

**071392399 [2007] RRTA 151 (19 July 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071392399

**COUNTRY OF REFERENCE:** China (PRC)

**TRIBUNAL MEMBER:** Ms. S. Borg

**DATE DECISION SIGNED:** 19 July 2007

**PLACE OF DECISION:** Melbourne

**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), first travelled to Australia on a valid visa early 2000s and departed after several months in the same year. The applicant then returned to Australia shortly afterwards on a valid visa. [*Detailed events relating to relevant visa conditions deleted: s.431*] His visa expired early the following year and the applicant did not attempt to renew his visa or apply for another visa class.

The applicant applied to the Department of Immigration and Citizenship for a Protection Visa (Class XA) in the late 2000s. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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

The applicant applied to the Tribunal for review of the delegate's decision.

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

### **RELEVANT LAW**

Under s.65(1) 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 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's evidence:*

The Tribunal asked the applicant how he became involved in Falun Gong. He stated that in the early 2000s, he was feeling lonely and came across Falun Gong practitioners who were handing out pamphlets about Falun Gong which said it was good for your health and so he decided to try it.

He stated that initially he was suspicious of Falun Gong mainly because he was told it was bad when he was living in China. However due to an overriding sense of loneliness he decided to investigate the practise and believed that it was good for you.

The applicant stated that he practised regularly with other practitioners in one of the practitioner's residences or alone in the privacy of his own residence.

The Tribunal asked the applicant why he didn't try Tai Chi instead if he was looking to improve his health? The applicant stated that he doesn't know much about Tai Chi and that he wasn't in contact with anyone who practised it. He said that his contact was through practitioners handing out leaflets and he was lonely and wanted to participate. It started off as simply becoming involved for good health but now he considers himself a practitioner.

When asked about his role in Falun Gong and about his knowledge about its practices he stated that he is just a practitioner. He knows it is a religion, that the leader of the movement is Le Hongzhi and that it began some time in the 1990's.

When asked if he read any books he stated that he only reads from the web. He reads a web page by Minghui. The Tribunal later conducted a web search for websites by Minghui. The results of which indicate that there are many Minghui schools all over the world and a lot of information on different web pages regarding FalunGong and a reference to Minghui schools.

When asked about the exercises, the applicant said he did not know how many there were but he was able to take the Tribunal Member through all of the various positions. He stated that he would run through the various stances over the period of two to three hours.

The applicant stated the core principles of Falun Gong being truthfulness, compassion and balance.

When asked what is Falun, the applicant replied 'a turning wheel' within the heart.

The applicant was unable to describe any major incidents which occurred in 1996 and 1999. His response was that in China (where he was living at the time) any information was suppressed by the Chinese government. All they would tell the Chinese people was that Falun Gong was evil and that citizens are not to practice it. He went on to say that China has no opposition party, "it is not like Australia - people are kept in the dark". It is very dictatorial. The applicant said that he believed that information was suppressed for fear that with the ever increasing membership of Falun Gong the practitioners would overthrow the government.

The applicant gave evidence that if he were to return to China, he would continue to practice Falun Gong and he believed he would be imprisoned for doing so. He said that when he was living in China he was not aware of the persecution, however whilst living in Australia he has spoken to elderly people who are Falun Gong practitioners and they told him how they had been imprisoned when in China for being Falun Gong practitioners.

## **BACKGROUND AND COUNTRY INFORMATION**

### **Human Rights**

The United States' Department of State *Country Reports on Human Rights Practices-2004*. Released by the Bureau of Democracy, Human Rights, and Labor, 28 February 2005 states:

"The People's Republic of China (PRC) is an authoritarian state in which, as specified in its Constitution, the Chinese Communist Party (CCP or Party) is the paramount source of power. Party members hold almost all top government, police, and military positions. Ultimate authority rests with the 24-member political bureau (Politburo) of the CCP and its 9-member standing committee. Leaders made a top priority of maintaining stability and social order and were committed to perpetuating the rule of the CCP. Citizens lacked the freedom to express opposition to the Party-led political system and the right to change their national leaders or form of government. Socialism continued to provide the theoretical underpinning of national politics, but Marxist economic planning has given way to pragmatism, and economic decentralization has increased the authority of local officials. The Party's authority rested primarily on the Government's ability to maintain social stability; appeals to nationalism and patriotism; Party control of personnel, media, and the security apparatus; and continued improvement in the living standards of most of the country's 1.3 billion citizens. The Constitution provides for an independent judiciary; however, in practice, the Government and the CCP, at both the central and local levels, frequently interfered in the judicial process and directed verdicts in many cases.

