

0807045 [2009] RRTA 35 (22 January 2009)

DECISION RECORD

RRT CASE NUMBER: 0807045

DIAC REFERENCE(S): CLF2008/110615

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Angela Cranston

DATE: 22 January 2009

PLACE OF DECISION: Sydney

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of China (PRC), arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention
4. The applicants applied to the Tribunal for review of the delegate's decisions.
5. 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 applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. 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.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail

himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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

20. The Tribunal has before it the Department's file relating to the applicants
21. The Tribunal previously rejected the applicant's husband's claims. In a decision record, the Tribunal said the following about the applicant's husband:

Activities in Australia

The Tribunal accepts that the applicant may have attended a Falun Gong group in Australia and also that he engaged in the study of Falun Gong and attended some Falun Gong activities. A statement by a fellow practitioner testifies to the applicant's Falun Gong practice and there are photographs of the applicant at various Falun Gong rallies. The Tribunal accepts that the applicant has participated in Falun Gong activities and that such participation may give the impression to his co-practitioners that he is a committed practitioner. They may then, in good faith, be prepared to testify to that observation. However such statements do not, in themselves, establish that the applicant has a genuine belief in or commitment to Falun Gong. The applicant's commitment may well have been simply to give such an impression, and nothing more. As such the Tribunal gives little weight to these statements. The Tribunal also accepts that there are photographs of him at various demonstrations, however, it is not claimed that these photographs have also been published.

In the absence of any further evidence and lack of relevant detail, the Tribunal does not accept that the appearance of the applicant at Falun Gong rallies, will be of adverse interest to the Chinese authorities. Furthermore, the country information above indicates that, even if he comes to the attention of the authorities because of his Falun Gong activities in Australia, ordinary followers may be lectured to by Chinese authorities and urged to renounce their ways but nothing more. Having regard to the Tribunal's finding that the applicant does not have any genuine commitment to Falun Gong, the Tribunal does not accept that this conduct would constitute "serious harm" amounting to persecution.

The Tribunal has formed the view that the applicant engaged in activities in Australia in order to strengthen his claim for refugee status and he has no real belief in or commitment at all to Falun Gong. As the Tribunal is not satisfied that the applicant's conduct was otherwise than for the purpose of strengthening his claim to be a refugee under the Refugees Convention it must disregard his conduct in Australia as required by section 91R(3) of the Act.

22. In her application, the applicant stated as follows:

My name is [Name]. I was born on [date], [Province P], Peoples Republic of China (PRC). My [child] is [Name], born on [date] in [Province P].

I came to Australia with my [child] on [date]. My husband is a Falun gong practitioner who left China on [date] and is seeking asylum in Australia.

The police kept coming to my house weekly, harassing me, asking the whereabouts of my husband. This made me very frightened. My [child] too was very afraid. I was worried that he would become sick because he was so anxious.

I worked [in a position] at [Company Co] in [Province P]. The police kept phoning me at work [quite often]. [At regular intervals] the police asked me to go to the local Police Security Bureau (PSB). [At other times] they came to my work place and either spoke to the general manager or to me directly. This began in [year 3], after my husband left China. During this time I was so scared that my heart beat fast.

The police told the general manager that my husband was a Falun Gong practitioner. Falun Gong is banned in China and Falun Gong practitioners are persecuted. They lost their jobs: they are put in prison and tortured and sometimes killed.

I lost my employment at [Company Co] in [year 4] The general manager dismissed me because, when the police were coming and going, this disturbed the normal life of the company and upset the customers.

The people I worked with and the neighbours began to think that my husband and I were bad people because the police kept coming. I was very nervous and whenever I heard an ambulance I was afraid that the police were coming for me to take me to a mental hospital because that is what happened to my husband and that is what happens to people in China when the PSB are after them.

The police also went to my [child's] school and asked where [the child's father] was. [The child] was very frightened. After that the other children no longer played with [my child]. My [child] was a class monitor but after the police came, the teachers said [my child] could no longer be a monitor. [My child] was not allowed to join the activities of the class. The teachers and children said [my child] and [our] family must be bad people if the police keep coming. [My child's] studies suffered at this time and [my child] began to hate going to school.

Because the police kept coming to our house and to [my child's] school asking where my husband was my [child] began asking if he was a bad man and Falun Gong is a bad thing. I was afraid that my [child] would no longer respect [my husband] This made me very upset. I was very scared. I saw a lot people put in jail and many are missing. I was afraid of what might happen to me and my [child].

