

**061031975 [2007] RRTA 73 (17 April 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 061031975

**COUNTRY OF REFERENCE:** China

**TRIBUNAL MEMBER:** Dominic Lennon

**DATE DECISION RECORD SIGNED:** 17 April 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.

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**In accordance with s.431 of the *Migration Act 1958*, the Refugee Review Tribunal will not publish any statement which may identify the applicant or any relative or dependant of the applicant.**

## **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 Multicultural Affairs 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, arrived in Australia and applied to the then Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa. The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act and that the Tribunal has jurisdiction to review the delegate's decision under s.411(1)(c) 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.

Subsection 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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 the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now 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.

### *Application for Protection*

In a statement in her application for a protection visa, the applicant stated that:

1. I was born in the early 1960s in City A. I lived in City A for all my life until I moved to Country B in the early 1990s to study. My child was born in Country B. The child's father is my first husband, who is Chinese.
2. Between the early 1970s and the early 1980s I completed my schooling. In the early 1980s I was studying at a school in City A (it was an intermediate-level skilled qualification). Later I was working for a government agency. I went to Country B for study in the early 1990s. I was studying at a Foreign Language School when I was in Country B. I returned to China in the early 2000s because my mother was unwell.
3. I came to City C, Australia in the early 2000s. My family was persecuted by the Chinese government during the Great Cultural Revolution and I received education of democracy in Country B which is a democratic country, my democratic rationale has been enhanced and I started participating in the democratic political movement.
4. Since arriving in Australia I have actively participated in the overseas democratic political movement. Being in Australia makes me clearly understand how communism in China adversely influences the country and the Chinese population.
5. My family was persecuted by the Chinese government. I have had adverse sentiment on communism and socialism since I was a child. During the Great Cultural Revolution, my father was working in the education profession in City A. He graduated in Country D. My mother was working in the health profession. During the Great Cultural Revolution, both parents were intellectuals but they were degraded as the lower social class. They were targeted by the Chinese government.
6. On many occasions the government handcuffed my parents and humiliated them in the street. The government wanted to show the public that there was no use in being educated.
7. Also the government raided our house several times and all my family's assets were confiscated. In the late 1960s, my parents were sent to a camp located in a rural area in City A. My father's physical health was seriously devastated and he got severe illness because he was persecuted for a long period of time. My mother's mental health deteriorated due to being tortured in the camp.
8. After coming back to City A, my parents were still under supervision and continued receiving mind correction through labour. They were forced to serve food and to clean. They had to do very unhygienic and heavy work everyday and they were never able to resume their previous work.
9. Under long term persecution, my father died of incurable disease in the early 1990s. My mother was diagnosed with mental health problems. My parents' torture experience has left a

shadow of fear in my heart and I started feeling resentful to the communism and socialism in China.

10. From the family tortures and the dark side of society in China, I understood more about the every disadvantage of socialism. In the early 1990s I resigned from my job and went to Country B, which is a democratic country, for study so as to seek a way to save my country and people.

11. While I was studying in Country B, I experienced the advantages of a democratic social system. I also contacted other democratic supporters and found out that problems in China are resulted from communism and Chinese Communist Party (CCP) dictatorship. Therefore I started participating in overseas democratic movement. In Country B I often participated in different kinds of democratic movement activities with a group of Chinese patriots and other international friends.

12. Since the early 1990s until I left Country B, I joined memorial activities annually. I went to City E and participated in protests held in front of the Chinese Consulate to have a determined objection to Chinese government and their tyrannies and made efforts in improving the democracy in China.

13. My mother's health issues were getting worse during the early 2000s. Her mental health did not have any improvement so I went back to City A with fear as I wanted to take care of my mother. By this time I had also divorced my second husband who was from Country B. Since we have divorced, I no longer have a right to live in Country B. My child does not have a right to live in Country B because both of his/her parents are Chinese.

14. After arriving in City A, since I have participated in democratic movement in Country B, the Chinese government and its department were concerned about my whereabouts and they investigated my current situation. The authorities called me and they called my sibling asking about my situation including where I was living and what I was doing. I believe that while I was in China there was someone following me. On one occasion a friend of mine saw someone taking photos of me. On a few occasions in City A I was questioned by the authorities. On each occasions the questioning lasted a few hours. They asked me whether I had taken part in the protest outside the Chinese Consulate in Country B.