The security apparatus is made up of the Ministries of State Security and Public Security, the People's Armed Police, the People's Liberation Army (PLA), and the state judicial, procuratorial, and penal systems. Civilian authorities generally maintained effective control of the security forces. Security policy and personnel were responsible for numerous human rights abuses.

The country's transition from a centrally planned economy toward a market based economy continued. Although state-owned industry remained dominant in key sectors, the Government

has taken steps to restructure major state-owned enterprises (SOEs), privatized many small and medium SOEs, and allowed private entrepreneurs increasing scope for economic activity. Rising urban living standards; a burgeoning middle class; greater independence for entrepreneurs; the reform of the public sector, including government efforts to increase transparency and eliminate administrative hurdles; and expansion of the private sector, including foreign-invested enterprises, continued to increase workers' employment options and reduce state control over citizens' daily lives.

The country faced many economic challenges, including reform of SOEs and the banking system, growing unemployment and underemployment, an aging population, the need to construct an effective social safety net, and rapidly widening income gaps between coastal and interior regions and between urban and rural areas. In recent years, between 100 and 150 million persons voluntarily left rural areas to search for better jobs and living conditions in cities, where they were often denied access to government-provided economic and social benefits, including education and health care. The Government continued to relax controls over migration from rural to urban areas, and many cities took steps to expand the rights of migrants and their dependents to basic social services. In the industrial sector, continued downsizing of SOEs contributed to rising urban unemployment that was widely believed to be much higher than the officially estimated 4 percent, with many sources estimating the actual figure to be as high as 20 percent. The Government reported that urban per capita disposable income in 2003 was \$1,028 and grew by 9 percent over the previous year, while rural per capita cash income was \$317 and grew by 4 percent. Official estimates of the percentage of citizens living in absolute poverty showed little change from the previous year. The Government estimated that 30 million persons lived in poverty, and the World Bank estimated the number whose income does not exceed one dollar per day to be 100 to 150 million persons.

The Government's human rights record remained poor, and the Government continued to commit numerous and serious abuses. Citizens did not have the right to change their government, and many who openly expressed dissenting political views were harassed, detained, or imprisoned, particularly in a campaign late in the year against writers, religious activists, dissidents, and petitioners to the Central Government. Authorities were quick to suppress religious, political, and social groups that they perceived as threatening to government authority or national stability, especially before sensitive dates such as the 15th anniversary of the 1989 Tiananmen massacre and other significant political and religious occasions. However, the Constitution was amended to mention human rights for the first time.

Abuses included instances of extrajudicial killings; torture and mistreatment of prisoners, leading to numerous deaths in custody; coerced confessions; arbitrary arrest and detention; and incommunicado detention. The judiciary was not independent, and the lack of due process remained a serious problem. The lack of due process was particularly egregious in death penalty cases, and the accused was often denied a meaningful appeal. Executions often took place on the day of conviction or on the denial of an appeal. In Xinjiang, trials and executions of Uighurs charged with separatism continued. Government pressure continued to make it difficult for lawyers to represent criminal defendants. The authorities routinely violated legal protections in the cases of political dissidents and religious figures. They generally attached higher priority to suppressing political opposition and maintaining public order than to enforcing legal norms or protecting individual rights. According to 2003 government statistics, more than 250,000 persons were serving sentences in "reeducation-through-labor" camps and other forms of administrative detention not subject to judicial review. Other experts reported that more than 310,000 persons were serving sentences in these camps in 2003.

Throughout the year, the Government prosecuted individuals for subversion and leaking state secrets as a means to harass and intimidate, while others were detained for relaying facts about Chinese human rights issues to those outside the country. Among those detained or convicted on such charges were Christian activists Zhang Rongliang, Liu Fenggang, Xu Yonghai and Zhang Shengqi, and journalists Zhao Yan, Shi Tao, Li Guozhu and members of the independent PEN Center's China branch. The Government detained individuals administratively to suppress dissent and intimidate others. In April and June, authorities

detained many who planned 15th anniversary commemorations of the 1989 Tiananmen massacre, including activist Hu Jia and "Tiananmen Mothers" organization founders. Similarly, military officials detained Dr. Jiang Yanyong because he wrote to government leaders requesting an official reassessment of the 1989 Tiananmen massacre.

The number of individuals serving sentences for the now-repealed crime of counterrevolution was estimated at 500 to 600; many of these persons were imprisoned for the nonviolent expression of their political views. Nongovernmental organizations (NGOs) estimated that as many as 250 persons remained in prison for political activities connected to the 1989 Tiananmen demonstrations.

