

**071606657 [2007] RRTA 299 (7 November 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071606657

**DIAC REFERENCE(S):** CLF2007/83575

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

**TRIBUNAL MEMBER:** Bronwyn Forsyth

**DATE DECISION SIGNED:** 7 November 2007

**PLACE OF DECISION:** Sydney

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

**STATEMENT OF DECISION AND REASONS**

**APPLICATION FOR REVIEW**

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

The applicant, who claims to be a citizen of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship (Department) for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights.

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

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:

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] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (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.

*Sur place* – section 91R(3)

It is generally accepted that a person can acquire refugee status *sur place* where he or she has a well-founded fear of persecution as a consequence of events that have happened since he or she left his or her country. However this is subject to s.91R(3) of the Act which provides that any conduct engaged in by the applicant in Australia must be disregarded in determining whether he or she has a well-founded fear of being persecuted for one or more of the Convention reasons unless the applicant satisfies the decision maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention.

## **CLAIMS AND EVIDENCE**

The Tribunal has before it the Department's file relating to the applicant, which includes the applicant's protection visa application, statement of claims, and the delegate's decision record. Also before the Tribunal is the Tribunal's file and relevant independent country information.

### Protection visa application

According to her protection visa application, the applicant is a Chinese national. She completed 10 years of education and was employed. She was married and lived in the same place in China since the mid 1990s.

In the statement accompanying her protection visa application the applicant said that she started to study Falun Gong in 1998 because a friend told her that Falun Gong could help her to cure her illness without medical treatment. She said initially there was little change but after a few months she felt she did not need medicine anymore. She told her friends that Falun Gong was good and they saw that her health improved. The police in her city became aware of her practice and she was arrested from her home and all her Falun Gong books and materials were confiscated. The police warned her family that if she practiced Falun Gong again she would never be released. To help her to be released her family wrote a letter of 'resipiscence' for her. She was detained for a number of days during which time she was beaten and not allowed to eat which cause her health to worsen. When she was released she had a surgery. The applicant was arrested again because she could not stop practising Falun Gong. She said she was beaten and the authorities threatened to remove her organ. Again her family wrote a letter of 'resipiscence' for her to secure her release. She does not want her family to suffer so someone helped her to travel to Australia. Since arriving in Australia she has seen many Falun Gong practitioners who have advised her not to return and who helped her fill in forms and write her statement in English.

Submitted with the application was a photocopy of a page of a Chinese passport issued to the applicant. The applicant noted in her application form that she did not have any difficulty obtaining travel documents and that she left China legally.

### Review Application

#### ***Tribunal hearing***

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from two people that claimed to be fellow Falun Gong practitioners in Australia. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

### Applicant's evidence

#### *Passport*

The applicant submitted to the Tribunal a Chinese passport issued in her name. She confirmed that she was a citizen of China and that the passport was genuine.

### *Residence and family in China*

The applicant confirmed that she was born in China and told the Tribunal that she had lived all her life there. She said since about the age of 17 or 18 she had lived at the same address.

### Family, education and employment

The applicant told the Tribunal that she has her parents, siblings and a child are living in China. She said that she is divorced.

She said that she attended primary school for several years, junior school for several years and then she completed a further two years of education at a vocational college. She told the Tribunal that she graduated from the college. She said that she stayed at home for a few months before commencing work in her family's business. She said that she worked for various employers on and off until she came to Australia.

### Claims for protection - practice of Falun Gong

Asked why she believed she was refugee, the applicant told the Tribunal that she was a Falun Gong practitioner in China and she was persecuted so she dare not return.