15. Because I was so afraid in City A I went and stayed with a relative in City F. After several months the authorities found me and asked me to come in to be questioned. I knew that I was not safe there anymore, so I went back to City A. In China people have ID cards and so you cannot be safe anywhere. Wherever you are the authorities can check your ID card and they know who you are. In China I was extremely scared and fearful and I was very alert all the time. I did not know when the bad luck would come to me.

16. In the early 2000s, I fled from China to Australia with my child. I did this because I was very scared. My mother is still in hospital and is still very unwell.

17. Since I came to Australia, I have continued to be concerned about the political change in China and I became more active in participating in the overseas democracy movement. In particular after the release of a newspaper article, overseas protest against China Communist Party dictatorship has been expanded continuously and more and more people resigned from the CCP. I have again realised that if Chinese make efforts together, we can obtain the international support and China's way towards democracy will be brilliant. In order to

contribute more to promoting China's democracy, I initiated the contact with a Pro Democracy Organisation and I became the member of this group. During the last year, I have been joining gatherings, rallies and forums protesting the Chinese government's tyrannies. [Information about the applicant history deleted in accordance with s.431 as it may identify the applicant].

18. The details of me joining a Pro Democracy Organisation are explained as follows:

a. In the early 2000s, I participated in the gathering and rally that was organised by a Pro Democracy Organisation. This activity aimed to support 4,000,000 people who renounced the CCP.

b. A year later, I participated in the gathering and rally that was arranged by the same organisation. This activity aimed to support 7,000,000 people who renounced the CCP.

c. Shortly after, I participated in the gathering and rally organised by the same organisation. This activity aimed to support 9,000,000 people who renounced the CCP.

d. That same year, I participated in another gathering and rally arranged by the same organisation.

e. Later that year, I participated in another demonstration arranged by the same organisation. Also in the evening of that day, I participated in a candle gathering held in front of the Consulate-General of the People's Republic of China.

19. Since coming to Australia my child and I have started to practise Falun Gong because my friend told me that it would help my child get better. My child has a serious health issue which is being treated. Practicing Falun Gong relieves the bad energy from your body. What I know about Falun Gong is what I have learnt from my friend. I practice Falun Gong at home because I have to look after my child. Sometimes I practice with my friend.

20. My child and I have recently started to learn Falun Gong formally from a Falun Gong organisation that my friend is a member of. We go several days a week. I hope that I will learn more about Falun Gong by going to this organisation and that by practising Falun Gong my child will get better.

21. In addition to the fears that I have mentioned that are because of my political beliefs and activities, I fear that if I was to return to China the Chinese authorities would find out that I had practised Falun Gong in Australia and was interested in learning more about it. The practice of Falun Gong is illegal in China. I have heard that practising Falun Gong members are imprisoned by the Chinese government and psychologically tortured while imprisoned. I am afraid that I would be imprisoned and tortured by the Chinese Government because I would continue to practise Falun Gong in China and encourage my child to practise Falun Gong to help him/her get better.

22. I am afraid that when the Chinese government find out that my child was practising Falun Gong will send him/her to a special institution for children who practise Falun Gong. My child would not receive treatment for his/her illness there.

23. I am determined to participate in the democratic movement and to continue my practice of Falun Gong. My religious and political beliefs and my actions in protesting CCP are unacceptable in China. If I go back China, I will be persecuted in the same way as other people who have different or unacceptable religious and political opinions. Therefore, I am always scared. If I was allowed to stay in Australia I would be able to practice my religion and hold my political beliefs without fear.

The applicant lodged a further statement with the Tribunal in which she reiterated her claims and stated that she and her child were formally learning Falun Gong.

### ***Tribunal Hearing***

The applicant appeared before the Tribunal to give evidence. An interpreter was present to assist her.

The Tribunal noted that she arrived in Australia in the early 2000s but did not lodge her application for protection until some time later and asked why she didn't lodge her application earlier. She said that when she first arrived in Australia she had to spend a lot of time with the doctor because her child was sick. The Tribunal observed that it would be reasonably expected that a person arriving in Australia who is fearful of persecution would lodge an application for protection as soon as possible. She responded that she had a temporary visa and so was not fearful of persecution. Asked what sort of visa she responded a visa. Asked how long it was valid for she said a few months. Asked what happened in the early 2000s she stated that she applied for a visa on the basis of her child's medical condition at the time she had a visa and was therefore not fearful of being returned and persecuted. This is why she did not put in her application for a protection visa.

