been detained. She said she had called her family and they had told it was not so long. She eventually said that, at the time she completed the statement, she thought they were detained for a few weeks.
 28. The Tribunal then referred to the applicant's statement lodged with the review application, which stated that the persecution of Falun Gong did begin in 1998 and that many people were arrested then, including her parents. The applicant said that she did not say this. She said that she just signed what was put in front of her.
 29. The Tribunal then asked the applicant for an overview of her fears should she return to China. She said that she must tell the truth and could not give up her faith. She said her parents had been detained and that if she returned, she will suffer the same thing. She said that the police had recently visited her home and she believes that a previous

migration agent had given the Chinese authorities documents showing she was a Falun Gong practitioner.

30. The Tribunal asked the applicant whether she was indeed a Falun Gong practitioner. She said she was. As to whether the Chinese police are looking for her now, she says she believes they know that she is in Australia, as she believes the migration agent gave her documents to the Chinese Government. As to how she knew this, she said that she called her child in China and her husband had answered and told her that the police had visited their home and asked her what she was doing in Australia to cause this.
31. The Tribunal noted that there could be another explanation for this. It said that, perhaps the police were visiting because the applicant had stayed in Australia and this is frowned upon by the authorities.
32. The Tribunal then asked the applicant about her family and past employment. She said that she left her province some years ago. She said this was after her parents had been detained and they were afraid of what would happen to their children. She said that she first went to another province in a specified year, as she dared not stay home. She said her relative took her to the vehicle to take her there and she went with another friend. When asked, she said this friend was not a Falun Gong practitioner.
33. The applicant said that she then met her husband in the other province and after they were married they went to live in another city. She said that she went back for a visit to her parent's home just once in the next few years.
34. The Tribunal then asked the applicant what she was doing in the other village. She said she was working in a company and that the village was a moderate distance from their home.
35. The Tribunal asked the applicant whether she is still married to her husband or whether they are now separated or divorced. She confirmed that he was still her husband. She confirmed that her child lived with her husband in the family home. She said her husband was not a Falun Gong practitioner. The Tribunal asked her why she remained with him, if he had beaten and abused her as claimed. She said that as a Falun Gong practitioner, she could endure what he was doing and she stayed there for the child's sake.
36. As to whether her husband knew she was coming to Australia, she said 'yes', he had helped her. As to whether he knew she was going to apply for refugee status, she said he did not know this but that he just wanted her to leave him. She said he had a girlfriend at the time. She confirmed that he was living with this woman. The Tribunal asked her why she had earlier said that they were not separated. She said that in China there was no such thing as separation and they were still married. He said that her husband and the woman had rented a home together and he lives there with the woman and would return to the family home on occasion, as the child was living there with a relative.
37. The applicant told the Tribunal that she had some family members. She confirmed that they had remained in her home province. She confirmed that they were also Falun Gong practitioners. As to why they had remained there but she had left, she said that they did not practise Falun Gong in public like her and her parents. She said that they

would attend the fa (or 'law') sessions but not do the Falun Gong exercises in public. She then said that she lived with her parents at the time but they did not. She thought about it for some time and then said that both were married.

38. The Tribunal noted that she had earlier said that she was no longer living with her parents and that she was living in the nearby town and working there. She said that she would visit her parents and it was then that she learnt about Falun Gong.
39. The Tribunal expressed surprise that she would know how to do Falun Gong if she had to return to her village. She said that she was there and that her mother gave her the book *Falun Dafa* to take with her. She showed the Tribunal this book at the hearing. She said that she had learnt the exercises in the time she was with her parents at home. She said that she then lost her job and returned to live with her parents and it was then she found they had been in detention. She said she remained at home for a few months before she left for the other province.
40. As to when the applicant last talked to her parents, she said that she called them once last month. She said that she did not talk to them very often; actually, very rarely.
41. As to her parents' practice of Falun Gong, the applicant said that they first learnt of it from a Falun Gong practitioner friend they knew. She said that her father went to the rally in a city to protest.
42. As to how often her parents practised Falun Gong, she said that they would do the exercises every morning with others, in a public place. She said they would also study fa twice a week.
43. The Tribunal asked the applicant what her Falun Gong practice routine was when she returned to the village. She said that she would do the exercises and study fa by herself.
44. The Tribunal then referred to the *Falun Dafa* book she had in her possession and asked her how she had managed to bring it to Australia. She said she kept it on her body at all times and that when she left China, she a big coat on, and had it in the coat.
45. As to how the applicant knew that her parents had been detained, she said that they later said they were scared and worried and said they had been detained, but did not give details. She noted that her parents looked a bit weak and that her father had an injury.
46. The Tribunal asked why she continued to practise Falun Gong after it was banned in 1999. She said that she was a genuine practitioner. The Tribunal said this did not explain why she would keep doing it when he was banned. The applicant said that after practice, she would obtain a purified body and heart and she would be in a better mood and was learning how to be a better person through truth, compassion and forbearance. Also, she was not as sick as before and felt released, more open-minded and tolerant.
47. The Tribunal asked her where she practised Falun Gong after she was married. She said that she would do it at home as she dared not do anything in public. She said that she did not do anything in public or private with other Falun Gong practitioners at that time and had to practice the exercises and study fa in private.
48. The Tribunal asked the applicant how she managed to hide her Falun Gong practice from her husband. She said that he was not at home all the time as he worked and she