Asked when she started to practise and why, the applicant replied she started to practise in 1998 when she heard from a friend that it was good for one's health. Asked if she practised ever since then or whether there were breaks in her practice, the applicant replied that she started in 1998 and that in 1999 there was a crackdown so she would not dare to go to the park or large public places. Asked if she only practised in private since that time, the applicant confirmed that since 1999 she had only ever practised secretly. Asked how often she practised, the applicant replied that she usually practised when she has the time to do it. After further questioning about the frequency of her practice, the applicant replied that she practised every two days or every day and other times every two or three days. She said she generally practised at night for about 30 minutes. Asked how often she practised now, the applicant replied whenever she has time, every three or four days or every one or two days. Asked if she still practised alone or in a group, the applicant replied that once a week she went to practise and studied with other practitioners in a park. She said she usually practised by herself. Asked how many people gathered there, she said sometimes seven or eight and sometimes more than ten. She said that they gather at night for an hour. Asked what they did, she replied that she did the exercises following a tape and that after this they would study Fa and talk about Falun Gong as well as sometimes sending righteous thoughts and then people would discuss Falun Gong. She said several days a week they just practised exercises and that the study of Fa was only held once a week.

The applicant confirmed that other than one year (from 1998 to 1999), she just practised by herself. Asked whether that meant she had no one to talk to and no Falun Gong friends, the applicant replied that she did but she performed the exercises alone. Asked who she had spoke to about the Fa and how often she spoke to those people, the applicant replied that she had a friend with whom she sometimes had contact by

phone or she would go to his place. She said that they did not practise the exercises together because they did not dare to.

#### Knowledge about Falun Gong – theory and history

Asked what she did when she practised Falun Gong, the applicant replied that she did the five exercises and correctly named the five exercises. Asked why she performed the third exercise and what its purpose was, the applicant replied that it was called ‘penetrating the two cosmic extremes’ and that it was practised to mix the physical energy inside you with the energy in the universe with the purpose of purifying the body.

Asked if she had read any books on Falun Gong, the applicant replied that she had read the ‘Zhuan Falun’ as well as a book called ‘Ji’. Asked what ‘Ji’ was about, the applicant replied that it was the main points, or the essence of Falun Gong. Asked which book illustrates the five exercises, the applicant replied that the book does not specifically teach one how to do the exercises but rather it teaches a person how to study Fa. The Tribunal indicated that according to its understanding there was a book called ‘Falun Gong’ that illustrates the exercises. The applicant replied that the books written by Master Li were the ‘Zhuan Falun’, the ‘great consummation law of Falun Gong’, and the book she had previously referred to about the essence of Falun Gong. Asked if she had read all those books, the applicant replied that she had read the main book which is called the ‘Zhuan Falun’, which she thought was published at the end of 1995.

The Tribunal referred to the fact that they were some large demonstrations by Falun Gong practitioners in the 1990s before going on to ask the applicant if she could tell the Tribunal what occurred. The applicant replied that in April 1999 a professor in the Tianjin Education College published an article which attacked Falun Gong and that this article triggered the event where ordinary Falun Gong practitioners went to tell the truth in front of the education college. She said many people were arrested which triggered the demonstration at Zhongnanhai in Beijing. Asked if she attended, the applicant replied that she did not. Asked why she did not attend in view of the fact that she was practising at that time, the applicant confirmed that she was practising at that time and said that maybe she went to practise with the intention to get healthy and fit and cure diseases and it was at the beginning of her practice which is why perhaps she did not attend. Asked when she became committed to Falun Gong, the applicant replied that she started in 1998 and after practising for a while she felt the benefits to her health and then she went into it step by step. Asked when it became part of her life that she could not live without, the applicant replied that she went into it step by step over a period of time and that there was no defining point where she could say that she could not live without it.

Asked to explain what Falun Gong was and why she practised Falun Gong, the applicant replied because Falun Gong teaches people to be good people, to do kind things, to tell the truth which was truthfulness and forbearance. Asked to explain the importance of energy for Falun Gong practitioners, the applicant replied because it relates to the cultivation of Gong of the body. After further questioning, the applicant replied through practice you can make a person return to his or her true nature and make a person do good deeds. Asked how this occurred, the applicant replied through

the cultivation of the heart and mind. The Tribunal referred to the applicant's evidence about an exercise that purifies the energy in a person before asking the applicant what the source of the energy was and how it purifies people. The applicant replied that people are able to absorb a great amount of energy. Asked again why the energy was so important in the practice of Falun Gong, and whether, for example, it was like a god, the applicant replied that it was not, before going on to say that all five exercises benefit people in their own way.