I believe that everybody has the right to believe in whichever philosophy or religion they wish, and to have freedom of speech and freedom to meet with people who think the same. I believe in my husband. He is a Falun Gong practitioner. I believe that what he did is right.

I believe that the Chinese government should allow these freedoms and not expect everyone to follow the party line. I believe that the government is wrong to ban the practice of Falun Gong and to persecute Falun Gong practitioners.

My husband began practising Falun Gong in [year 1]. I was curious. I noticed that it did no harm to others and he became physically strong and stronger. Before, he was always sick. We had to pay lots of money on medicine. He became more calm and happy and helpful and friendly to others. I began to wonder whether I should practice Falun Gong as he did. I was scared to do so because the government clamped down on people who practiced Falun Gong. I was torn between whether to practice or not.

In Australia people have the freedom to practice Falun Gong. Because I am no longer afraid that the police will come after me in Australia for practising Falun Gong I have begun to study Falun Gong. I attended with my husband the Gong practice in [Suburb S] and plan to join a Falun Gong weekly study program in [Suburb T] with my husband.

During [a major public event] Falun Gong practitioners were permitted to stage a peaceful demonstration outside [a large building in City C]. They were asking that persecution of Falun Gong be stopped in China. I accompanied my husband to this demonstration. People from all over the world supported us and signed petitions. They treated us with respect. My [child] was surprised about this.

I am asking the government of Australia to protect me and my [child] I am afraid that if I am sent back to China I will be put in jail. In 1989 I went to Tiananmen Square in Beijing and I saw the Chinese government attack the students who had no weapons. Many students have gone missing. Many were killed. This is what happens to people in China if they go against the government.

I am a qualified [professional]. I have national certificate [in my profession] from China. I asked that the Australian government grant me a visa to live and work in Australia. I am a Chinese woman, I work hard. I have also studied English. I wish to contribute to this country.

23. The Department interviewed the applicant. At that interview, the following transpired:

Q. Did you get any letter like termination

A. No it was a private co...

Q. What is the significance of the exercises?

A. Because Falun is the biggest one in the universe and includes Buddhism and Ying and Yang in Daoism

24. The applicant provided to the Tribunal a document entitled '[Company Co] Dismissal notice' which was dated early in year 4 and an email from her to her husband which was dated stating that policemen came to her company on the previous day and that they told her that 'your husband must tell you do something for Falun Gong Group in China'.

25. The Tribunal spoke to the applicant The Tribunal also took evidence from the applicant's husband and Witness W. The applicant and her husband both took oaths on the Bible.
26. The applicant stated she arrived in Australia and on which class of visa. She stated she got the visa from someone who did it for her. She stated she gave this person her passport, her id card and the money. When asked did she give them anything in relation to work, she stated she gave the documents to the person some months before the visa was granted. When asked did she apply for the visa before she lost her job, she did not answer. She then stated she lost her job early in year 4. When asked if she arranged for the visa before or after this time she did not answer. She then stated it should be after she lost her job, but she was not too sure.
27. The applicant stated that if she went back to China, the police would detain her, they would ask her to sign undertakings that she would not practice Falun Gong, they would ask her what she had done in Australia, they might even send her to a mental hospital and remove her organs or they might kill her or they might sentence her because of her participation in demonstrations and gatherings in Australia. She stated her husband was a Falun Gong practitioner. When asked was he detained in China, she stated when he was detained. When it was put to her that in a statement to the Tribunal her husband had stated he was detained on different occasions to those mentioned by her, she stated maybe she got it wrong, all this happened early in year 1 when he was called in several times. When asked was she harassed by police in China after he left, she stated they started harassing her in May of year 3. She stated they initially came to find out where her husband was, they then learned he was in Australia. She stated they told her he took part in some demonstrations and had said lots of bad things about the Chinese Communist Party (CCP). They said to tell him not to practice Falun Gong and not to say these bad things about CCP. When it was put to her that he had only arrived in Australia at around that time as when she stated that the police harassment started, she stated the harassment started soon after that. When it was put to her that it seemed like a short period of time for her husband to have done the things she claimed he had done in Australia and for the Chinese to find out about them, she stated she thought the Tribunal was right.
28. The applicant stated she did not have a problem obtaining a passport. She did not have problems leaving China
29. The Tribunal put to the applicant she had stated she lost her work and gave the Tribunal a dismissal notice, however when the Department asked her at interview did she get any termination letter, she stated no, it was a private company. She stated she did not have that letter at that time in Australia, it was in China and was later faxed to her. When asked why she did not tell the Department that, she stated it was her problem.
30. The applicant stated she talked to her husband on the phone rarely once he came to Australia. She stated she did not initially dare tell him what was happening in China but later told him. When asked if she told him over the phone, why tell him via the internet also, she said the phone was taped and it was safer through the net. When asked why she thought the email was safer, she stated it was her own feeling and email was the common way of communicating. When asked was she aware the government monitored email including yahoo, she stated she did not know, she thought email was safe.