Her application for a further visa was refused (she was told she had to return to China to put in an application for the type of visa applied for). It was then that she lodged application for a protection visa.

Pressed as to why she would not have lodged the application given that she only had a temporary visa and was then applying for a visa which she may not get and why she did not seek protection immediately she responded that she had a belief that she would be granted the visa she applied for and would be allowed to live permanently in Australia.

The Tribunal asked about whether she could return to Country B. She stated that although she had married a citizen from Country B she was not able to stay in Country B following the divorce. The Tribunal noted that she divorced in the late 1990s (a finding by the delegate) and did not leave until some time later suggesting that she had a legal right to stay in Country B. She responded that she divorced her *first* husband in the late 1990s, met her second husband in Country B and that they divorced in the early 2000s.

She and her first husband left China for Country B in the early 1990s. They had no problem obtaining passports. Her visa expired a few years later. She and her first husband separated in the late 1990s. She met a Country B citizen in the late 1990s married him in soon after but they were divorced in the early 2000s and she returned to China.

Asked about Falun Gong she stated that it started in the 1990s. Asked to be more specific she stated the date. She named the spiritual leader. She was not aware of the name of the book and has not read it but knows the practice. She named and performed the some exercises. She

only became involved in Falun Gong a few months after she arrived in Australia and is not familiar with its inception and changing status in China in the 1990s.

Asked about her family she stated that she has a number of siblings. Both parents are deceased. Her father worked in education profession and her mother worked in the health area. The Tribunal observed that according to her statement her father had studied in Country D to which she responded that he studied at the University of City H.

She stated that the Cultural Revolution started in the early 1960s, before she was born. The Tribunal observed that it started in the late 1960s after she was born. She stated that she may have been confused and confused the date with the date of other movements and a great natural disaster (a famine). Her father was sent to the countryside to work and then later came back to work in the education profession. Her mother had been working in the health area during the revolution. Asked to identify other incidents of persecution she stated that she had been criticised publicly. Persecution had also led to her mother's health problems.

Asked what sort of persecution she faced as a result of her connection to parents who were targeted during the Cultural Revolution she stated that she would be viewed with suspicion particularly as her family members have still not joined the Communist party.

The Tribunal observed that the Cultural Revolution ended 30 years ago and that the leaders of the Revolution were condemned in 1976 and 1977 and that it was highly unlikely that she would be victimised as a result of being the daughter of parents who were targeted during the Cultural Revolution. She stated that even though the Cultural Revolution ended a long time ago people like her (whose family had suffered during the Cultural Revolution) were still at risk if they haven't joined the party. She indicated, by way of example, that in the early 1980s her older sibling was forced to close his/her business because he/she hadn't joined the Communist party.

The Tribunal noted that she had also claimed to be exposed to possible persecution as a result of her pro democracy activism. Asked about her activism in China before the early 1990s (when she relocated to Country B) she stated that after Tiananmen Square (1989) she began to question Communism but did not do so openly. Asked how, if she didn't express her views openly, she would have attracted the attention of the authorities she stated that the authorities would eavesdrop on conversations and spy on her. If you had friends or acquaintances who were suspect you became suspect.

Asked how she got a passport to visit Country B if she had become an enemy of the State she stated that everyone can get a passport. The Tribunal notes that country information indicated that dissidents had difficulty in obtaining a passport. She stated that that sort of problem was encountered by senior, high profile leaders but not her as she was not senior enough.

She stated that Country B was the catalyst for her political awareness. In Country B she saw society operate under a democratic system of government and became a fervent believer in democracy. Every year (she was in Country B for several years) she attended commemorations held for those who lost their lives in the Tiananmen Square massacre. She didn't, however, join a political party to pursue her ideals because as a foreigner she wasn't allowed to.

Upon her return to China in the early 2000s she was questioned and told to stop her involvement in pro democracy activism and Falun Gong. The Tribunal noted that she had not



even started practising Falun Gong until the early 2000s. She stated that she was warned about desisting from Falun Gong activity as well as pro democracy activity because she knew some Falun Gong practitioners and was suspected of having allegiances to it.