Asked what her understanding was of a third eye, the applicant replied that there is a path or tunnel 'in there', an aperture or an opening which is a cosmic eye. Asked what that allows one to do if it is open, the applicant replied that not everyone can see with it even when it is open as it depends on the level of a person's cultivation. Asked what else the third eye allowed one to do, the applicant replied that not everybody wants to open the third eye but by opening it you can increase your level of cultivation and bring people to higher levels and there were five levels. She told the Tribunal that the third eye was connected to what is medically known as the 'pine nut gland'. Asked what one is able to see if they have their third eye open, the applicant replied that you can see an eye and it is not about seeing the other side of a wall and that in some instances the eye is not allowed to be open. The Tribunal referred to a talk by Master Li which noted that if the third eye is open one might think that a person has supernatural abilities. The applicant replied that that was the case and that the Master might open the eye for some people, but, if he were to make everyone see the other side of the wall, the world would be a very messy place.

Noting the applicant's evidence that there were five levels of cultivation, the Tribunal asked the applicant which level she had attained. She replied that she had not reached any of the five levels. Asked how that was possible, the applicant replied that it really depends on being enlightened. After further discussion about the five levels the applicant explained that in order to reach the five levels one has to reach a higher level. She said not all Falun Gong practitioners are at a level and some have no level.

#### Arrests

The applicant told the Tribunal that on one occasion, several policemen came to her home and said that she practised Falun Gong and took her away to the police station where they put her in a room and questioned her. She said that they asked her to get on her knees and they kicked her. Asked what questions they asked her, the applicant replied that they told her that she practised Falun Gong and asked whether she knew that she was not allowed to. She said they told her that she was so young and asked why she practised Falun Gong. She told the Tribunal that she was detained for a number of days. Asked whether she was questioned everyday or whether she was left alone, the applicant replied that she was not questioned everyday but probably every three or four days. Asked if she was asked the same questions, the applicant replied that they just deliberately tormented you by getting you out of the cell and letting you squat for a while and opening the window if it is cold weather. Asked how she thought the police knew that she was practising Falun Gong if she practised in secret, the applicant replied that she did not know. Asked how she was released, the applicant replied that she was asked to write an undertaking.

Asked whether she continued to practise after she was released, the applicant replied that she did not practise straight away but probably about a month later because her health was not good and her parents were worried about her. She said that she went to hospital and that she did not recover well after leaving detention, so she decided to practise Falun Gong again to recover. Asked how often she practised at that time, the applicant replied everyday because due to her poor health she did not work at that time. Asked why she believed Falun Gong fixed her illness and why it had the ability to do that, the applicant replied that at the beginning her friend told her Falun Gong would be for her health, and she pursued Falun Gong with that purpose, and afterwards she felt there was an improvement so she firmly believes that it does improve one's health. The Tribunal noted that the applicant had been practising for many years and asked in view of all she now knows whether she was able to explain how Falun Gong was able to heal her illness. The applicant replied that the main purpose of Falun Gong is to cultivate the heart and mind. She said it is an exercise of cultivating both your nature and your mind and your life, and that it teaches people to give up attachments, and to be a good person. She went on to say that the exercises are beneficial for one's health. Asked what it was about Falun Gong in her view that allowed people to be cured physically, the applicant replied that Falun Gong does not heal illness, but by practising it changes the inside situation of your body, expelling the bad elements gradually, so one's health will be good. She said when she started to practise again her health gradually improved and that she continued to practise until she came to Australia.

Asked if she had any other problems with the police other than the incident she had spoken about, the applicant replied that whenever there was a festival such as the Chinese New Year, the police and neighbourhood committee would come and see what she was up to. She said two to three people would come and ask whether she had been studying Falun Gong lately and say that she would be arrested. Asked if they had ever arrested her again, she replied that they did not. Asked if she was arrested at any other time, the applicant replied that on other occasion while she was at home a few police officers came and took her away, but they did not detain her for a long time. She said that they let her go the next day and she was not required to write an undertaking. Asked whether she was mistreated physically, the applicant replied that she was and that they kicked her in her private area quite badly and she was assaulted. Asked whether she was surprised that the authorities released her so quickly, the applicant replied that she did not think of that. She said she did not dare to think what might occur. Asked where her child was at the time, the applicant replied that her child was studying and sometimes her child was not at home.