31. The applicant stated she took an oath on the Bible because she went to Church. When asked how she reconciled Church with her Falun Gong practice, she stated Falun Gong was not a religion. She stated she believed in Christianity and Falun Gong, anything good and truthful. When asked what happened to her when she died, she stated if she could reach a certain level which meant she was not an ordinary person, she would go back to her natural state. When again asked what she thought happened to her when she died, she stated according to Falun Gong people would not die, they started a new cycle of life. She stated if you follow truthfulness, benevolence, and forbearance, you will never die, life goes on. When asked where she started the new cycle, she stated she had not reached the highest level and her knowledge of Falun Gong was basic and was not enough. When asked how she reconciled her belief that she would not die and start a new cycle with Christianity, she stated it was not contradictory. She did not elaborate. She stated Jesus was born, died and would come back and the two were not contradictory.
32. The applicant stated the significance of the exercises in Falun Gong was so that she could lift her xinxing, it could get rid of the temptation and all kinds of desires and could reconcile yourself with the principles of the universe. She stated this would lead you to have a good life and following the principles of truthfulness, benevolence, and forbearance. She stated by that way she could reach a higher level and not be an ordinary person. When asked why she told the Department that it was because Falun was the biggest one in the universe and included Buddhism and Ying and Yang in Daoism, she stated at that time her understanding of Falun Gong was very shallow however now it was better. She stated however that she still agreed with what she told the Department.
33. The applicant stated in Australia she had taken part in demonstrations, learned Fa, practiced the exercises and she had tried to do something for the Falun Gong organisations. When asked what, she stated to tell the truth about Falun Gong which was that it was not an evil cult. The applicant stated she needed to tell the truth via the internet because the internet was safe.
34. The applicant stated she participated in an event in City C which coincided with another major event and was for the 20 July 1999 crackdown. When asked was it the one event, she stated she was also at another city location, Location L, where there was an assembly about the truth about human organ harvesting and they also distributed pamphlets, and a little later when a former senior official from China came to Australia she had participated in demonstrations. She also stated she was in a Parade around this time to announce that people had renounced their membership of the Communist party. She stated she distributed pamphlets at Location M and also took part in regular events at Suburb U and Suburb T and events to tell the truth about Falun Gong. She also distributed pamphlets and CDs in Location M.
35. The Tribunal then spoke to Witness W. He stated he first met the applicant at the hearing but had spoken to her earlier on the phone. He first got to know the applicant's husband in mid year 4 when he had gone to City D. He stated the applicant's husband had been back to City D a few times. They had talked to a number of candidates for the government elections. City D was a sister city with City E. The applicant's husband had talked to a number of the candidates and had been to City D a few times after the first time.

