

071744964 [2007] RRTA 326 (24 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071744964

DIAC REFERENCE(S): CLF2007/102718

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Gabrielle Cullen

DATE DECISION SIGNED: 24 December 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 for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter.

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

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

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

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Protection Visa Application

Information on the protection visa application indicates that the applicant is a man in his thirties from Shandong province in China. He is married with one child who is in Australia. In his application form he claims to have lived at the same address in China for a number of years and worked at his employers as a professional from the early 1990's until he left China. He left China as a guardian to his child who obtained a visa to come to Australia.

Department Movement records show he arrived in Australia in the mid 2000's and departed some months later, arrived again after a few weeks and departed some months later before returning after a few more weeks.

In his statement attached to his protection visa application the applicant claims that after he came to Australia he got to know some Falun Gong practitioners and participated in some of the gatherings, parades and demonstrations. He said he posted some Falun Gong material back to China as he has some relatives who practise Falun Gong. He returned to China and on the following day the police arrested him and interrogated him for a number of hours, questioning him on whether he was a Falun Gong practitioner and who the people in the photos they showed him were. The applicant claims he did not confess and relatives paid a bribe for his release. The police then searched his house, looking for Falun Gong material and his computer was taken away. He returned to Australia and in China a few days later was sent a subpoena to appear before the authorities. He claims if he returns to China he will be put in jail.

The applicant submitted the following two documents with his application:

- Decision on bail pending trial with restricted liberty of moving; and
- Subpoena to appear.

Documents submitted in support of his application

The Tribunal received a further statement from the applicant summarised as follows:

- The applicant has been a Falun Gong practitioner since [the mid 2000's].
- He had heard of Falun Gong in China, and his neighbour also practised Falun Gong. After the crackdown she was arrested and sent to a Labour camp for a number of years.

- After getting to know Falun Gong practitioners in Australia, he realised they were gentle, peaceful and kind hearted people and felt drawn to their community.
- [In the mid 2000's] the applicant and his child moved in with another Falun Gong practitioner from his home town. He claims the man taught him the exercises and meditation and he began to practise with him. He claims the man introduced him to a women who holds weekly Falun Gong book sessions at her home. He says he goes every week. He claims that he attends many activities with practitioners and regularly attends the group book-reading and sharing session.
- The applicant claims that he has been mailing Falun Gong related material to his former neighbour for dissemination, via his elder sibling.
- He claims he decided to go home before his visa expired and bought a one way ticket to China with no intention of coming back. He called friends and family, including his former neighbour, to inform them of his return.
- After his arrival, a number of uniformed police came to his home and he was taken to the [station] and asked about his activities overseas and the purpose of his trip home. The policemen showed him many photos and asked him to point out who was who. He assumed they were Falun Gong practitioners. The interrogation went on for a number of hours but the applicant did not confess anything and his family paid a sum of money as a security bond and bailed him out.
- [Some days later] the same policemen came to his home again and searched his house and took away a desktop computer as well as some English learning books. He claims he did not take any Falun Gong materials as he feared they may be discovered by customs and he was planning to obtain the books from local practitioners.
- After the raid, he became worried and they tried to pay money but contacts said that there was little they could do and that his situation was quite difficult.
- After learning this, he tried to get in touch with his former neighbour but was unable to contact her.
- As he grew more anxious he decided to leave as the police did not have any evidence on him. His contacts in the PSB said the PSB were collecting evidence against him.
- After he returned to Australia he received a message from his sibling on his mobile phone advising him that a subpoena had been issued and the applicant asked that his sibling mail the subpoena to him.
- The applicant applied for a protection visa.
- [Later] the applicant's sibling told him that his former neighbour had been arrested about one month previous.

- His wife telephoned the applicant and informed him that she had been dismissed from her workplace as a result of a police investigation.