In the period between her return to China in the early 2000s and her departure for Australia she was not overtly involved in pro democracy activism and Falun Gong. She was too scared of being persecuted.

Upon her arrival in Australia in the early 2000s she joined a Chinese Organisation. She attended a number of rallies and submitted some photographs depicting her at the rallies. She refuted the suggestion that her sole purpose was to deliberately attract the attention of the Chinese authorities in order to ground a claim for protection and asserted that her pro democracy activity was borne of a genuine intent to protest against the Chinese government. She gave some vague information about the leadership, membership, location and activities of the group; saying she did not want to go into detail and jeopardise the organisation.

Person G gave evidence. He told the Tribunal that he was a leader of the Pro Democracy Organisation. He met the applicant in the early 2000s although he had been aware of her attendance at its rallies prior to meeting her.

#### INVITATION TO COMMENT ON INFORMATION

The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.

The information is as follows:

[Information in this letter has been amended in accordance with s.431 as it may identify the applicant]

- You arrived in Australia in the early 2000s. You applied for a visa which expired almost a year later. You then applied for a protection visa.

This may form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as your delay in applying for protection until your other visas expired could support the inference that you engaged in pro-democracy and practice in Falun Gong merely to seek to stay in Australia rather than out of a commitment to democracy in China or genuine interest in Falun Gong. A person with a genuine commitment to democracy or Falun Gong and who were fearful of persecution on either of those grounds might reasonably be expected to lodge an application for a protection visa promptly upon their arrival in Australia.

Section 91 R(3) of the Migration Act requires you to satisfy the Tribunal that you engaged in pro-democracy activity and practice in Falun Gong otherwise than for the sole purpose of strengthening your claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

- In the statement you lodged in support of your application for a protection visa you state at paragraph 2 that:

Between the early 1970s and the early 1980s I completed my schooling. I later studied in City A. During the early 1980s I was working for a government agency.

This may form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you face persecution as a result of having parents who were targeted during the Cultural Revolution as this history suggests that you were not denied any opportunities or discriminated against as a result of your links to your parents.

- In the statement you lodged in support of your application for a protection visa you state at paragraph 4 that:

Since arriving in Australia I have actively participated in the overseas democratic political movement.

However your witness in the hearing before the Tribunal, Person G, gave evidence that he was a leader of the Pro Democracy Group and did not meet you until after the early 2000s.

This may form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you actively participated in the overseas democratic political movement since arriving in Australia. It could also form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you face persecution as a result of your pro democracy activities as Country Information indicates that it would be unlikely that the Chinese authorities would take much interest in unimportant or inactive members of pro democracy groups and that they are more interested in leaders, organisers and high profile dissidents. It could also form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as, when combined with the fact that you met Person G over several months after your arrival and following expiry of your visas, it could support the inference that you met with Person G merely to strengthen your claim to be a refugee rather than a commitment to democracy in China. As indicated above Section 91 R(3) of the Migration Act requires you to satisfy the Tribunal that you engaged in pro-democracy otherwise than merely to strengthen your claim to be a refugee.

- In your statement and your oral evidence to the Tribunal you indicated that you were not involved in pro-democracy activities in China either before you left China for Country B or in the period between your return to China and your travel to Australia.

This information could form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you face persecution as a result of your pro democracy activities as Country Information indicates that it would be unlikely that the Chinese authorities would take much interest in people who had not become involved in pro-democracy activities in China unless they were leaders or organisers. Country Information indicates that the primary determinant of the Chinese authorities' attitude would be the person's profile or influence before they left China. The authorities appear to take the view that persons with no involvement in pro-democracy activities in China and who first become involved in after they leave China are merely seeking to take advantage of an opportunity presented by Western legal systems to acquire refugee status and are not a threat to the state.

- In the statement you lodged in support of your application for a protection visa you state at paragraph 20 that:

My child and I have recently started to learn Falun Gong formally from a Falun Gong organisation that my friend is a member of. We go several days a week. I hope that I will learn more about Falun Gong by going to this organisation and that by practising Falun Gong my child will get better.