36. Witness W stated he thought the applicant's husband was genuine in his practice. Witness W stated he had spent some time with him asking questions. He stated he had met a number of practitioners who had been seeking asylum, he had agreed to support some but others he had declined. Witness W stated in the applicant husband's case, he found his understanding of the principles of Falun Gong, his practice of Falun Gong and the way he followed truth, forbearance and compassion in his life and his view of the persecution meant that he thought he was genuine. He also stated he had read professor Tennant's assessment and from his own personal observations, he thought the applicant's husband was forgetful and believed he had been in a mental hospital. He stated he thought the applicant's husband still had a genuine fear of returning to China.
37. Witness W stated that he believed in the cycle of life, in this dimension or in another dimension as a human being or other human being. He stated he thought Christians had a different view. It was his understanding Christians did not believe in the cycle of life, and believed in a God. When asked could you be both, he stated Falun Gong had many people from different backgrounds. He stated in Falun Gong there were different 'levels' of knowledge and they respected choice.
38. Witness W stated the applicant's husband studied and practiced Falun Gong and he had spoken to the applicant's husband who had also said he was involved in a number of demonstrations and rallies. He had personally witnessed the applicant's husband talking about his suffering in China to some candidates for the government election on more than one occasion.
39. He stated he did not know if the applicant was genuine because he had not spent much time with her. He stated he was aware she had practiced since she had been in Australia, he had read her parent's letters to her and what she had written was very typical. He stated she suffered persecution herself and her child's isolation at school was typical of Falun Gong persecution.
40. The Tribunal asked would he be worried if someone in China was writing to someone in Australia about Falun Gong. He stated he would be worried about intercepted mail. He stated it was common knowledge that mail was intercepted. He also stated that he had sent mail to a relative, the mail was intercepted and the police had visited his relative and continued to do so. He stated he had gone back to China for a few days to say goodbye to a family member. He stated he did not have many problems, there were some attempts by local police to see him but they were blocked. He stated his family had been visited on a number of occasions by the police and they had asked what he was doing and when he was going back to China.
41. Witness W stated if the applicant went back she would be arrested and persecuted. He stated this happened to every practitioner if you did not stay silent and spoke up about the persecution. When asked did he think she had engaged in the practice for the purposes of the refugee application only, he stated it was very natural for her to take up the practice because of her husband and she had supported her husband throughout his persecution. He stated if she did not have good faith, she would have divorced her husband. If she did not have good faith in Falun Gong then she would not have been able to cope. He stated when she got to Australia she would have had a golden opportunity to practice.

42. When asked if her faith was good then would she know what happened to her after death, he stated not necessarily, everyone had a different understanding of Falun Gong and he personally measured persons not by what they said but by what they did. He stated people came to Falun Gong for different reasons, some started because of health, others sought a new way of life.
43. He stated that there may be some people who had a faith other than Falun Gong, but these people may not be certain whether they had one or the other and they encouraged them to believe in truth, compassion and forbearance.
44. The applicant's husband stated that the applicant had difficulties after he left China. He stated when he came to Australia he joined the Fa group study group in Suburb V soon after he arrived. He gave flyers at Suburb V some weeks later. He also joined the Fa study group in Suburb X shortly after in mid year 3. He also went to Location M and distributed pamphlets around this time. He stated he had a bad memory because he had been to hospital.
45. The applicant's husband stated he joined the protests about the human organ harvest in the following year, year 4. He stated another Falun Gong event was when a major public event took place that year. He stated another event was Event F and when a former Chinese senior official came to Australia, he protested. He also did a number of Falun Gong activities during another ceremony in City C. He also practiced in a park in City C and after he moved to Suburb Y, he started to practice in a public place there. He stated he also went to other practice sites.
46. The applicant's husband also stated he had been to City D to take part in 'telling the truth' activity. He had been to City D more than once around this time period. He stated political party candidates came to their assemblies and at that time he told them his experience. He also went to another place where they set up posters. He had also joined the City D Fa study group.
47. He also used the internet to tell people about the truth in China. He stated he used a messaging service which was similar to MSM and if he saw someone he did not know on the line, he tried to tell them about Falun Gong and he also tried to find out about Falun Gong in China. He also stated he talked to students in China about Falun Gong using the messaging service. When asked was he worried about it, he stated yes, however he thought a lot of people were working for Falun Gong, some people sacrificed their lives and he himself had been a victim and he wanted to tell the truth. When asked was he worried for the students, he stated yes, but he thought the truth should be shared. When asked what would happen if the Chinese got hold of his correspondence, he stated they may be detained. When asked if it was common knowledge that the internet was monitored, he stated some knew, he knew. He stated he also worried about his parents but had warned them and the students about the messaging service and not to keep track of the website. He stated he warned them via the internet. When it was put to him that the applicant stated she thought the internet was safe, he stated she may have thought it safer than the telephone, he knew more about it than her. When asked if he knew why not tell her, he stated he told her but she did not believe him. When it was put to him that she sent him an email about Falun Gong from China, he stated maybe she thought it was necessary for him to know and maybe she thought it was safe.