Freedom of movement continued to be restricted. However, the Government continued to relax its residence-based registration requirements. The Government denied the U.N. High Commissioner for Refugees (UNHCR) permission to operate along its border with North Korea and deported several thousand North Koreans, many of whom faced persecution and some of whom may have been executed upon their return, as provided in North Korean law. Abuse and detention of North Koreans in the country was also reported.

Significant legal reforms continued during the year, including a Constitutional amendment specifically to include protection of citizens' human rights and legally obtained private property for the first time. In July, the Government enacted the Administrative Procedures Law, which prohibits government agencies from violating citizens' rights or seizing property without clear legal authority. A new infectious disease law was enacted prohibiting discrimination against people with HIV/AIDS and Hepatitis B, and employment discrimination against those with HIV/AIDS and Hepatitis B was outlawed. Treatment of some migrant workers was improved in many major cities through the passage of laws intended to guarantee migrant children access to public education and to protect migrant workers' rights to receive their salary on a regular basis. The Government enacted reforms related to interrogation of detainees, fighting corruption, procedures for requisitioning land, confiscation of personal property, extending social security, regulating religion, and providing legal aid. At year's end, it remained unclear how widely these reforms would be implemented and what effect they would have.

Since the Government banned the Falun Gong spiritual group in 1999, criminal proceedings involving accused Falun Gong activists were held almost entirely outside the formal court system. In December, a Beijing attorney sent an open letter to the National People's Congress highlighting issues of arbitrary detention and unlawful process in cases involving Falun Gong. The letter focused on the April detention and subsequent administrative sentencing of his client, Huang Wei of Shijiazhuang, Hebei Province, who was released in 2002 from a 3-year reeducation sentence for Falun Gong activities. On April 13, Huang was detained again, his home was searched, and a security official signed Huang's name on a confession, according to the open letter. Huang was sentenced on June 3 to three more years of reeducation in connection with Falun Gong. When Huang tried to sue the Government in protest, his attorney was denied permission to see his client. According to the letter, court and prison authorities told the attorney that only the "610 Office" of the Ministry of Justice could address Falun Gong matters. In the process, the letter described how judges explained that courts are under strict orders not to accept Falun Gong cases and that, in such cases, the courts do not follow normal pretrial procedures. The attorney's letter concluded that such treatment of accused Falun Gong adherents was unlawful."

## **Falun Gong**

General information concerning the Falun Gong movement is found at <http://www.falundafa.org.au>. The website and the main book of teachings, Zhuan Falun, emphasise that Falun Gong is an `ancient practice` not associated with any religion. It involves the performance of five sets of simple exercises. A central component of Falun Gong is studying the universal principles of truthfulness, benevolence and forbearance. Zhuan Falun indicates that Falun Gong exercises can be done at home, alone: there is no need

to practise at any particular time or location or, apparently, with any particular frequency. There is no requirement for congregation.

### **(i) Background to Falun Gong**

The practice / philosophy that is loosely known as Falun Gong was founded in 1992 in China by Li Hongzhi as a development from the ancient Chinese self-realisation and development regime known as qigong . While the practice of qigong is a tradition within China, Falun Gong is novel in its blending of qigong with elements of Buddhist and Taoist philosophy. Many terms such as Falun Dafa, Falun Gong, and Falun gong 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). There is no question that Falun gong 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)

Falun Gong first came to the attention of PRC authorities after demonstrations by Falun Gong adherents in April 1999 in Tianjin and later that month outside the Zhongnanhai in Beijing. The initial government crackdown against Falun Gong began in late July 1999, when a number of government departments implemented restrictive against the movement, banning Falun Gong and issuing an arrest order for Li Hongzhi. The movement was declared an “evil cult” and outlawed in October 1999.

Dr Benjamin Penny of the Centre for Cross-Cultural Research at the Australian National University states the following about Falun Gong practice:

.. as put to me by local practitioners, and it is made very clear in *Zhuan Falun* and other writings by Li Hongzhi, doing the five sets of exercises is necessary but not sufficient to be considered a cultivator. Indeed the performance of the exercises can be considered secondary to cultivating what practitioners call the *xinxing*, defined in Falun Gong texts as “mind or heart nature, moral character”. Such cultivation means living by an ethical code and changing one’s life to comply with the doctrinal tenets of Falun Gong. In the first instance this means living by the moral trinity of “Truth, Compassion and Forbearance” but it also means changing the way one relates to the world by getting rid of “attachments” and understanding one’s place in the cosmos and the nature of humanity. (Penny, Dr. B., ‘Questions and Answers on the Falun Gong movement for Refugee Review Tribunal (RRT) Members following a seminar at the RRT on 29 August 2003’, Answers received by the RRT on 22 September 2003, Section 1, Answer 1)