was not working as she was expecting a child. The Tribunal asked her when her husband found out about her practice of Falun Gong. She said that was possibly around a specified time.

49. The Tribunal asked the applicant how her husband knew that she was practising Falun Gong. She said that he opened the door and saw her meditating. The Tribunal noted that meditating is not confined to Falun Gong alone and neither are the Falun Gong type of exercises. She said that he opened the door and asked what was going on and said 'are you practising Falun Gong?' and she said 'yes'. The Tribunal asked her whether he had any suspicions of her practising Falun Gong prior to this and she said he did not, until that time. The Tribunal said that it found it a bit unusual that he would then immediately think that she was practising Falun Gong, upon seeing her doing her meditation. She said that he asked her and she told him the truth.
50. The Tribunal asked the applicant whether she was afraid that her husband might report her to the police. She said she was. The Tribunal noted that she had claimed he had treated her badly and again asked why she remained with him, given the risk to her of being exposed. She again said she remained because of her child who was young.
51. The Tribunal asked the applicant when she made plans to leave China. She said she did this when her husband found out she was a Falun Gong practitioner. The Tribunal asked whether her parents helped her to leave China. She said that it was not through her parents' help but through her husband. She said he found a travel company for her who fixed up the passport and visa. He said that he wanted her to go away, as he did not want himself and their child to be afflicted by Falun Gong.
52. The Tribunal referred to the protection visa application statement and noted that she had stated that her parents had helped her leave China. She said this was an exaggeration suggested by the friend. The Tribunal asked her how it was an 'exaggeration' to suggest that her parents helped her, as opposed to her husband. She then said that her parents were already known to be Falun Gong practitioners and she did not want to get her husband and child in trouble.
53. The Tribunal asked the applicant whether she had any contact with other Falun Gong practitioners in Beijing. She said she met a person some time ago and he or she was going to introduce her to Falun Gong and she said that she was already a Falun Gong practitioner. She said that she met her friend through this friend and that they were soon very good friends. This was after her husband had found out she was a Falun Gong practitioner.
54. The Tribunal then asked the applicant about her Falun Gong practice in Australia. She said that she studied fa and did the exercises here. She said that in the past she has done this at a few locations in Sydney but now that she is studying English, she does not have the time to attend groups and does the exercises at home. However she does study fa in groups.
55. The Tribunal then referred to the newspaper clipping and the photographs provided by the applicant. She said the newspaper clipping was about 35 million people leaving the Communist Party and the clipping photo showed her to one side. She confirmed she appeared in all the photographs, which showed Falun Gong and related activity.