48. The applicant's husband confirmed he had followed Falun Gong and when he had started. The applicant's husband stated when he died, he thought he would go to a different dimension. When asked if he died, he stated physically the body disappeared and the spirit carried on. When asked how, he stated the spirit entered a new space. When asked what that meant, he stated it could be achieved by going through a channel. He then stated the spirit stayed the same in a different space. When asked why he took an oath on the Bible, he stated Falun Gong was not a religion, even though it involved theories from Buddhism and Daoism, he attended the Anglican Church every week, was a Christian and thought he should choose in front of God. When asked how he reconciled Christianity and Falun Gong, he stated Falun Gong was not a religion, they went to the same destination via two different channels, and all these religions shared the same destination. When put to him that may not be true, that Christians believed in God, and that they would be united with God, however the Tribunals understanding of Falun Gong was they did not believe that He repeated Falun Gong was not a religion, Christianity was, he believed in Falun Gong however when he was at Church he felt inner peace and there were a lot of common points between the two, they both asked people to be good. The applicant stated he had been a Christian for a year. He was asked if both Falun Gong and Christianity asked a person to be good then why become Christian because he already believed in being good. He stated from his own experience the feelings were different. At the Church he felt part of the big family and could feel love from God. The applicant's husband stated he could have both. When it was put to him one believed in reincarnation and the other did not, he stated he had asked himself that question however at the end of the day the ruler of the world was the same.
49. The applicant's husband stated he told the previous Tribunal when he was previously detained and reiterated those dates. When asked if he was detained after that date, he stated no. It was put to him that the previous Tribunal had stated it asked him how many chapters in *Zhuan Falun* and he said 7. The applicant's husband stated back in China the number of chapters varied but the content remained the same. He stated the book in China was a photocopied book. He stated that here all the books had 9 Chapters. The Tribunal put to him it understood they were based on 9 different lectures and it was curious he said 7. He stated he learned after the crackdown of Falun Gong in China and the book he had was second hand. When it was put to him the date of the earlier hearing was some months after he said he was attending Falun Gong study and practice in Australia, he stated at the last hearing he was stressed and probably made an error. The first book in Mainland China had only 7 chapters.
50. Departmental records indicate the date that the applicant's husband arrived in Australia and the date the applicant arrived in Australia.

Country information

According to Dr Benjamin Penny's talk, '*An Academic's Perspective*', given to the Tribunal on 26 July 2006, he would look at a number of factors in order to know if a person was a genuine Falun Gong practitioner. One of the factors includes knowing the main scripture of Falun Gong, *Zhuan Falun* including how many chapters are in it.

Monitoring of Falun Gong protest activities in Sydney

51. In September 2006, DFAT advised that “If practitioners have played an active role in Falun Gong organisations overseas, the Chinese authorities are more likely to take an interest in their cases.” (DIAC Country Information Service 2006, *Country Information Report No. 06/53 – China: Return of failed asylum seekers*, (sourced from DFAT advice of 14 September 2006), 15 September)
52. In March 2007, DFAT advised that:

Authorities could, however, treat the person more severely if he or she was quoted publicly as criticising China’s regime or senior leadership in the media. **If, for example, the person had been an active, outspoken member of one of these groups and had publicly called for the end of Communist Party rule in China**, he or she would be more likely to be put under surveillance and possibly detained on return to China. At the extreme, the person could be criminally prosecuted, for example under Article 105 of China’s Criminal Law, which prohibits “incit[ing] others by spreading rumours or slander or any other means to subvert State power or overthrow the socialist system.” (DIAC Country Information Service 2007, *Country Information Report No. CHN8990 – CIS Request CHN8980: China: Publication of client details*, (sourced from DFAT advice of 20 March 2007))
53. The Tribunal notes that a 2003 paper by the Immigration and Refugee Board of Canada quotes a representative of the Falun Dafa Association of Canada (FDAC) who reported that she has “heard/read quite a number of stories [where] supporters, especially family members were persecuted due to their support to Falun Gong, or simply because they are family members” (28 Nov. 2003). According to the representative, these non-practitioners may be “interrogated, arrested, beaten, removed from their jobs, demoted, or refused bonuses” (FDAC 28 Nov. 2003). It is noted that the examples she provides relate to people who have published information on the internet criticizing the Chinese authorities (Immigration and Refugee Board of Canada 2003, *CHN42185.E – China: Situation of people who do not practice Falun Gong, but who oppose the government’s policy of labelling the group a cult and who encourage others to learn about Falun Gong (2001-2003)*, 2 December).
54. The same Immigration and Refugee Board of Canada paper reports on family members of Falun Gong practitioners who are not practitioners themselves. The articles in the report do not state whether the family members opposed the government’s policy of labelling the group a cult or whether they encouraged others to learn about the Falun Gong. The report states:
 - At a 2003 press conference in Canada, Wang Yuzhi, a Falun Gong practitioner, claimed his family members in China have been abducted and arrested because of his involvement in the Falun Gong and his public statements against the Chinese administration (Clearwisdom 19 Apr. 2003).
 - Another article describes the story of Ming Li, a Falun Gong practitioner, and her non-practicing daughter, who reportedly was detained several times by police because of her mother’s involvement in the group (Clearwisdom 11 Nov. 2003). According to the mother’s testimony, although she and her daughter were re-united in the United States in 2003, for the previous three years the police in Guangzhou City had refused to issue the daughter a passport because of Jiang Zemin’s alleged policy that “‘Falun Gong practitioner’s relatives are not allowed to go abroad’” (ibid.).