In a detailed paper about Falun Gong practice and belief, Dr Penny says:

The cultivation of *xinxing* is the “top priority” of the practitioner. *Xinxing*, says Li, is involved with gain and loss. “‘Gain’ is to gain conformity to the characteristic of the universe. The characteristic that makes up the universe is Zhen-Shan-Ren (*truthfulness-benevolence-forbearance*)... ‘Loss’ is to give up those ill thoughts and conducts of greed, personal gain, lust, desire, killing, battering, stealing, robbing, deceiving, jealousy, etc.” (Penny, Dr. B. *The Past, Present and Future of Falun Gong* (paper presented to a seminar at the Refugee Review Tribunal in Sydney Australia), 4 May 2001, pp.3-4)

### **(ii) When and why Falun Gong started to attract government attention**

Founded in 1992, Falun Gong first came to prominence in April 1999 after several thousand Falun Gong adherents staged a sit-in in Tianjin, outside the publishers of the Tianjin University journal that had published an article criticizing the movement. Official attention



was heightened when more than 10 000 adherents of Falun Gong coordinated a peaceful demonstration outside Beijing's leadership compound, the Zhongnanhai, on 25 April 1999. The demonstration was the first major public manifestation of Falun Gong's popularity in China, and is reported to have caught the PRC authorities unawares. The incident is widely considered to have been the trigger for the initial crackdown against Falun Gong commencing in July 1999. The authorities are reported to have been mainly concerned by the capacity of the group to mobilize large numbers of followers, unnoticed, for a public demonstration. Subsequently, after some conflicting signals, they branded the Falun Gong a "threat to social and political stability". The government banned Falun Gong on 22 July 1999 and launched a massive propaganda campaign to denounce its practice and the motivation of its leaders, in particular Li Hongzhi. Since then, the government's accusations against the group have been repeatedly publicized by the state media and government officials. (Amnesty International 2000, *People's Republic of China: the Crackdown on Falun Gong and Other So-Called "Heretical Organizations"*, ASA 17/11/00, 23 March, Section 2.1 Penny, Benjamin, 2001, *The Past, Present and Future of Falun Gong (paper presented to a seminar at the Refugee Review Tribunal in Sydney Australia)*, 4 May; ter Haar, Barend J., 2001 (updated 2002), *Falun Gong: Evaluation and Further References*, on his website at Leiden University (Holland); Human Rights Watch 2002, *Dangerous Meditation: China's Campaign Against Falungong*, January (released 7 Feb 2002), Section I – Summary and Recommendations).

### **(iii) Overview of types of treatment of Falun Gong practitioners since 1999**

The crackdown against Falun Gong commenced in July 1999. From that time on, Falun Gong 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 Falun Gong and attempting to justify the crackdown. From July 1999 until the end of 1999, a "legal infrastructure" to counter Falun Gong was erected: the banning of CCP members, civil servants and members of the military taking part in Falun Gong activities; the introduction of restrictions on legal officers representing Falun Gong practitioners and a circular calling for confiscation and destruction of all publications related to Falun Gong. Falun Gong 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 more restrictive measures were implemented during 2001. Such measures included the utilisation of more severe sentences, allegedly incorporating the use of psychiatric institutions to detain and "re-educate" Falun Gong practitioners; an increase in systematic and state sanctioned violence against Falun Gong practitioners; an escalated propaganda campaign against Falun Gong, 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 Falun Gong. Reports suggest that PRC authorities also attempted to restrict the movement of suspected Falun Gong practitioners within China; to prevent the international press from covering the activities of the Falun Gong movement, and launching an offensive against the internet structure underpinning the effectiveness of the Falun Gong 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 Falun Gong 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 Falun Gong organisation in China itself. While there has been a dramatic abatement in the visibility of Falun Gong activities within China, there have increasingly been reports highlighting demonstrations in China by foreign followers of Falun Gong. These demonstrations have been met with strong resistance from PRC authorities, with the arrest, temporary detention and expulsion of foreign Falun Gong 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, John and Pan, Phillip P, 2001, 'Torture is Breaking Falun Gong', *Washington Post*, 5 August).

#### **(iv) Evidence of differential treatment of leaders and followers**

Reports about Falun Gong note that PRC authorities are less interested in individual members practising alone than those actively propagating Falun Gong as a "core" member. The Department of Foreign Affairs and Trade (DFAT) in November 1999 indicated that the Chinese government's campaign against Falun Gong had targeted the leaders and organisers of the organisation, and those with some degree of influence or recognition, noting:

The main criterion for selecting individuals for prosecution while releasing others appears to be the degree to which an individual has played a leadership or organisational role in Falungong, this is especially the case for those suspected of organising demonstrations and other perceived acts of defiance after the banning of Falungong on 22 July [1999]. Detainees who express contrition for their actions, renounce their beliefs and publicly denounce Falungong teachings are likely to be released quickly after questioning. Others have been released with a warning. ...