56. The Tribunal then gave the applicant a warning that, if she had practised Falun Gong in Australia merely for the purpose of strengthening her refugee claim than it would have to disregard this conduct in assessing her refugee claim. She at first claimed not to understand this and the Tribunal repeated this a number of times and in different ways. She first said that she doesn't worry about herself but worries about her child if she returns. She then said that she was a genuine Falun Gong practitioner.
57. The Tribunal then asked the applicant some questions so as to ascertain her level of knowledge about Falun Gong. She correctly identified the two main texts of Falun Gong as *Falun Dafa* and *Zhuan Falun*. The Tribunal noted that she did not have this book with her and she said that she had a copy of *Zhuan Falun* at home. The Tribunal said that it understood that *Zhuan Falun* was the main text. She said that the content is quite similar and she finds *Falun Dafa* best as it is more complete and contains details of the exercises. As to how many chapters there are in *Zhuan Falun*, the applicant correctly answered nine
58. The Tribunal asked the applicant to name the colour of the falun. She said there were seven colours. The Tribunal said it understood it to be golden yellow. She then showed the Tribunal a Falun Gong medallion around her neck, which contained seven colours.
59. The Tribunal noted that the applicant had earlier referred to the three principles of Falun Gong: truth, compassion and forbearance. It then asked her to name the fourth exercise, which she did correctly. As to how many times this exercise should be repeated, she correctly answered nine times. As to how many times the third exercise should be repeated, she correctly answered nine times. As to the location of the falun, she correctly identified the abdomen.
60. The Tribunal asked the applicant how one could see the falun spinning. She said that it rotates and that if it rotates inwards, it is salvation for yourself, and if it rotates outwards, it is salvation for others. The Tribunal asked again about how one could *see* the falun spinning and referred to the idea of the third eye. She said she knew of the 'tianmu' or third eye, but as she did not reach that level, she did not think to mention it. As to whether Falun Gong is concerned with breathing, she correctly answered it was not
61. The Tribunal then asked the applicant to give examples from her daily life as to how she applied the principles of truth, compassion and forbearance. She first said that she should tell the truth and be kindly and help others and endure any hardships. The Tribunal noted that she was not giving examples from her life, just giving the meaning of these terms. She said that for truth, one should be sincere to others and tell the truth. She then said that after practice, one knows how to be a good person and it has helped her to upgrade her heart. She said that she was not very physically strong before but feels much better now. The Tribunal noted that she was giving generalisations and the meanings again, and was saying how Falun Gong had helped her, not how she had applied the principles in her life. The Tribunal said that she had not given any specific examples from her life as it might expect from a person who was a genuine Falun Gong practitioner. She said that she probably was not understanding the question. The Tribunal invited her to think about her response to this and was free to give an answer to this question at any time before the hearing ended.

62. The Tribunal ask the applicant why she did not seek asylum or protection in the transit country. She said that she knew that Australia was a free country and was a harmonious country which accepted different cultures and beliefs. She said she had found out about this on the internet. The Tribunal asked her why she had not found out any information about the transit country on the internet. She said she did not think about it and did not know about the transit country. She then said that she didn't know she was going there. She said her husband organised the itinerary and she just knew she was travelling. The Tribunal said it found it difficult to believe that she did not know where she was going when she left China. She again said that her husband did it for her. The Tribunal asked her whether she had any relatives in Australia. She said she did not. She said she only had information about Australia and didn't know about the other country and only stopped there for a few days.
63. The Tribunal then asked the applicant about her leaving China and whether she thought the police were looking for her at that time. She said that she did not believe they were looking for her then, but the police had since visited her home.
64. The Tribunal then asked the applicant about her changing her Chinese Identity Card several years ago. She said that this was true. Her parents had arranged for her to have a new card issued with a different date of birth and a different address. The purpose of changing this was so that she could have a different Chinese Household Registration and would not be linked to her parents. The Tribunal said it would have expected that not changing her name might have been a problem and she said that the issue was that her identification number was different. She said that she later transferred her household registration to the other province. As to whether it was then transferred to the city, she said it was not; it was left there because that was her husband's home.
65. The Tribunal then spoke to the first witness. He said he had been in Australia for many years. The Tribunal referred to his statement which was before the Tribunal. As to what he believed of the applicant's Falun Gong practice, he said that the applicant had told him the story of her family's suffering in China and that he had then read information himself about Falun Gong treatment in China. He said he had accompanied her to Falun Gong and related rallies in various places. He believed he had attended a small number with her. He said that he met her some months ago and that she would have told him about her being a Falun Gong practitioner. He said that they mostly had contact over the telephone at that time.
66. The Tribunal then spoke to the second witness. He said that he first met the applicant through the person who the applicant had travelled to Australia with. He met the applicant shortly after meeting her travelling companion.
67. As to the applicant's Falun Gong practice, the second witness said that he drove the applicant and her friend to attend Falun Gong meetings early in the relationship. He said he did not know this at the time, as they said that they were going to visit some friends. He said that they told him later that they were going to Falun Gong lessons. As to why they would have hidden this from him, here in Australia, he said that they had a genuine fear of disclosing that they were Falun Gong practitioners and that their perceptions were different at that time. The witness said that he knows the applicant still practises Falun Gong.