The applicant also submitted the following documents to the Tribunal:

- Notification that the applicant's wife has been dismissed from her employment position.
- Express post receipt with date stamp.
- Tax invoice showing one way trip to China.
- Electronic Airline Ticket schedule showing flight to Australia and details of the return flight.
- Photographs of the applicant participating in Falun Gong demonstrations on various dates and at different locations throughout Australia.
- Statutory Declaration from the applicant's housemate indicating that he regularly practised with the applicant at home and elsewhere.
- Statutory declaration from a friend stating that he met the applicant at a Falun Gong rally and that he is impressed by his sincere cultivation.
- Statement by another friend stating that he met the applicant and the applicant has been involved in a number of Falun Gong activities, including practise and learning, celebration of World Falun Dafa day, and a protest rally. He claims the applicant is a genuine Falun Gong practitioner.
- Statutory Declaration from a friend claiming that she met the applicant when she was distributing materials. She claims he was trying to introduce Falun Gong to the applicant when she discovered that he also practised. He claims that from then on they went to study group and attended many Falun Gong events and rallies together.

Tribunal Hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from a witness. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

The applicant was represented in relation to the review by his registered migration agent.

The applicant indicated that before he left China, he was living at a particular address. He said he had lived there for a number of years. He said before that he lived at another address. The applicant said when he left his wife moved back home and lives there with his family. He said his wife informed the authorities when they moved.

The applicant claims his wife worked as a professional and specified her salary. He said he was a professional in a different vocation. He said he resigned his position when he left to travel with his child to Australia. The applicant said his child is at school and is not a Falun Gong practitioner.

The applicant confirmed that his passport was obtained in his name and legally.

The applicant confirmed that he was not a Falun Gong practitioner when he left China for Australia. He said that at that time he knew that his neighbour was a Falun Gong practitioner. He said he lived next door to her. The Tribunal asked the applicant how he knew her, he said because when she went to make a complaint she was sent to a former education camp. The Tribunal put to the applicant that he was not living at that address at that time, that he did not move there until the following year, the applicant said that at that stage he did not know her but when she came back he knew her, but that her husband and child had been living next door. He said she was in the camp for a period of years. The Tribunal asked why he would be told that she was a Falun Gong practitioner when it had been classified as an evil cult by the Chinese government, the applicant said that it was known by everyone, and that the neighbours talked and they all knew it.

The applicant said he became a Falun Gong practitioner in the mid 2000's. He said he met a woman who was handing out leaflets.

The Tribunal asked the applicant why he became a Falun Gong practitioner, the applicant said that in China this society's attitude to Falun Gong is very strict and he became friends with his neighbour after she came back from the labour camp. He said she was very kind, very helpful and he had a good impression of her and that he had a lot of contact with her. He said after he came to Australia then he heard the truth about Falun Gong and that it was different to what was said in China. He said he then went to see the Falun Gong activities and got to know Falun Gong practice. He said he would help them hold slogans and banners.

The applicant said his housemate has been in Australia for a period of years and has been granted refugee status.

The Tribunal asked him why he became involved, the applicant said because he felt shocked when he found out about the truth of the organs. The Tribunal asked him why he embraced Falun Gong, he said because he found out about the truth of it after he had contact with practitioners in Australia. He said the Falun Gong practitioners are kind, tell the truth and do not do bad things. The applicant said that his health was not good and he happened to live with a practitioner and they practised together. The applicant said he attends a study group and also goes to another study group on a different night. The applicant says he does his exercises at home, but he would sometimes go to the park in the morning at 6 a.m. where his friend was the assistant. He said he would also practice with his housemate. The applicant says he currently practises at home because where he is living now it takes him half an hour to get to the railway station. The applicant said his housemate began practising when he arrived in Australia, but he was unsure whether he had practised in China. He says he practises at home and elsewhere.

The Tribunal asked the applicant why he became a Falun Gong practitioner, he said that after seeing them and having contact with Falun Gong practitioners he realised they were good people. He said he had high blood sugar. The Tribunal asked him whether he had seen a doctor, he said no and that he had had the problem in China. The applicant said that he had never seen a doctor and the Tribunal asked him how he knew he had high blood sugar, he said he got thirsty a lot. The applicant said he did his exercises everyday.

The applicant said he had read the books, Zhaun Falun and Hong yin – a collection of poems by Master Li. The applicant confirmed there were nine lectures in the book but was vague

about the poems, he thought one was this is a perfect world but said he could not recall He said he mainly reads Zhaun Falun.

The applicant said he was not a member of the Falun Dafa Association of New South Wales.