Those deemed to have played a leadership role faced possible charges of "incitement to subversion". ... PRC authorities have questioned large numbers of Falungong practitioners in their efforts to identify leaders and organisers. In many cases, such questioning has involved periods of detention. Early release is offered for those who co-operate, including by identifying those who had "led them astray".

(Department of Foreign Affairs and Trade (DFAT) 1999, *Falun Gong a ka Falun Dafa in China*, 9 November – CISNET China CX38557).

This is consistent with a Chinese government announcement of 23 July 1999, that 'ordinary' Falun Gong practitioners would be treated differently from organisers and key members of Falun Gong. Thus, it would seem that ordinary adherents of Falun Gong who practise privately are not the subject of particular attention by the authorities (see also DFAT update CX 38557, 9 November 1999).

A Canadian Immigration and Refugee Board research response in January 2000 highlighted information indicating that Falun Dafa practitioners may face criminal as opposed to administrative punishment if they are alleged to have occupied a leadership role, publicized Falun Dafa through the Internet or print publications, "leaked state secrets" about the campaign against Falun Dafa or were high ranking officials. (Immigration and Refugee Board of Canada, 2000, *CHN33627.E*, 21 January - REFINFO).

Country Information Service 2000, Report No 396/00- Update on Falun Gong (Falun Dafa) - 17 July 2000. DFAT CX43498 states that:

"Those who have played a leadership or organisational role in Falungong activities are more likely to attract the attention of the authorities. We expect that "ordinary followers" who come to the attention of the authorities (through their participation in public demonstrations or by being named by others), will be lectured on the error of their ways and the social damage caused by Falungong, and urged to repent their actions and renounce their beliefs. If they

comply, we expect they will be released quickly. Those who refuse to cooperate with the authorities are likely to be subject to longer periods of detention, usually non-judicial ("re-education through labour"). We assess that ordinary adherents of Falungong who practice privately are unlikely to be the subject of particular attention by the authorities. Chinese authorities are likely to take a close interest in adherents who are members of the communist party, government employees or workers in state owned enterprises, and require them to renounce Falungong or be subject to further action."

Official reports continue to distinguish between a small minority of "core members" or "diehards" who play leading roles or actively participate in illegal Falungong-related activities, and the majority of ordinary practitioners "infatuated" or led astray by Falungong. (Department of Foreign Affairs and Trade (DFAT) 2001, *China Falun Gong Update*, 10 September – CISNET China CX57264; DFAT, 2002, CIR No. 136/02 Falun Gong practitioners, 20 May – CISNET China CX64757).

According to the Department of Foreign Affairs and Trade (DFAT):

"Chinese Authorities ... are more concerned by the ability of Falun Gong members to organise themselves and to propagate Falun Gong beliefs. Laws banning Falun Gong are aimed at preventing the formation and public assembly of groups and the use of public means (books, videos, leaflets, mass media etc.) to promote Falun Gong." (DFAT, 2002, Country Information Report No 136/02, Falun Gong Practitioners, 20 June - CISNET China CX64757).

This is in keeping with more recent assessments. According to a report from Australia's Department of Foreign Affairs and Trade, although Chinese authorities officially considered Falun Gong to be an 'evil cult' (xiejiao) which promoted 'anti-human, anti-social and anti-scientific' superstition, they were more concerned by the ability of its members to organise themselves and to propagate Falun Gong beliefs. Laws banning Falun Gong were aimed at preventing the formation and public assembly of groups and the use of public means (books, videos, leaflets, mass media etc.) to promote Falun Gong. The authorities are less likely to regard an individual member who practised alone and in private (should such a person come to their attention), and who did not actively propagate Falun Gong as a 'core' or 'diehard' member. 'Core' members were more likely to be subject to legal penalties. Treatment of Falun Gong practitioners was likely to differ from province to province, and even from city to city, as a consequence of the considerable discretion available to law enforcement and judicial authorities across China. As a broad generalisation, treatment of detainees across the board was likely to be worse in those provinces where the legal system was weakest and/or levels of economic development were low. DFAT also observed that conditions for detainees in gaols and re-education centres throughout China were generally harsh, with poor access to adequate medical treatment. Physical violence towards detainees, while not officially condoned, was not uncommon. (2002, 'Falun Gong practitioners', Country Information Report, DFAT, CIR No. 136/02, 24 May, CX64757).