68. The second witness said that he was asked to go to China to obtain evidence for the applicant's case. He said that he was surprised that he would be asked to do this and could not see why the applicant's parents could not talk on the phone or send a letter. He has since come to understand more about how Falun Gong practitioners are persecuted in China. He went to China recently and met the applicant's parents in a neutral place, as this was the only safe place. They came with statements prepared, as did a friend of theirs. As he cannot read Chinese he asked them to talk about their Falun Gong practice. He said that the father was able to give a coherent statement but the mother was quite withdrawn. He said he noticed how their mood changed when they started talking about Falun Gong and their incarceration several years prior. He said their friend expanded on their history. He took detailed notes of these interviews which he can provide if necessary. He was grateful that they had said to make sure that he carries the statements on his person when returning to China, as he later discovered that his luggage had been tampered.
69. As to the threats that were made against the applicant, the second witness referred to the previous agent, saying he said he had 'very good friends in China' indicating triad ties. He also referred to later phone calls where, after getting their money back from the migration agent and making complaints to the relevant authority regarding the migration agent holding himself out to be a solicitor, the agent threatened the applicant and the applicant's friend by saying that he had their file and he would send them to the Chinese Consulate and the Chinese police and she won't get back to China without being arrested. The applicant spoke to her husband and found out that the police had been to their place. He said that the husband had rung the applicant's father and scolded him, saying the police had been at his house and what was the applicant doing in Australia? He said that the applicant told him she had only given her city address to the agent.
70. The Tribunal suggested that the police may have been there because she had departed. He said he could not say for sure. The Tribunal also suggested that there may have been some record of the applicant's residence in the city, given the requirements for residence registration in China.
71. As to whether she has any comments to make on the second witness' evidence, the applicant said that what he said is true. As to whether she had anything further to say on how she applied the Falun Gong principles in her life, she said she was not good at expressing herself.
72. The representative then said that he was not sure she understood the question properly. The Tribunal said it had explained it to her in detail a number of times earlier. The second witness said that he may be able to give some evidence on this. He said that when the applicant found out that the police had been at her home, he said that she had to make a decision as to whether to return to China or not. He said he tried to console her and told her to continue with her action, giving advice from his cultural and religious background as a Christian. He noted how then she meditated on this issue for a resolution. [This suggested 'endurance' to the Tribunal] He said that he attended a meeting of Falun Gong (though not a Falun Gong practitioner himself) and could see how cultivation and meditation played a part in practitioners finding answers to problems.

INDEPENDENT COUNTRY INFORMATION

CHINA AND FALUN GONG:

73. Material available to the Tribunal regarding the circumstances in China and the practice of Falun Gong indicates that the movement commenced in 1992 with the teaching of Li Hongzhi, known to adherents as Master Li. The movement blends Buddhist and Taoist philosophy.
74. Two important publications were written by Li Hongzhi. The first, *Falun Gong* (1993), provides information regarding the philosophical approach and also explains and provides diagrams for practice of the five sets of exercises associated with the movement. The second, *Zhuan Falun* (1995), is a series of writings on the philosophy informing Falun Gong practice. (see www.falundafa.org/eng/books.htm). The Falun Gong emblem, using the swastika and yin/yang symbols, is said to represent the universe in miniature (www.falundafa.org/book_eng/zfl_new.html) and is the so-called Law Wheel which is found in the lower abdomen of practitioners, although it can not necessarily be felt or observed.
75. The movement came to the adverse attention of authorities during 1999, being a protest by adherents against the publication of a critical article in Tianjin in April 1999. Following this, more than 10,000 practitioners coordinated a peaceful demonstration outside Beijing's leadership area on 25 April 1999. The Tribunal notes that after these mass demonstrations in April 1999, the group was banned that July. Since that time there have been reports from Human Rights Watch, the Australian Department of Foreign Affairs and Trade (DFAT) and the United States Department of State which indicate that persistent Falun Gong activists risk adverse attention in China which can lead to re-education or prison terms on return. Known activists are likely to be monitored on their return to China. Where practitioners continue public practice or do not co-operate with authorities this could lead to non-judicial detention. (see Human Rights Watch, 2002, *Dangerous Meditation: China's Campaign Against Falun Gong*; Department of Foreign Affairs and Trade, 2001, *DFAT Report 162*; United States Department of State, 2006, *Country Reports on Human Rights Practices 2005: China*)
76. The US Department of State's *China (includes Tibet, Hong Kong, and Macau) Country Reports on Human Rights Practices - 2005* states in part under *Freedom of Religion*:

The extent of public Falun Gong activity in the country remained negligible, and practitioners based abroad reported that the government's crackdown against the group continued. Since the government banned the Falun Gong in 1999, the mere belief in the discipline (even without any public manifestation of its tenets) has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Although the vast majority of practitioners detained have been released, many were detained again after release (see section 1.e.), and thousands reportedly remained in reeducation-through-labor camps. Those identified by the government as "core leaders" were singled out for particularly harsh treatment. More than a dozen Falun Gong members have been sentenced to prison for the crime of "endangering state security," but the great majority of Falun Gong members convicted by the courts since 1999 have been sentenced to prison for "organizing or using a sect to undermine the implementation of the law," a less serious offense. Among them, Yuan Yuju and Liang Hui in Luzhou, Sichuan Province, faced such criminal charges during the year. Most practitioners, however, were punished administratively. Liu Yawen of Beijing and Zheng Ruihuan and Liu Yinglan of Shandong Province were among those reportedly detained administratively for Falun Gong activity. In addition to being sentenced to

reeducation-through-labor, some Falun Gong members were sent to detention facilities specifically established to "rehabilitate" practitioners who refused to recant their belief voluntarily after release from reeducation-through-labor camps. In addition hundreds of Falun Gong practitioners have been confined to mental hospitals, according to overseas groups (see section 1.d.).

During the year allegations of abuse of Falun Gong practitioners by the police and other security personnel continued to be made. Groups based abroad estimated that as many as two thousand practitioners have died in custody (see section 1.c.)

Police continued to detain current and former Falun Gong practitioners and place them in reeducation camps. Police reportedly had quotas for Falun Gong arrests and targeted former practitioners, even if they were no longer practicing. The government continued its use of high-pressure tactics and mandatory anti-Falun Gong study sessions to force practitioners to renounce Falun Gong. Even practitioners who had not protested or made other public demonstrations of belief reportedly were forced to attend anti-Falun Gong classes or were sent directly to reeducation-through-labor camps, where in some cases beatings and torture reportedly were used to force them to recant. These tactics reportedly resulted in large numbers of practitioners signing pledges to renounce the movement. During the year a former Chinese diplomat based in Australia publicly described how government operatives based overseas reported on the activities of Falun Gong practitioners.

FALUN GONG BELIEF AND PRACTICE:

77. The following is taken from the Australian Falun Gong website:

Falun Dafa is a self-cultivation practice that has brought better health and inner peace to millions around the world. We call it a cultivation practice: "cultivation" refers to the improvement of one's heart and mind through the study of universal principles based on Truthfulness, Benevolence, and Forbearance; "practice" means doing exercises and meditation to energise the body.

Learning Falun Dafa is easy. The practice is simple, powerful, and absolutely free. The main principles of Falun Dafa are explained in their entirety in the book *Zhuan Falun*, and in the beginner's text, *Falun Gong*, both written by Falun Dafa's founder, Mr. Li Hongzhi. Also essential to the practice are the five gentle exercises, including a sitting meditation, which you can learn quickly and easily at any of the thousands of practice locations around the world.

We invite you to discover the extraordinary practice of Falun Dafa for yourself. You can start by learning the exercises at your local practice site, and start learning the principles by downloading one of the books for free from this Web Site, or pick one up at your local library.

What is Falun Dafa?

Falun Gong (also called Falun Dafa) is an ancient form of qigong, the practice of refining the body and mind through special exercises and meditation. Like tai chi, qigong is a vital part of many people's lives in Asia; almost every Chinese park is brimming by the break of dawn with people practicing these arts.

In just eight years since its public introduction, Falun Dafa has grown to become the most popular form of qigong ever in Chinese history. The major reason for this is that Falun Dafa distinguishes itself from other qigong practices by emphasising not only physical cultivation, but also cultivation of one's moral character in daily life according to higher principles taught by Mr. Li Hongzhi, Falun Dafa's founder.

Falun Dafa's effectiveness in improving health and its profound principles have quickly made the practice immensely popular throughout the entire world. Since being introduced to the general public in 1992 by Mr. Li, Falun Dafa has attracted tens of millions of people in over 60 countries. Most major cities and universities in the United States, Canada, Australia, and Europe have English-speaking Falun Dafa practice groups.

...
from <http://www.falunau.org/aboutdafa.htm>: accessed 14 May 2007.

78. The following extract from the international Falun Gong website discusses the exercises that Falun Gong practitioners perform:

The Exercises of Falun Dafa

The five exercises of Falun Dafa are gentle, slow, and easy to learn. You can read through this page to get a general overview of each exercise, then click on the links below each exercise's description to see more detailed instructions, as well as video clips of Mr. Li performing each exercise with English instructions.