- A 10 May 2001 *Wall Street Journal* article posted on the Clearwisdom Website documents the plight of Zhang Xueling who was sentenced to three years without trial in a labor camp after she made repeated, unsuccessful attempts to have the police authorities confess to torturing to death her mother, a Falun Gong practitioner, and to issue a death certificate. Although initially a non-practitioner, Zhang Xueling eventually became a member of the Falun Gong (*Wall Street Journal* 10 May 2001).

Immigration and Refugee Board of Canada 2003, CHN42185.E – China: Situation of people who do not practice Falun Gong, but who oppose the government’s policy of labelling the group a cult and who encourage others to learn about Falun Gong (2001-2003), 2 December)

FINDINGS AND REASONS

55. The Tribunal accepts that the applicant is a National of China and to whom she is married
56. The applicant has claimed that after her husband left China, in year 3, she was harassed by the police who visited her the same month and subsequently went to her place of work and her child’s school. She also claimed that she subsequently lost her employment. She claims that the police initially came to find out where her husband was and when they learned he was in Australia, they told her he had taken part in demonstrations and had said lots of bad things about the Chinese Communist Party. She also claimed that when she came to Australia, she began practicing Falun Gong.
57. The Tribunal has a number of concerns with the claims made by the applicant about the alleged events in China Firstly, given the date that the applicant’s husband arrived in Australia and given his evidence at hearing that it was some weeks before he even joined Falun Gong groups let alone engaged in any public activity, then the Tribunal has difficulty believing that the police repeatedly visited the applicant’s home in mid year 3 as described by the applicant. In addition, when asked by the Department at hearing about any termination letter the applicant responded that she never got one, however she provided one to the Tribunal and stated that when the Department asked her, she did not have the letter with her in Australia, it was in China and later faxed to her. The Tribunal also has difficulty believing this. If that were the case, then she would have told the Department. These two things leads the Tribunal to doubt that the police did visit the applicant and her child after her husband left or that she lost her job. The Tribunal has considered the email from the applicant to her husband however the Tribunal has concerns as to why the applicant would email her husband whilst she was in China. When the applicant was asked was she aware the government monitored email including yahoo, she stated she did not know, she thought email was safe, however her husband stated at hearing that he knew the internet was monitored and he had told the applicant. The Tribunal remains unconvinced that the applicant would have thought email was safe. Even if the applicant did email her husband, given the Tribunal’s overall concerns with the applicant’s testimony in relation to the events that happened in China the Tribunal is not convinced the applicant’s email overcomes the problems it has with the applicant’s evidence.
58. The applicant has also claimed that she is now a Falun Gong practitioner, however at Departmental interview she was unable to explain the significance of practising the Falun Gong exercises and at the Tribunal hearing she was unable to elaborate on issues

such as where the new cycle of life took place. She was also unable to provide plausible explanations as to how she reconciled her Falun Gong beliefs with her Christian beliefs. Whilst the Tribunal appreciates that persons may be at various stages in their understanding of Falun Gong, the Tribunal has concerns that in this case the applicant's level of knowledge of Falun Gong that she displayed at the Departmental stage and her explanation for the lack of that knowledge as well as her inability to elaborate or explain her alleged beliefs at the Tribunal stage does not reflect someone who has genuinely converted to Falun Gong, but rather someone who has attempted to learn about Falun Gong for the purposes of her refugee claim. Accordingly, the Tribunal finds that even though it accepts that the applicant has participated in Falun Gong activities in Australia, it is not satisfied that she has done so otherwise than for the purpose of strengthening her refugee claim. Accordingly, it disregards this conduct in determining whether she has a well-founded fear of being persecuted on her return to China.