The US Department of State's *International Religious Freedom Report 2002*, however, suggests that the targets for such repression were widened from those groups discussed above. The report stated:

After the January 2001 self-immolations of five individuals claiming to be Falun Gong practitioners in Tiananmen Square, the Government initiated a comprehensive effort to round up practitioners not already in custody, and sanctioned the use of high pressure indoctrination tactics against such individuals in an effort to force them to renounce Falun Gong. Neighborhood committees, state institutions (including universities), and companies reportedly were ordered to send all known Falun Gong practitioners to intensive anti-Falun Gong study sessions. Even practitioners who had not protested or made other public demonstrations of belief were forced to attend such classes. Those who refused to recant their

beliefs after weeks of intensive anti-Falun Gong instruction reportedly were sent to reeducation-through-labor camps, where, in some cases, beatings and torture were used to force them to recant their beliefs. These tactics reportedly resulted in large numbers of practitioners pledging to renounce the movement. (US Department of State 2002, *International Religious Freedom Report 2002: China*, October, section II).

The US Department of State's International Religious Freedom Report 2004, states:

According to Falun Gong practitioners in the United States, since 1999 more than 100,000 practitioners have been detained for engaging in Falun Gong practices, admitting that they adhere to the teachings of Falun Gong, or refusing to criticize the organization or its founder. The organization reports that its members have been subject to excessive force, abuse, detention, and torture, and that some of its members have died in custody. For example, in December 2003, Falun Gong practitioner Liu Chengjun died after reportedly being abused in custody in Jilin Province. Foreign observers estimate that half of the 250,000 officially recorded inmates in the country's reeducation-through-labor camps are Falun Gong adherents. Falun Gong places the number even higher. Hundreds of Falun Gong adherents were also incarcerated in legal education centers, a form of administrative detention, upon completion of their reeducation-through-labor sentences. According to the Falun Gong, hundreds of its practitioners have been confined to psychiatric institutions and forced to take medications or undergo electric shock treatment against their will. During April to June 2003, official Chinese media accused Falun Gong adherents of "undermining anti-SARS operations." Over 180 Falun Gong adherents were detained for allegedly inciting public panic and "spreading false rumors about SARS."

(US Department of State 2004, *International Religious Freedom Report 2004: China*, September).

CX43498 of 17 July 2000 and CX64757 of 24 May 2002 provided responses to earlier questions by CIPS regarding Falun Gong.

QUESTIONS:[17.06.05]

Q.1. Is there a consistent profile of the type of Falun Gong followers who would be more likely to attract the attention of authorities and the kind of treatment they could expect? What appears to be the most common treatment given to 'ordinary' followers?

Q.2. Current attitude/treatment by PRC authorities of Falun Gong practitioners who practise beliefs privately.

Q.3. Are there differences of treatment (and if so, please describe) depending on Provinces?

Q.4. Falun Gong representatives have reported numerous deaths of followers in custody. PRC authorities ascribe these to suicide and ill health. Please provide your assessment of the likely situation.

ANSWER:[28.06.05]

The advice given on CX43498 of 17 July 2000 and CX64757 of 24 May 2002 remains relevant.

(DFAT Country Information Report No. 05/34, dated 28 June 2005.)

US Department of State 2005, *Country Reports on Human Rights Practices 2004: China* (includes Tibet, Hong Kong, and Macau), 28 February 2005 states:

The Government continued its crackdown against the Falun Gong spiritual movement, and tens of thousands of practitioners remained incarcerated in prisons, extrajudicial reeducation-through-labor camps, and psychiatric facilities. Several hundred Falun Gong adherents reportedly have died in detention due to torture, abuse, and neglect since the crackdown on

Falun Gong began in 1999.

.....The extent of public Falun Gong activity in the country continued to decline considerably, 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) was sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Although the vast majority of the tens of thousands of practitioners detained since 1999 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" have been 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. Most practitioners, however, were punished administratively. 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 (see Section 1.d.).

Police in the past often used excessive force when detaining peaceful Falun Gong protesters. During the year, allegations of abuse of Falun Gong practitioners by the police and other security personnel continued. According to the foreign-based Global Mission to Rescue Persecuted Falun Gong Practitioners, 1,047 Falun Gong practitioners, including children and the elderly, have died since 1997 as a result of official persecution (see Section 1.c.). Other groups based abroad estimated that as many as 2,000 practitioners have died in custody.

As recently as 2003, the Government continued its effort to round up practitioners not already in custody and sanctioned the 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.