At the hearing before the Tribunal you stated that you feared persecution by the Chinese authorities when you returned to China in the early 2000s because of your association with the pro democracy movement and Falun Gong. This is inconsistent with paragraph 20 of your statement and the evidence you gave earlier in the hearing that you started Falun Gong a few months after you arrived in Australia. This inconsistency may form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as the fact that you gave different accounts as to when you were first associated with Falun Gong may cast doubt on the veracity of your evidence including your claim to be a genuine follower of Falun Gong.

Your assertion at paragraph 20 that "My child and I have recently started to learn Falun Gong" (parenthesis added) may also form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you are a genuine practitioner of Falun Gong. This is because despite being aware of Falun Gong in China, you did not show any interest in practising it in Country B where you claim to have been involved in other practices banned in China (pro-democracy activities) and did not show interest in practising Falun Gong until shortly before you made the statement in the early 2000s. Furthermore you are educated and claim to have embraced the ideals of democracy (paragraph 3 of your statement you state that "I received education of democracy in Country B which is a democratic country, my democratic rationale has been enhanced"). It might be expected that an educated person with an interest in ideas would have read or at least be aware of the name of the central text of a belief system they claim to follow. The fact that you did not show interest in practising it until shortly before you made the statement combined with your lack of knowledge of the Falun Zhuan (the book of teaching for Falun Gong) and inability to name the book at the Tribunal hearing could support the inference that you took up practice of Falun Gong merely to strengthen your claim to be a refugee rather than a commitment to it. As indicated above Section 91R(3) of the Migration Act requires you to satisfy the Tribunal that you engaged in Falun Gong otherwise than merely to strengthen your claim to be a refugee.

- You were issued with passports and travel permits to visit Australia in the early 2000s.

This information could form part of a reason for affirming the delegate's decision to refuse the applications for protection visas as it could cast doubt on your claim that you face persecution as a result of your links to your parents or pro-democracy activity in Country B as Country Information indicates that you would not have been issued with passports and travel permits if you were of any interest to the Chinese authorities.

You are invited to comment on this information. Your comments are to be in writing and in English.

The applicant lodged the following response:

I refer to the first point raised in the letter from the Refugee Review Tribunal (the Tribunal) and state the following:

1. My child has a serious medical condition. As his/her mother this has a direct impact on me and has been very difficult to deal with. This was first discovered when my child was a few years old. My child is now several years older and has ongoing medical issues as a result of his/her condition. I applied for another type of visa because we needed medical treatment.

2. Prior to arriving in Australia, and throughout most of my time here leading up to my initial application for protection, I had no knowledge of protection visas. I first became aware of protection visas in the early 2000s through a friend. The same friend referred me to a Resource Centre who later assisted me with the protection visa application process.

3. The delay in my applying for a protection visa does not mean I am not fearful of returning to China. The delay is a result of being so preoccupied with my child's medical condition and my not knowing how the system works. I stayed on the previous visa for so long simply because I didn't realize you could also apply for refugee status whilst on the previous visa.

I refer to the second point raised in the letter from the Tribunal and state the following:

4. My father worked in the education profession and was persecuted during the Cultural Revolution. When the Cultural Revolution ended there was a great shortage of educators. My father was released from the labour camp in the early 1970s and began work in the education area in City A. He was able to get work despite having been persecuted during the Cultural Revolution because of the educators' shortage. In short, he was needed. [Information about the applicant history deleted in accordance with s.431 as it may identify the applicant].

5. I attended primary and secondary school as most children did. My parents activism had no bearing on this.

6. In spite of my parents activism the shortage of educators in China after the Cultural Revolution meant that even those like my father could still obtain work and also why their children were not necessarily discriminated against. However, this does not mean I had a normal childhood. Because of my parents experiences with the Cultural Revolution they were not at home for many parts of my life and my mother was quite ill. I did not have home life conducive to learning and schooling and at times had to take care of my mother. In China at that time even though you were poorly you still graduated from school.

I refer to the third point raised in the letter from the Tribunal and state the following:

7. When I first arrived in Australia I didn't know there was a pro-democratic organisation here and this is why there was a delay in my becoming politically active. This, coupled with the fact that I was taking care of a sick child, prevented me becoming involved in the pro-democracy movement in Australia sooner. This is why I didn't meet Person G sooner.

8. As China is a communist, those who are involved with democracy are persecuted. It was out of fear of persecution that I never became active in the pro-democratic movement in China.