...
The exercises of Falun Dafa are:

- Exercise 1: Buddha Showing a Thousand Hands
- Exercise 2: The Falun Standing Stance
- Exercise 3: Penetrating the Two Cosmic Extremes
- Exercise 4: The Great Heavenly Circuit
- Exercise 5: Strengthening Divine Powers

from: <http://www.falundafa.org/eng/exercises.htm>: accessed 14 May 2007.

79. References to exercise 3 being performed in a relaxed manner and to exercises 3 and 4 being performed nine times can be found at http://www.falundafa.org/book/eng/flg_2006_4.htm#3 (accessed 5 August 2008).

WHAT MAKES A GENUINE FALUN GONG PRACTITIONER?

80. The following is extracted from a talk to the Refugee Review Tribunal by Dr Benjamin Penny, a noted China scholar and someone with a high degree of knowledge about Falun Gong:

...
P21. Question: How would you determine that a person is a genuine Falun Gong practitioner in Australia in 2006?

I appreciate that this is a crucial question for Members. Let me say first of all that I have never been in the position of having to decide whether a practitioner is genuine as most of the practitioners I know are firmly committed and very serious. There is simply no question about them. And indeed if I really wanted to know if person x was a genuine practitioner I would ask one of my genuine ones to talk with person x. They would be able to tell in about 30 seconds. But if you can't do that I would look at three factors:

1. the five exercises. All practitioners would know of their existence and should be able to perform them confidently, allowing for physical disability (like not being able to get into a lotus position), age or a degree of natural clumsiness. I would not be confident that they would be able to tell you the names of each exercise, or each part of each exercise, or the

rationale for the exercises that Master Li occasionally notes, as they may well have learnt them by imitation rather than ever looking at a book or a website.

2. the book. Similarly, I would expect all practitioners to know of the main scripture of Falun Gong, Zhuan Falun. Please note this title is not translated and that non-Chinese speaking practitioners refer to it in Chinese. Please also note that this book is NOT the one called Falun Gong. Apart from knowing of the book genuine practitioners should also have read it. This will, however, not do you much good as in my experience practitioners don't read it as they would any other book. They also don't tend to discuss particular passages with other practitioners. It's a good thing simply to read it, a little like an incantation. If you ask a practitioner what a certain passage means, the best you can expect would be, in my experience, a referral to another part of the book. You could ask them how many lectures are in it (it's an edited transcription of Master Li's lectures). The answer is nine.

3. What I would do to test genuineness, however, is to talk to applicants about why they do Falun Gong, what their experience of it is, how it has helped them and other people they know, etc. I realize the interview situation can be a little artificial but whenever I've talked to practitioners and displayed sincerity in wanting answers, they've never held back. You might also ask them how they apply the moral tenets of truth, compassion and forbearance (zhen, shan, ren) in their lives.

Bear in mind there is a serious translation issue here. Chinese practitioners will not be aware of the English translations of some of these terms. They would live Falun Gong in Chinese – and if interpreters are used, unless they are very experienced in specific Falun Gong matters, ambiguities and misinterpretations may be common.

In Chinese, practitioners would tend to refer to Falun Gong amongst themselves not as Falun Gong but as Falun Dafa. But in an interview situation they would not expect you to know the word dafa so they would likely call it Falun Gong.

...

P27

Question: Can you practice Falun Gong, without being religious, like yoga?

DR PENNY: I appreciate your question. There are plenty of people who do yoga simply as a kind of exercise regime. It would also be possible to do the Falun Gong exercises and nothing else but you would not be regarded as a genuine Falun Gong practitioner. Cultivation has got two aspects. One is the exercises. The other is cultivation of what they call "xinxing" - one's moral character and way of living - according to the tenets of Zhuan Falun.

If you were just doing the exercises and had no interest or knowledge in the moral teachings, you are not a genuine Falun Gong practitioner. [emphasis added]

DR BENJAMIN PENNY, FALUN GONG SEMINAR, MELBOURNE, WEDNESDAY, 26 JULY 2006

FINDINGS AND REASONS

81. The Tribunal accepts that the applicant is a national of the Peoples Republic of China, based on a copy of the applicant's Chinese passport presented at the hearing.
82. The applicant claims to fear serious harm from the Chinese authorities should she return to China. This arises from her claimed practice of Falun Gong in China and Australia. She states that police have been to her place in China in regards her Falun

Gong practice and activities in China and Australia and she will be at risk from the authorities should she return to China.