Asked whether her child knew that she was a Falun Gong practitioner, the applicant replied that her child did. Asked what her child's views were, the applicant replied that her child does not feel anything, but her child does not support it or ask about it. She said that she told her child they were making arrests so her child should not tell anyone that she is a practitioner. She said that she told her child that she was going to Australia. Asked whether her child asked her to stop practising so she could remain with her child in China, the applicant replied that her child did not say that and that her child is a very sensible and understanding person. She told the Tribunal that she told her child 'this is what happened to your mother', that her child knew that she was going to be arrested so her child did not tell her not to go.



### Accuracy of protection visa application

The Tribunal noted that in the applicant's original application she stated that she was detained in a particular month. The applicant replied that she had asked a migration agent to help her. She said that her statement of claims to the Tribunal was written by herself and she asked somebody else to translate it into English.

The Tribunal noted that in her original application she stated that she was arrested again in a particular year whereas today she spoke about being arrested again a year later. The applicant replied that as she did not know English she did not really know what was written. She told the Tribunal that she engaged a migration agent and told him when the second arrest was happened. Noting that she had signed the form, the Tribunal asked the applicant whether the agent read back to her what he had written. The applicant replied that the first time she went to the agent she said that she wanted to migrate and he said she should tell him her experiences and that then he would write the material for her. She said the second time she went to him, he said that he had done everything for her according to what she had said. She told the Tribunal that he was Chinese. Asked whether he translated it back to her, she said that he did not but simply said that he wrote down what she had told him. She said that she knew to go to him from a newspaper.

### Passport

The Tribunal noted that the applicant was first arrested several years previously yet a passport was issued in her name sometimes ago. Asked why she waited some years to seek protection, the applicant replied that her passport was renewed and that she always had a passport and had travelled previously. Asked why therefore she did not stay where she travelled to and seek protection earlier, the applicant replied that at time she did not think it was necessary to seek asylum. Asked when she thought it was necessary, the applicant replied sometimes ago and that it was very frightening. The Tribunal noted that she was arrested previously for several weeks and mistreated, whereas as in the second occasion she was only detained for a short period of time. The applicant replied that on the second occasion she felt that if she was found out again it was likely that they may remove her organs, which was far more frightening. Asked why she believed the government renewed her passport if she had been arrested in the past, the applicant replied that she did not know. She confirmed that it was issued legally. The Tribunal referred to country information that indicated that if a person is of interest to the authorities, it is difficult to be issued a passport in their own name. The applicant replied that she does not know why they issued her a passport. The applicant confirmed that it was a genuine passport issued in her name in her city. The Tribunal referred to country information that indicated if someone was wanted by police, they would also experience difficulties departing at the airport. The applicant replied that she was not stopped, so may be the photograph did not look like her. The Tribunal noted that her correct name was on the passport and her date of birth, so that if she was on a list of wanted people it would be easy for the authorities to identify her. The applicant replied that she did not know how she was able to leave.

### Practice in Australia

The Tribunal asked the applicant whether she already knew a lot about Falun Gong when she arrived in Australia or whether she has learnt most of what she knows about Falun Gong since arriving. The applicant replied that she knew about Falun Gong in China and she has been continuing her study of Fa in Australia.

The Tribunal noted that the applicant had been practising Falun Gong in Australia and asked whether the practitioners there encouraged her to lodge an application, the applicant replied that they had not. Asked whether there were lots of people at practise in a similar situation to hers, the applicant replied that they were mostly Chinese but some are western and she did not know whether they were Australian citizens or not. The Tribunal noted that in Falun Gong there is no leader before asking whether there was someone that organised the group. The applicant replied that there was not, but that there was someone maybe who is a teacher but that person does not practise with them. She said it was just them who voluntarily practised together. She said the teacher or organiser was mainly responsible for the cassette player and placard and that he speaks to people who see them practise and want to ask questions or to join. She told the Tribunal that when they do exercises they have to listen to a tape that plays music. She said that she had a CD at home and that the music that leads them through the exercises.