UK Home Office Country Report on China, April 2005 records that:

**6.108** According to the USSD Religious Freedom Report 2004:

"The Government continued its repression of groups that it categorized as "cults" in general and of the Falun Gong in particular. The arrest, detention, and imprisonment of Falun Gong practitioners continued. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons and reeducation-through-labor camps and there have been credible reports of deaths due to torture and abuse." [2f] (p 1)

**6.109** As noted by the same source,

"Estimates of the number of Falun Gong (or Wheel of the Law, also known as Falun Dafa) practitioners have varied widely; the Government claimed that prior to its harsh crackdown on the Falun Gong beginning in 1999, there may have been as many as 2.1 million adherents of Falun Gong in the country. Some estimate that the true number of Falun Gong adherents in the country before the crackdown was much higher. The number has declined as a result of the crackdown, but there are still hundreds of thousands of practitioners in the country, according to reliable estimates." [1] (Section I.)

**6.110** According to the AI Report 2004:

“Rhetoric intensified in the official media against the Falun Gong spiritual movement, which was banned as a “heretical organization” in July 1999, apparently exacerbating the climate of violence and intolerance against the Falun Gong. Detained Falun Gong practitioners, including large numbers of women, were at risk of torture, including sexual abuse, particularly if they refused to renounce their beliefs. According to overseas Falun Gong sources, more than 800 people detained in connection with the Falun Gong had died since 1999, mostly as a result of torture or ill-treatment.” [6g] (p 3)

**6.111** As noted in the UN Report on China’s Persecution of Falun Gong (2000-2003) dated October 2003:

“The benefits of Falun Gong practice to people and society were originally recognized and commended by various levels of Chinese government. In fact, the authorities’ positive regard facilitated the spread of Falun Gong in the early 1990s. The state-controlled media – including national and local newspapers, TV, and radio stations – frequently covered activities and benefits of Falun Gong practice. The increasing popularity of Falun Gong, however, proved to be too much for a few officials within the Chinese government. From clandestine undermining in early 1994, to the orchestrated smear campaign and banning of Falun Gong books in 1996, to police harassment in 1997, certain power blocs within Chinese government gradually escalated their underhand persecution to overt assault.” [8f] (p IV)

The US Department of State's International Religious Freedom Report 2005 observes:

During the period covered by this report, the Government's respect for freedom of religion and freedom of conscience remained poor, especially for many unregistered religious groups and spiritual movements such as the Falun Gong.

Falun Gong blends aspects of Taoism, Buddhism, and the meditation techniques and physical exercises of qigong (a traditional Chinese exercise discipline) with the teachings of Falun Gong leader Li Hongzhi. Despite the spiritual content of some of Li's teachings, Falun Gong does not consider itself a religion and has no clergy or places of worship. Estimates of the number of Falun Gong (or Wheel of the Law, also known as Falun Dafa) practitioners have varied widely; the Government claimed that prior to its harsh crackdown on the Falun Gong beginning in 1999, there may have been as many as 2.1 million adherents of Falun Gong in the country. Some estimate that the true number of Falun Gong adherents in the country before the crackdown was much higher. The number has declined as a result of the crackdown, but there are still hundreds of thousands of practitioners in the country, according to reliable estimates.

The Government has banned all groups that it has determined to be "cults," including ..... , the Falun Gong, .... After the revised Criminal Law came into effect in 1997, offenses related to membership in unapproved cults and religious groups were classified as crimes of disturbing the social order. A ban on cults, including the Falun Gong spiritual movement, was enacted in 1999. Under Article 300 of the Criminal Law, "cult" members who "disrupt public order" or distribute publications may be sentenced to from 3 to 7 years in prison, while "cult" leaders and recruiters may be sentenced to 7 years or more in prison.

During the period covered by this report, the Government's respect for religious freedom and freedom of conscience remained poor, especially for members of many unregistered religious groups and spiritual movements such as the Falun Gong. The Government tends to perceive unregulated religious gatherings or groups as a potential challenge to its authority, and it attempts to control and regulate religious groups to prevent the rise of sources of authority outside the control of the Government and the CCP.

..... members of groups that the Government determined to be "cults," especially the Falun Gong spiritual movement, were subject to government pressure and sometimes suffered abuse.