83. From the independent country information, the Tribunal accepts that if the applicant is a genuine Falun Gong practitioner, there is a real chance of her suffering serious harm in China. However, the Tribunal must first be satisfied that the applicant is credible in her claims. After hearing the applicant's oral evidence, the Tribunal had some doubts as to the credibility of the applicant and the truthfulness of her claims. These doubts centred on four issues: the applicant's inability to express how she applies the three central beliefs of Falun Gong in practice, how her husband found out about her practice of Falun Gong, that her husband helped her leave China and that she has been prepared in the past to not tell the truth in order to enhance her protection visa application claims
84. Regarding the first issue, the Tribunal was satisfied that the applicant had a level of knowledge of Falun Gong practices and beliefs which was commensurate with someone who was a Falun Gong practitioner. However, the Tribunal asked the applicant a number of times to give examples from her daily life as to how she applied the principles of truth, compassion and forbearance. She was not able to do so. The independent country information [Dr Penny] suggests that a genuine Falun Gong practitioner would be able to articulate how they put Falun Gong into practice in their everyday life.
85. The applicant suggested to the Tribunal she was not understanding the question and was not good at expressing herself. Her representative suggested she did not understand the question. The Tribunal does not accept this. The Tribunal considers that it was not a complicated question and the applicant did not indicate any problem with the interpreter. This does therefore raise serious doubts as to the applicant's credibility
86. The second issue going to the applicant's credibility is her description of how her husband found out about her Falun Gong practice. She said that he opened a door in their home and saw her meditating and asked what was going on, and said 'are you practising Falun Gong?' and she said 'yes' The Tribunal asked her whether he had any suspicions of her practising Falun Gong prior to this and she said he did not, until that time.
87. To the Tribunal, it seemed somewhat implausible that the applicant's husband would come in and see her doing meditation and automatically assume she was a Falun Gong practitioner, especially when he had, on the applicant's evidence, no prior suspicions. She could have been practising another form of meditation not illegal in China.
88. The third issue was that her husband helped her leave China. The applicant described how he abused her after he found out that she was a Falun Gong practitioner. He no longer wanted her as his wife and took a girlfriend. Yet, he willingly arranged for her departure from China The Tribunal considered that this behaviour might possibly be inconsistent with his other behaviour and hence implausible.
89. Fourthly, the applicant has admitted to the Tribunal that she was prepared to enhance her protection visa claims at the suggestion of others. This is demonstrated by her initial claim that her parents were detained for a number of months whereas she now says it was for a considerably shorter period. This might suggest to the Tribunal that she is

generally prepared to not tell the truth in order to have her protection visa application succeed.

90. What swayed the Tribunal as to the applicant's truthfulness was the evidence of the second witness. He came across as a witness of truth. He appears to have cast a critical eye over what he has been told by the applicant and has come to the view that she is a genuine Falun Gong practitioner. He was able to give a day-to-day example of how the applicant applied the Falun Gong principle of endurance in relation to her problems in China. He also told the Tribunal that he took the applicant and her friend to Falun Gong practice in Sydney. Further, he actually travelled to China and spoke to the parents of the applicant and obtained evidence from them in support of the applicant's claims.
91. The other witness also appeared to the Tribunal to be a credible person. He gave evidence of when he first met the applicant and she had later told him the story of her family's suffering in China and that he had then obtained information himself about Falun Gong treatment in China. He also said that he had accompanied the applicant to four Falun Gong and related rallies in Australia.
92. Thus, the Tribunal accepts that the applicant is a credible person and has been truthful in her claims. The Tribunal first accepts that the applicant was unable to directly tell how she applies the three Falun Gong principles in her life because she has difficulty expressing herself. Secondly, it accepts that the events leading to her husband's discovery of her Falun Gong practice and his assistance with her departure from China did occur as the applicant stated. Thirdly, it accepts that the applicant is now telling the Tribunal the whole truth in regards her claims. Fourthly, the Tribunal also accepts the statements of the applicant's parents and their friend as genuine and truthful
93. Thus the Tribunal accepts the applicant's claims as follows:
 - That she became a Falun Gong practitioner and learnt the exercises and the law through her parents, who were already Falun Gong practitioners
 - That she obtained a new Chinese identity card and moved from her hometown to avoid possible persecution arising from her, and her parents, having been public Falun Gong practitioners
 - That her husband discovered that she was a Falun Gong practitioner and did not want her to be his wife anymore, found a girlfriend and the relationship deteriorated
 - That she left China with the help of her husband, together with a fellow Falun Gong practitioner
94. The applicant has also claimed in her oral evidence, and in more detail in her written statement, to be practising Falun Gong in Australia and to be involved in Falun Gong-related protests and demonstrations. These claims are supported by the evidence of the witnesses and through photographs and a newspaper clipping. The Tribunal accepts that the applicant has practised Falun Gong in Australia since shortly after her arrival in Australia. Further, the Tribunal accepts that her involvement in Falun Gong and related activities in Australia is motivated by a genuine commitment to that philosophy and not as some attempt to support her claim to refugee status. She thus satisfies the Tribunal that she has engaged in this conduct otherwise than for the purpose of strengthening her

claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol:s.91R(3)

95. The Tribunal then considered whether the Chinese authorities are now aware of the applicant's Falun Gong practice in China and Australia. The applicant said she thinks the Chinese police are looking for her now. As to how she knew this, the applicant said that she called her child in China and her husband had answered and told her that the police had visited their home and asked her what she was doing in Australia to cause such trouble.
96. The applicant believes the Chinese authorities know she is in Australia and is a Falun Gong practitioner because her previous agent, must have given her protection visa application documents showing she is a Falun Gong practitioner to the Chinese Government, as threatened. She suggested that only he knew her city address.
97. The Tribunal can accept that the migration agent made threats to the applicant but is not convinced that he followed through on those threats. The Tribunal considers there is an equally plausible explanation for this police visit. First, the Tribunal considers that there must have already been some official record of the applicant's address, given permanent and temporary household registration requirements in China. It is equally plausible that the police were visiting the applicant's address because she had remained in Australia and this is frowned upon by the authorities.
98. Further, the only other person who the applicant actually feared would disclose her Falun Gong status in China was her husband. However, he was the one who told her, with some concern, that the police had visited her old home. Further, given that he subsequently helped the applicant to leave China, he would have no interest in now disclosing to the Chinese authorities that she was a Falun Gong practitioner, as his role may become apparent.
99. On the evidence before it, the Tribunal is not satisfied that the Chinese authorities *currently* know that the applicant was a Falun Gong practitioner in China and is one now in Australia. However, the Tribunal finds that the applicant has a real chance of coming to the attention of authorities on return to China in regards to being a Falun Gong practitioner. She was actively involved in Falun Gong activities prior to her departure. It is also likely, in the Tribunal's view, that should she return to China there would be official interest in her because she has not recanted on her beliefs in Falun Gong and would continue to practice them. This could result in serious harm, such as official interrogation, which has been known to result in torture and physical harm, or administrative or extra-judicial detention which can be undertaken without regard to lawful safeguards. These matters are so serious and systematic that they would be persecution for the purposes of the Act [see ss.91R(1)(b) and (c)].
100. In the Tribunal's view, the applicant is at real risk of serious harm, amounting to persecution, should she return to China. This would arise because of her adherence to the Falun Gong movement which falls within the terms of Article 1A(2) in three ways. The movement, and its basis on faith and practice, has the qualities of a religion, although it is purportedly not identified as such by adherents. The Chinese Government, however, does perceive the movement to have religious qualities, having labelled it a cult. It is also a particular social group in China, being a group with a shared world view and physical practice. Harm could also be said to arise by virtue of

the imputation of an anti-Government political view to that movement by authorities, therefore forming a political opinion imputed to the applicant. The harm can, then, be said to essentially and significantly arise by reason of a characteristic contemplated by the Convention. As such, it is the view of the Tribunal that the applicant is a refugee within the meaning of the Convention.

101. In the Tribunal's view, the real risk of serious of harm extends to the entire country of China, because the Chinese Government has highly centralised elements and the security authorities have a national structure, although considerable local autonomy. The applicant would be readily identifiable by authorities on return and in the Tribunal's view would probably be of interest to authorities, no matter where in the country she attempted to reside.
102. There is no material which indicates that the applicant has any right of residence in any third country, being only a citizen of China and currently physically in Australia She is also outside her country of nationality.
103. The applicant, therefore, is a person owed protection obligations by Australia and this matter should appropriately be remitted to the Department.

CONCLUSIONS

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

DECISION

105. 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.

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 *Migration Act 1958*

Sealing Officer's I.D. prrt44