#### Future conduct and harm feared

Asked if she would ever give up Falun Gong so she could be safe and remain in China, the applicant replied that as Falun Gong is her faith now she will not give it up. Asked what it was about Falun Gong that she felt that she could not give up, the applicant replied that truth, compassion and forbearance makes you into a good person. She said before she was evil-tempered and she did not treat people kindly and she feels that after practising she has changed as a person.

When the Tribunal asked the applicant what she feared would happen to her if she returned to China, the applicant replied that because she believes she is a practitioner, she has taken it as her faith and she thinks wherever she goes she will continue to practise as well as in China. She said the crackdown on even ordinary practitioners is quite brutal and severe and that even worse things like removing organs out of living people can occur. She said that she thought it was frightening and that she can not return. The Tribunal referred to the applicant's previous evidence that she had a friend that she spoke to about Falun Gong and asked whether he had experienced any problems with the authorities. The applicant replied that she did not know whether anything had occurred to him now but to her knowledge nothing had happened to him. She said that she told her friend about her experience and he had not mentioned having any problems himself and as result should not think that he had. She told the Tribunal that other Falun Gong practitioners and former school mates that she was unable to get into contact with may have had problems with the authorities. Asked whether she personally knew of anyone who has had her experience, the applicant replied that she did not before saying that sometimes if she can not get in touch with people she thinks something must have happened to them.

#### Evidence from witnesses

The first witness told the Tribunal that she met the applicant when they were studying Fa. She said that day the applicant was late and so the applicant asked her where they were up to and that is how they met. She said later she often saw the applicant in Fa study and she saw the applicant at the Mourning Country Day. She said the last time she saw her was last Friday when they were studying Fa. She told the Tribunal that she had not performed the exercises with the applicant, nor had she seen the applicant perform the exercises. Asked why she believed the applicant was a Falun Gong practitioner, the witness replied because she studies Fa at the hall and from the discussions she had with her, she felt the applicant has quite a developed knowledge of Falun Gong. Asked how long she thought the applicant had been practising Falun Gong, the witness replied since her time in China, so, for a long time. She said the applicant had not told her when she started to practise and or about her experiences in China. Asked if she knew of any Falun Gong practitioners still living in China, the witness replied that she is also a practitioner and that many practitioners are being persecuted in her city which is a big city and that people's organs were being removed. She spoke of a lawyer who defended practitioners having his practising licence taken from him. The witness said she had been practising Falun Gong since 1998 while she was in China and that she came to Australia as a refugee due to her practice of Falun Gong. Asked how often she practised, the witness replied often, whenever she has time. She said that she always practises in a group and that on Friday night she goes to study Fa and talk about Falun Gong but they do not perform exercises on Friday. She said she does not often practise in the morning and usually she practises in the afternoon in the park whenever she has time. She said that she only studies Fa on Friday and that they do not perform the exercises together. She said that she practises Falun Gong with her friend but not the visa applicant.

The second witness told the Tribunal that he met the applicant when they were having an activity. He told the Tribunal that he was a Falun Gong practitioner since about 1997 or 1998 in China and that he came to Australia as a refugee due to his practice of Falun Gong. He said since then he often sees the applicant on Friday night at about 7 or 8pm when they study Fa and then talk until about 10 or 11 or 12am. He said they saw each other for the Mourning Country Day, which is a national day of China but they name it as mourning for the country and that it is an event of telling the truth.