9. I did participate in the pro-democratic movement in Country B. In City E I often met with members of the Country B Democratic party and members of a Chinese Overseas

Democratic Movement. I also went to the Chinese consulate in City E and demonstrated outside. I was quite involved in, the pro-democratic movement before arriving in Australia and long before I applied for the protection of the Australian Government. This included attending meetings and parades.

10. Politically active, pro-democratic Chinese nationals returning from abroad may not be of much interest to the Chinese government while we live in foreign countries but when we return it is often to arrest, interrogation and persecution. Country information might suggest that it is only leaders, organisers and high profile dissidents that spark the state's interest but I would have to say that this is untrue and all of those involved in the pro-democratic movement face the threat of persecution once found out.

11. My pro-democracy activities and involvement have been genuine and not simply to strengthen my protection visa application. I have a genuine commitment to democracy. When I was overseas I became aware that China should have a multi-party system of government because single-party leadership leads to dictatorship. People can only enjoy freedom under a multi-party system.

I refer to the fourth point raised in the letter from the Tribunal and state the following:

12. When I was in Country B I already knew about Falun Gong but only after I arrived in Australia did I begin to openly and actively practice my beliefs - I only became aware of the organisation I am now involved with a few months after I arrived in Australia.

13. In China I practised Falun Gong as best I could. That was with a compact disc I obtained from friends and out of fear I was always very careful and secretive with it. I first participated in organised Falun Gong in Australia.

14. I wasn't overly involved in Falun Gong in Country B just the pro-democratic movement. The reason I feared persecution on my return to China in the early 2000s was because so many of the people involved in the pro-democratic movement in Country B were also followers of Falun Gong. I was guilty by association with Falun Gong members in Country B.

15. I was unable to name the Falun Zhuan at the hearing due partly to nerves and also because I had little knowledge of that particular text. Falun Gong is a combination of Confucianism, Buddhism and Taoism and we are taught these things from a very early age making it not necessary to read through all the scriptures to be a believer. There is much Falun Gong scripture and the Falun Zhuan is just some of the scripture I have not read but plan to when my life is more settled and I am free to.

16. I believe in being a member of Falun Gong and participating. I do not think that remembering the name of a particular scripture is so important.

17. My Falun Gong interests and involvement are genuine and not simply contrived to strengthen my protection visa application. Back in China I could not practice Falun Gong because of the prohibition but here I have the freedom to do so. In Australia, my child and I have been practicing Falun Gong. As I stated in my previous statutory declaration a friend told me it would help my child get better. Falun Gong has helped improve our health and gives us some spiritual guidance.

I refer to the fifth point raised in the letter from the Tribunal and state the following:

18. Anyone can apply for a passport in China. As China is a communist country they are not interested in pro-democratic activists staying there. The government is happier for us to leave and not cause any trouble as long as we never come back. Not being well enough known to the authorities I was fortunate to be able to escape.

### **FINDINGS AND REASONS**

I find that the applicant is a Chinese national, and for the purposes of the Convention I have assessed the applicant's claims against China as her country of nationality.

She claims to be exposed to a real chance of persecution on the following grounds:

- her connection to parents who were targeted during the Cultural Revolution
- her pro democracy/anti CCP activism in Country B
- her pro democracy/ anti CCP activism in Australia
- her association with practitioners of Falun Gong in Country B
- her practice of Falun Gong

### **Whether the applicant faces a real chance of persecution as a result of her connection to parents who were targeted during the Cultural Revolution**

The Tribunal notes that the Cultural Revolution occurred between 1966 and 1976. The Tribunal is not satisfied on the evidence submitted that the applicant would be persecuted as a result of her connection to parents who were targeted during the Cultural Revolution. The Tribunal notes that she claimed her parents were intellectuals and stated in her statement that her father had studied in Country D whereas she told the Tribunal at the hearing that he studied in China. Whilst she sought to explain the inconsistency at the hearing on the basis that he had studied at a Chinese campus of Country D the Tribunal notes that the statement clearly indicates that he studied in Country D. The Tribunal considers that the applicant's assertion in the statement lodged with the Tribunal that her father had studied in Country D was an embellishment designed to endow her father with further characteristics of a person likely to be targeted.

Irrespective of where the applicant's father studied and the applicant's inconsistency on this aspect of his education the Tribunal is not satisfied that the applicant faces a real chance of persecution as a result of her connection to parents who were targeted during the Cultural Revolution.