**(v) Falun Gong abroad:**

China seems to have little interest in the activities of ordinary Chinese who are not identified leaders abroad. Country Information Report, DFAT, CIR No.397/99, 9 November, CX38557, states:

“CHINESE AUTHORITIES DO HAVE THE CAPACITY TO MONITOR AND/OR RESTRICT DEPARTURE FROM CHINA OF SUSPECTED FALUNGONG LEADERS AND ORGANISERS, BUT IT IS NOT CERTAIN THAT THEY WOULD WISH TO EXERCISE THIS CAPACITY IN THE CASE OF ORDINARY MEMBERS. WE ARE NOT AWARE OF ANY INSTANCES WHERE RETURNEES HAVE BEEN QUESTIONED ABOUT THEIR FALUNGONG INVOLVEMENT, BUT CONSIDER THAT THIS WOULD BE POSSIBLE. THE AUTHORITIES MIGHT SEEK TO QUESTION HIGH PROFILE ADVOCATES OF FALUNGONG ON THEIR RETURN, OR EVEN TAKE ACTION TO PREVENT THEIR RETURN, BUT ARE UNLIKELY TO TAKE MUCH INTEREST IN ORDINARY ADHERENTS.”

Country Information Report, DFAT, CIR No.262/01, 7 September 2001, CX57787 states:

“WE ARE NOT AWARE OF ANY CASES OF FALUNGONG PRACTITIONERS RETURNING FROM ABROAD WHO WERE SUBJECTED TO LEGAL OR ADMINISTRATIVE PENALTIES WHO WERE NOT ALSO ENGAGING IN CONDUCT ILLEGAL UNDER CHINESE LAW.”

**(vi) Chinese authorities' interest in Falun Gong in Australia:**

There have been numerous reports that the Chinese authorities have been monitoring the activities of Falun Gong practitioners overseas. The earliest of such reports found in the sources consulted was in February 2000 when the Country Information Service stated that:

“It is likely that Chinese authorities would be seeking to obtain information on prominent Falungong practitioners/leaders abroad.” (Country Information Service 2000, Country Information Report No 58/00, Update Information on Falun Gong, 4 February).

One report observed that:

“The Chinese embassy spokesman pointed out that it is Australian "Falun Gong" practitioners that have frequently gathered people for a sit-down in front of the Chinese embassy, where they wave banners, play music, distribute materials, obstruct passers-by, and seriously interfere in the work order and dignity of the Chinese Embassy in Australia.”(‘Australia envoys attack "slanderous" article defending Falun Gong', BBC Summary of World Broadcasts, 18 August 2000, source: Zhongguo Xinwen She news agency).

## **FINDINGS AND REASONS**

It is clear from the evidence that although the applicant entered Australia on a valid visas, the applicant ran into difficulty and his visa was cancelled. The applicant was isolated and felt very lonely and when friendship was extended to him by Falun Gong practitioners he took an interest in the practice of Falun Gong. What started out as a need to feel a part of the community slowly grew into a belief in Falun Gong with the visa applicant embracing the practice.

The Tribunal accepts the applicant's claim that he practices Falun Gong regularly. Also that he goes to other practitioners homes and also practices alone in his own home.

S.91R(3) considerations:

Upon first reading of the materials one could be forgiven for concluding that the applicant claimed he was a Falun Gong practitioner as a last resort because he was unable to stay in Australia on his valid visa and not because he was a bona fide practitioner.

However, in listening carefully to the applicant it was clear that he first became acquainted with the practices of Falun Gong because he was lonely and isolated and the practitioners who handed out the leaflets on Falun Gong gave him an opportunity to become a part of a group and to break the isolation and loneliness.

After becoming involved in Falun Gong he started to form a genuine belief in the practice and now practices Falun Gong because he is a practitioner and not just as a vehicle out of the isolated lifestyle he had been living.

The Tribunal accepts that his motivation to become involved in Falun Gong was to escape the isolation and loneliness he felt and not simply to strengthen his claim to be a refugee.

Therefore the Tribunal finds that the applicant is a genuine practitioner of Falun Gong. Further, the Tribunal finds that the applicant intends to continue practicing Falun Gong if he returns to China and that he holds a well-founded fear (due to the stories told to him by older practitioners who were persecuted) that he will end up in detention and will be persecuted by the Chinese government.

Having regard to the country information, the Tribunal finds by reason of his religion, there is a real chance that the applicant may face abusive treatment and detention, or imprisonment in the reasonably foreseeable future, should he return to China, which the Tribunal considers sufficiently serious to amount to persecution.

There is a real chance that the applicant who is a Chinese citizen would not be able to avoid persecution by relocating within China as the crackdown on "cults" is a national policy, even if it is implemented with local variations. There is no evidence that section 36(3) of the Act applies to him.

The Tribunal is therefore satisfied, and finds, that the applicant has a well-founded fear of being persecuted for the Convention reason of religion.

## **CONCLUSIONS**

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

## **DECISION**

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



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. Inward