He told the Tribunal that he had never practised the exercises with the applicant nor had he seen her practise them. Asked whether he was aware of the applicant's experiences in China, the witness replied that he was not. He said that he usually practises alone at home. Asked whether it was possible to practise in a group, the witness replied that they can only study together and that before the study of Fa on Friday night people did not practise the exercises together. Asked whether, to his knowledge the applicant practises exercises with anyone, the witness replied that he did not know. Asked why he believed the applicant was a practitioner, the witness replied when they see each other and through their talk he feels that she has quite a deep knowledge so she should be a long term practitioner. Asked what discussion or knowledge he was referring to that made him form that opinion, the witness replied that for example, her knowledge about eating meat, and killing a life. Asked whether the applicant eats meat, the witness replied that he did not know. When the Tribunal indicated that in it would expect if people were having such a discussion they would ask each other whether they eat meat, the witness replied that Falun Gong does not say that one can not eat meat but asks you to get rid of the attachment to it. Asked if

he had anything further to add, the witness replied that in China even ordinary practitioners are persecuted, therefore as a fellow practitioner he has an obligation to try to help the applicant because the persecution is severe. He said that there are over a thousand spies and in China they were removing people's organs, so for practitioners like them they would definitely be persecuted if they return.

Address for correspondence

The applicant confirmed that her correct address for correspondence was the one stated in her review application.

## INDEPENDENT COUNTRY INFORMATION

The Tribunal has relied on the following information in making its decision.

Background to Falun Gong

The practice/philosophy/religion that is known as Falun Gong (also called Falun Dafa) was founded in 1992 in China by Li Hongzhi in Changchun, known to his followers as 'Master Li'. Falun Gong is based on the ancient Chinese self realisation and development regime known as qigong, but it is novel in its blending of qigong with elements of Buddhist and Taoist philosophy (UK Home Office, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April 2002, paragraph 1.1).

Meaning of Falun Gong

Falun Gong means the practice of the wheel of the law. According to Li Hongzhi Fa (fah) is 'law', 'way', or 'principles'. A 'gong' is a kind of practice and 'Falun' refers to a literal wheel in the abdomen of practitioners. The wheel turns one way to harvest energy from the universe, and then reverses and turns the other way, to send the energy through what Li calls energy mechanisms in the body (Penny, Dr. B. seminar on Falun Gong presented to Refugee Review Tribunal in Melbourne Australia on 14 July 2006).

Practice and belief

The practice of Falun Dafa involves aligning oneself with the universal principles of *Zhen* (truth, truthfulness) - *Shan* (compassion, benevolence, kindness) – *Ren* (forbearance, tolerance, endurance) and the practice of five sets of exercises, including one sitting meditation. The exercises open the energy channels in the body and balance and improve the well-being of the body and mind. A practitioner cultivates their 'xinxing' (heart/mind nature, moral character) to become a better person and to align oneself with the universal principles.

According to the Falun Dafa Association '**a true Falun Dafa practitioner would not try to be deceitful in the first place**' however possibly useful questions to determine whether someone is a practitioner may include:

- ◆ *Why don't they just renounce their belief in Falun Gong?*
- ◆ *Their abilities in practicing the 5 exercises over a two- hour period and their*

- understanding of the energy experienced during the practice.*
- ◆ *Their understanding of the book "Zhuan Falun"*
  - ◆ *Their commitment to speaking up to tell the truth of what is happening in China.*
  - ◆ *Their participation in activities in Sydney or in Australia?*

(Falun Dafa Association of Australia, "Information provided by the Falun Dafa Association of Australia to the Refugee Review Tribunal on 11 May 2001 as answers to the following questions with regards to the practice and operation of Falun Gong in Australia and China", 11 May 2001).

### Significant events in the history of Falun Gong

The first book published under Master Li's name is a book called *Falun Gong* in April 1993. The core teaching of Falun Gong is found in a book called *Zhuan Falun*, which was published in January 1995 and banned in July 1996. In about March 1996 Falun Gong left the Chinese Association for Scientific Research into Qigong. Falun Gong tried unsuccessfully to obtain registration from other organisations (Penny, Dr. B. seminar on Falun Gong presented to Refugee Review Tribunal in Melbourne Australia on 14 July 2006).

From about April 18 to April 23 several thousand Falun Gong practitioners staged a sit-in in Tianjin outside the publishers of an article that was critical of Falun Gong. It was the scene at which the first arrests of Falun Gong practitioners occurred. (United States Immigration and Naturalization Service (INS), 1999, *Chronological List of Events for the Falun Gong Movement*, Resource Information Centre, 5 December).