The Tribunal notes the claims made at points 4-6 of the applicant's submission but does not accept that the matters raised in themselves constitute past persecution or serious harm that could reasonably form a basis for an ongoing fear of persecution.

### **Whether the applicant faces a real chance of persecution as a result of her pro democracy/anti CCP activism in Country B**

The applicant asserts that she attended rallies in Country B to commemorate those who had lost their lives in Tiananmen Square. While she has not produced any independent evidence to corroborate her involvement in pro democracy/anti CCP activism in Country B the

Tribunal accepts that it would be unrealistic to expect the applicant to be able to adduce such evidence and has no reason to doubt her claims to have attended rallies in Country B.

The Tribunal notes that the applicant claims that upon her return to China in the early 2000s she was questioned by the Chinese authorities on several occasions and she thought someone was following her and that a friend of hers told her that someone was taking photographs of her. The Tribunal notes, however, that the applicant was permitted to return to China despite her many years of pro democracy/anti CCP activism in Country B. The Tribunal notes that, other than being questioned and a suspicion that she was being observed and photographed, she was not imposed on in any other way. The Tribunal notes that she was permitted to travel to Australia.

The Tribunal notes her explanation at point 18 of her submission that, notwithstanding Country Information that a person would not be granted an exit permit to travel to Australia if they were of any interest to the Chinese authorities, the reality is that anyone can apply for a passport in China.

The Tribunal is nevertheless not satisfied that the applicant faces a real chance of persecution solely on the basis of her pro democracy/anti CCP activism in Country B.

### **Whether the applicant faces a real chance of persecution as a result of her association with practitioners of Falun Gong in Country B**

The Tribunal found the applicant's evidence in relation to her involvement in Falun Gong unsatisfactory (see below) and does not accept that she was associated or perceived to be associated with practitioners of Falun Gong in Country B. It follows that the Tribunal is not satisfied that the applicant faces a real chance of persecution the basis of her association with practitioners of Falun Gong in Country B.

### **Whether the applicant faces a real chance of persecution as a result of her pro democracy/ anti CCP activism in Australia**

As indicated above, however, the applicant was permitted to return to China despite her many years of pro democracy/anti CCP activism in Country B and was not persecuted as a result of that activity. She was not involved in pro democracy/anti CCP activism in China between her return to that country and her departure for Australia. The Tribunal notes photographs of the applicant at rallies and the claims made at points 7-11 of the applicant's submission. It accepts that she has participated in pro democracy/ anti CCP activism in Australia in light of the absence of any serious repercussions following her return to China in the early 2000s despite her many years of pro democracy/anti CCP activism in Country B and independent information that indicates that ordinary participants of democracy/ anti CCP activism are not like to be targeted is not satisfied that the applicant faces a real chance of persecution solely on the basis of those activities in Australia.

### **Whether the applicant faces a real chance of persecution as a result of her practice of Falun Gong**

The practice/philosophy/religion that is known as Falun Gong was founded in 1992 in China by Li Hongzhi, who is known to his followers as Master Li. Falun Gong is based on the traditional Chinese cultivation system known as qigong, but it is novel in its blending of

qigong with elements of Buddhist and Taoist philosophy. Other terms such as Falun Dafa and Falunong 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 Falunong 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 Falunong*, February; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, pp.14-24, pp.91-95).

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 measures 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 (Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.8-10).

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.

Measures used against the Falun Gong have included 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 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 utilisation 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 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. In recent years there has been a dramatic abatement in the visibility of Falun Gong activities within China, with many practitioners performing the exercises at home instead of in public. But there have been regular public demonstrations, and the arrest, detention, and imprisonment of Falun Gong practitioners has continued. There have been credible recent reports of deaths due to torture and abuse. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons, labour camps, and extra-judicial “legal education” centres. Falun Gong cases are reportedly handled outside normal legal procedures by a special Ministry of Justice office, known as the 610 office.