59. However, in ascertaining whether the applicant has a well-founded fear of being persecuted on her return, the Tribunal also needs to consider the impact that her husband's activities may have upon her upon her return.
60. Although the former Tribunal was satisfied that the applicant's husband had attended a Falun Gong group in Australia and had also engaged in the study of Falun Gong and attended some Falun Gong activities, the former Tribunal was not satisfied that the applicant's husband's conduct was otherwise than for the purpose of strengthening his claim to be a refugee and accordingly, in determining whether he had a well-founded fear of being persecuted, disregarded his conduct in Australia as required by section 91R(3) of the Act.
61. This Tribunal has no reason to question the former Tribunal's findings in relation to the evidence about the applicant's husband's activities in China, especially given that at the last hearing the applicant husband agreed that he had stated that Zhuang Falun had seven chapters, even though he had been practicing in Australia for some months and given this Tribunal's doubts that the police did visit the applicant and her son after her husband left or that she lost her job. According to Dr Benjamin Penny a genuine Falun Gong practitioner should know this. However, whilst this Tribunal accepts the former Tribunal's findings in relation to the applicant's husband's activities in China, the Tribunal also accepts the former Tribunal's findings that he did attend a Falun Gong group in Australia and had also engaged in the study of Falun Gong and attended some Falun Gong activities. Indeed, given Witness W's evidence, the Tribunal accepts that the applicant's husband has participated in many Falun Gong related activities, and many of those were after the former Tribunal made its decision, that is this Tribunal accepts that after the former Tribunal made its decision, the applicant's husband travelled to City D, , spoke to candidates for the government elections, joined the protests about human organ harvesting in year 4, participated in Falun Gong events coinciding with a major public event in year 4, and protested when a former Chinese senior official came to Australia. The Tribunal also accepts that he displayed a knowledge of Falun Gong at hearing (although not a knowledge of Christianity) that the Tribunal considers is consistent with someone who is committed to Falun Gong. Given his continuing involvement in Falun Gong, his level of knowledge of Falun Gong as displayed at hearing and his ability to provide what the Tribunal considers to be thoughtful responses to its questions, and given Witness W's glowing endorsement, the

Tribunal is prepared to give the applicant's husband the benefit of the doubt and accepts he is now a genuine Falun Gong practitioner who has engaged in Falun Gong activity because of that genuineness, and not at the behest or direction of the applicant. Given that, the Tribunal must determine what impact if any, those activities in Australia have on the applicant's claim.

62. The Tribunal accepts the DFAT advice that it is likely that activists who have participated in protest activities against the Chinese government, including members of Falun Gong, will be monitored and questioned or detained on their return to China. Accordingly, given the applicant's husband's activities in Australia, the Tribunal accepts that it is likely he is known to the Chinese government as a Falun Gong practitioner or is perceived to be one. The Tribunal is of the view that the current information regarding circumstances in China for family members of known Falun Gong practitioners indicates that they remain of interest to authorities and that there is a risk that they could be mistreated if they are detained. There are allegations of mistreatment if detained, including claims from 2003 that family members may be interrogated, arrested, beaten, removed from their jobs, demoted or refused bonuses. The Tribunal believes that there is a real chance that serious harm could flow to the applicant should she return to China. The Tribunal is satisfied that should these harms eventuate, it would be directed at her by reason of the applicant's membership of her family and her husband's Falun Gong activities in Australia which are Convention related and not subject to section 91S. The Tribunal is also satisfied that the applicant could not avail herself of any State protection as it is clear that the State is the source of potential harm. The threat, in the Tribunal's view, extends throughout the country.
63. In the Tribunal's view therefore, the applicant holds a well-founded fear of being persecuted for reasons of the applicant's membership of her husband's family and that the reason for that harm is his Falun Gong activities in Australia which are Convention related and not subject to section 91S. In the Tribunal's view, therefore, the applicant holds a well founded fear of being persecuted for Convention reasons if she returns to China. On this basis, she is owed protection obligations by Australia and satisfies the provisions of s.36(2)(a) of the Act.

CONCLUSIONS

64. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.
65. The Tribunal remits the matter for reconsideration with the direction that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

Angela Cranston
Member

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.
Sealing Officer's I.D. PMRTJA