The government response to this demonstration led the Falun Gong to stage another, larger, demonstration on 25 April 1999, where more than 10,000 adherents of Falun Gong staged a demonstration outside Beijing's leadership compound, Zhongnanhai. This gathering was by far the largest since the 1989 Tiananmen Square protest, and took the authorities by surprise. The aim of the protest was to plead for a release of arrested practitioners in Tianjin, to request a legitimate status for Falun Gong, and to obtain a less restrained cultivation environment for practitioners. The government crackdown on the Falun Gong was a response to the Zhongnanhai demonstration. The movement was branded a "threat to social and political stability" and was banned on 22 July 1999. The government 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 have been repeatedly publicised by the state media and government officials (Human Rights Watch 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; Penny, Dr Benjamin 2003, *Falun Gong: What was it? and what is it now? A talk for the Refugee Review Tribunal National Members' Conference*, 29 August; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.7-10).

In January 2001 six supposed practitioners engaged in self immolation when they set themselves alight in Tiananmen Square. Falun Gong claim that this was staged by the government as a means of defaming the good reputation of Falun Gong and that the people were not practitioners. Between January and August of 2002 Falun Gong practitioners hijacked various cable television stations in China and broadcast pro-Falun Gong films, including one about what they claimed was "the real story" of the

self-immolation incident (Penny, Dr. B. seminar on Falun Gong presented to Refugee Review Tribunal in Melbourne Australia on 14 July 2006).

## **FINDINGS AND REASONS**

On the basis of the applicant's passport the Tribunal finds that the applicant is a national of China.

The applicant claims she will be persecuted by the Chinese authorities if she returns to China because she is a Falun Gong practitioner. The Tribunal accepts that the applicant is a genuine Falun Gong practitioner for the reasons outlined below.

### **Commitment to telling the truth**

The Tribunal finds that the applicant was a compelling and sincere witness. Throughout the hearing she answered the Tribunal's questions in a thoughtful and relaxed manner. The Tribunal tested the applicant's evidence with detailed and numerous questions and the applicant remained composed and at ease. As noted above in the independent evidence, according to the Falun Dafa Association of Australia, Falun Gong practitioners are committed to telling the truth and 'would not try to be deceitful in the first place'. The Tribunal formed the opinion that the applicant was at ease because she was committed to telling the truth rather than thinking of evidence that she thought would help her claim. On numerous occasions she simply told the Tribunal the truth, even if on first appearances it would not enhance her claim. For example, when the Tribunal asked her whether she had read all the books on Falun Gong she mentioned, she told the Tribunal that she had only read the main book called the 'Zhuan Falun', which she correctly pointed out was published at the end of 1995. Asked if she attended the large demonstration at Zhongnanhai in Beijing, which she clearly knew about, the applicant replied that she did not. Asked why she did not attend in view of the fact that she was practising at that time, the applicant confirmed that she was practising at that time and said that maybe she went to practise with the intention to get healthy and fit and cure diseases and it was at the beginning of her practice which is why perhaps she did not attend. By her response, the Tribunal formed the view that the applicant had not previously turned her mind to why she did not attend and that during the hearing she was genuinely doing her best to work out and express why she did not attend.

Asked when she became committed to Falun Gong, the applicant replied that she started in 1998 and after practising for a while she felt the benefits to her health and then she went into it step by step. Asked when it became part of her life that she could not live without, the applicant did not simply give a date but replied that she went into it step by step over a period of time and that there was no defining point where she could say that she could not live without it. By her response, the Tribunal formed the view that the applicant was not content to just give any response, but that she was committed to giving a response that reflected, as accurately as possible, the truth.

The applicant claimed that after the crackdown in 1999 she only practised in private but was arrested. Asked how she thought the police knew that she was practising Falun Gong if she practised in secret, the applicant did not seek to think of an explanation but simply replied that she did not know. Finally, noting country

information that if a person was of interest to the authorities, it would be difficult for that person to be issued a passport in their own name and to depart the country, the Tribunal asked the applicant how she thought it was possible she was able to obtain a passport and depart China. The applicant replied that she does not know why they issued her a passport and that she did not know how she was able to leave.