On 1 March 2005, new religious affairs regulations came into effect which bring regulatory practices within a legal framework and into compliance with China's Administrative Licensing Law. The new regulations protect the rights of registered religious groups, but critics say they give the authorities broad discretion to define which religious activities are permissible. Only groups which meet government requirements can be registered, and the government tends to perceive unregulated religious groups as a potential challenge to its authority. The Falun Gong and other groups labelled as "cults" remain banned, and Premier Wen Jiabao's 2004 Government Work Report emphasised that the Government would "expand and deepen its battle against cults", including Falun Gong (US Department of State 2005, *International Religious Freedom Report 2005: China (includes Tibet, Hong Kong, and Macau)*, 8 November; UK Home Office, 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.24-31).

The applicant has claimed that she commenced Falun Gong practice in the early 2000s. At the hearing before the Tribunal, she could perform the exercises but demonstrated little or no knowledge of the history of Falun Gong and had not acquainted herself with its text, Falun Zuan.

The Tribunal notes the claims made at points 12-17 of the applicant's submission. The Tribunal also notes her statement in which she claims that she and her child were formally learning Falun Gong at a Chinese organisation. The Tribunal considers that a person of the applicant's ilk (educated and intellectually curious) who has embraced Falun Gong as the applicant has claimed to have done would have some knowledge, of Falun Gong history and its main book of teaching, particularly if she had been learning it formally. The Tribunal also notes that her version of events has changed. In her statement she stated that "Since coming to Australia my child and I have started to practise Falun Gong because my friend told me that it would help my child get better" and at the hearing she gave evidence that she had not even started practising Falun Gong until the early 2000s. When she was questioned about the inconsistency with her other evidence at the hearing (that upon her return to China in the early 2000s she was questioned and told to stop her involvement in pro democracy activism and Falun Gong) she stated that she was warned about desisting from Falun Gong activity because she knew some Falun Gong practitioners and was suspected of having allegiances to it but did not mention practising it with a compact disc and did not resile from her evidence that she started to practice it a few months after arriving in Australia. On the evidence before me I am therefore not satisfied that the applicant is a genuine Falun Gong practitioner.

The Tribunal also notes that the applicant did not lodge her application for a protection visa for several months after her arrival in Australia. The Tribunal notes her explanation at the hearing and at points 1-3 of the applicant's submission that she was focussing on her child, was fully expecting another visa and that she only became aware of protection visas in the early 2000s but does not accept that explanation. Whilst it cannot be expected that the applicant could be aware of the formal processes involved a person of her background (having spent years as a human rights activist) would have been aware that persons in fear of persecution can seek asylum as refugees and it would be expected that a person with a fear of persecution would seek protection as soon as possible. Her claim that she only became aware of protection visas in the early 2000s diminishes her credibility.

In light of the applicant's limited knowledge of Falun Gong, the inconsistency in her evidence about when she started practising it (with a compact disc in China c.f. a few months

after arriving in Australia) and the timing and circumstances of her application for protection (several months after arrival and following expiry of her previous visa) the Tribunal is not satisfied that she engaged in the practice of Falun Gong otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol. The Tribunal is not satisfied that the applicant is a genuine Falun Gong practitioner and is not satisfied that she faces a real chance of persecution as a Falun Gong practitioner.

### **Cumulation**

The Tribunal notes, however, that it is incumbent on it to consider the cumulative effect of the applicant's claims in assessing whether she has a well founded fear of persecution for a convention reason/s.

The Tribunal has therefore considered the cumulative effect of the following bases of the claimed fear of persecution:

- Membership of a family who were targeted in the Cultural Revolution
- Involvement in pro democracy/anti CCP activism in Country B
- Involvement in pro democracy/ anti CCP activism in Australia
- Involvement in her association with practitioners of Falun Gong in Country B
- Involvement in her practice of Falun Gong (albeit primarily engaged in to strengthen her claim to be a refugee).

Whilst none of the above, standing alone, gives rise to a well founded fear of persecution the Tribunal is satisfied that the combination of these features of the applicant's history may have lifted her profile to the extent that she has a well founded fear of persecution based on her actual political belief (her belief in multi-party democracy) and imputed political belief (Falun Gong). In this context the Tribunal notes that a well founded fear of persecution is substantiated if there is a "real chance" of persecution and that 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. The Tribunal is satisfied that the chance of persecution occurring to the applicant persecution based on her actual and imputed political beliefs is not remote or insubstantial or a far-fetched possibility.

### **CONCLUSIONS**

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.

### **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 that is subject of a direction pursuant to section 440 of the Migration Act 1958.

Sealing Officer: ntreva