Similarly the Tribunal formed the view that the applicant's witnesses were credible and that they were simply telling the truth regardless of whether on first appearances their response would be helpful to the applicant's claims or not. For example, asked if they had ever seen the applicant practice the exercises, they both stated that they had not.

### Knowledge about Falun Gong

The Tribunal asked the applicant various questions about the practice of, and theory behind, Falun Gong. She gave her answers about topics that are not easily to articulate, in a quiet and thoughtful manner, again giving the Tribunal the impression that she wished to respond in a manner that reflected, as accurately as possible, the truth.

For example, asked what she did when she practised Falun Gong, the applicant replied that she did the five exercises and correctly named the five exercises. Asked why she performed the third exercise and what its purpose was, the applicant replied that it was called 'penetrating the two cosmic extremes' and that it was practised to mix the physical energy inside you with the energy in the universe with the purpose of purifying the body. Asked what her understanding was of a third eye, the applicant replied that there is a path or tunnel 'in there', an aperture or an opening which is a cosmic eye. Asked what that allows one to do if it is open, the applicant replied that not everyone can see with it even when it is open as it depends on the level of a person's cultivation. Asked what else the third eye allowed one to do, the applicant replied that not everybody wants to open the third eye but by opening it you can increase your level of cultivation and bring people to higher levels and there were five levels. She told the Tribunal that the third eye was connected to what is medically known as the 'pine nut gland'. Asked what one is able to see if they have their third eye open, the applicant replied that you can see an eye and it is not about seeing the other side of a wall and that in some instances the eye is not allowed to be open. The Tribunal referred to a talk by Master Li which noted that if the third eye is open one might think that a person has supernatural abilities. The applicant replied that that was the case and that the Master might open the eye for some people, but, if he were to make everyone see the other side of the wall, the world would be a very messy place. Asked whether she was able to explain how Falun Gong was able to heal her illness and what it was about Falun Gong in her view that allowed people to be cured physically, the applicant replied that Falun Gong does not heal illness, but by practising it changes the inside situation of your body, expelling the bad elements gradually, so one's health will be good.

The Tribunal finds that the applicant would not have been able to meaningfully respond to the questions asked in the manner she did, unless she had genuinely studied the Fa and digested some of its teachings. On the basis of her commitment to

telling the truth and her knowledge about Falun Gong, the Tribunal finds that the applicant is a genuine Falun Gong practitioner.

#### Practice in Australia – section 91R(3)

The applicant claimed that she has practising Falun Gong in Australia. Her two witnesses gave evidence that she attends practise on Friday nights and that she has participated in Falun Gong activities such as the Mourning Country Day. The Tribunal has found that the witnesses were credible and the Tribunal accepts their evidence. The Tribunal asked the applicant whether she already knew a lot about Falun Gong when she arrived in Australia or whether she has learnt most of what she knows about Falun Gong since arriving. The applicant replied that she knew about Falun Gong in China and she has been continuing her study of Fa in Australia. When the Tribunal asked the applicant whether the other practitioners had encouraged her to lodge an application, the applicant replied that they had not. The Tribunal has found that the applicant is a credible witness and the Tribunal accepts this evidence.

Judicial authority suggests that section 91R(3) is intended to be limited to conduct engaged *solely* for the purpose of strengthening an applicant's refugee claims. On this view the Tribunal has not disregarded the applicant's activities in Australia and finds that these activities are further reasons to support a finding that the applicant is at risk of harm if she returns to China.

The applicant is outside China and fears persecution which involves serious harm to the applicant. The persecution which the applicant fears arises from her membership of Falun Gong and opposition to the activities of Chinese Government more generally. In view of independent information that Falun Gong practitioners are persecuted by the Chinese authorities across China, the Tribunal finds that state protection is not available to the applicant and that the applicant is not able to relocate. There is also no evidence before the Tribunal to suggest that third country protection is available to the applicant. The Tribunal therefore finds that the applicant's fear of persecution for reasons of religion, political opinion and membership of a particular social group is well-founded and there is a real chance that the applicant will suffer harm.

#### **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*.