The Tribunal asked what being a Falun Gong practitioner meant to him, he says it is his belief. The Tribunal asked why he would put himself at risk in China by being a Falun Gong practitioner, the applicant said because after came to Australia it was different to what he had seen and heard in China He said the practitioners he had had contact with were kind people. He said while he was in Australia he forgot about the high pressure in China. He said he liked Falun Gong because it asked people to be truthful and kind and to practise forbearance. He said it asked people to improve their morality. He said it has changed his life by improving his health, and that he can now stand the harshest of all harsh, and do truthful things.

The applicant correctly named the five exercises and confirmed that particular verses were recited before the exercises. He correctly said the verse to be recited before the second exercise. The applicant correctly said that the principle behind the second exercise was to unblock each part or meridian of the body and to increase wisdom. He was able to correctly show the movements comprising the fourth Falun Gong exercise and that you do the same thing nine times.

The applicant confirmed that he followed the teachings and beliefs of Falun Gong and that the main principles are truth, forbearance and compassion. The Tribunal asked him how he applies these moral tenants in his life, he said by being truthful and by being genuine. He said one needs to be merciful and have a kind heart and be kind to all people and everything. He said with regard to forbearance to stand the harshest of all harsh, to be tolerant of unfair treatment.

The applicant said the 'xinxing' was to improve morality, to get rid of all attachments, such as desire for promiscuity, jealousy and other attachments and only that way can you cultivate your morality. He said you can improve your 'xinxing' by no matter what you encountered by being tolerant. He said you need to get rid of all attachments. He said by doing the exercises you improve your morality and you improve your physical fitness or health and this improves your 'xinxing'. He said it is different from other qi gong because when you do other qi gong you only do the exercises but in Falun Gong you need to improve you 'xinxing' and if you only do the exercises in Falun Gong you do not improve your morality. He said the main thing in Falun Gong is to cultivate your nature and your body.

The Tribunal asked the applicant to tell it about the Falun and its significance. The applicant said it rotates and it is placed in the abdomen by Master Li. The applicant said that when it rotates clockwise it absorbs energy from the universe and when it rotates the other way it gives salvation to others. He said the exercises are based on the characters of the universe. He then correctly described the Falun symbol. He said the Falun rotates 24 hours nonstop. He said if the person does not do the exercises the energy mechanism exercises the people. The Tribunal asked the applicant what rotates the wheel and the applicant again said it is placed in by Master Li and that when you do the exercises it has the characteristics of the universe, and when the universe rotates, the Falun rotates. He said if you just did the exercises and do not cultivate your moral character your Gong would not improve.

The Tribunal asked the applicant why he feared return to China and he said as he went back to China and because he is a Falun Gong practitioner and will continue to practise if he returns to China. He said on his return to China during the middle of the day the police took him away and beat him up. The Tribunal asked what questions the police asked him, and the applicant said they asked him what he had done in Australia. He said they did not refer to his neighbour. He said he did not confess to being a Falun Gong practitioner. The Tribunal put to him that if being truthful is part of the teachings of Falun Gong, so why did he not confess to being a Falun Gong practitioner, he said he knew if in China he admitted it that would be the end. The Tribunal asked him what evidence the police had; he said they asked him what he had done in Australia, what organisations he had joined. He said they interviewed him because they said they had evidence against him. He said he asked the police what evidence they had, and they said you confess first. The Tribunal asked him whether subsequently he knew what evidence they had, and he said when he went back he heard about his neighbour.

The Tribunal asked him why he did not mention in his initial statement with his protection visa application, about what happened to his neighbour. He said he did not know at the time he made his application; he said he heard later.

The applicant confirmed that he had bought a one-way ticket to China and had had no intention of coming back to Australia. The Tribunal put to him that if he was a committed Falun Gong practitioner and he knew the danger, why he would return back to China. He said he thought that whatever he did here would not be known in China. He said he felt that he needed to go home as it was the home of his childhood. He said that when in China he practised at home.

In answer to the Tribunal's question, he said they searched the house, and he said they did not find anything and took away an IELTS test and an English book. The Tribunal asked him why he did not take any Falun Gong materials home if he was not returning to Australia. He said he had mailed some to his neighbour via his sibling. The Tribunal asked him whether his sibling had been in trouble with the police, he said he had been questioned but had not been in trouble.

The Tribunal asked the applicant how he left China. He said friends and relatives made enquiries with the PSB and the situation he was in was not a criminal offence. They said they were collecting evidence so he booked a ticket, he said he thought he better come as he still had an Australian visa, then he left and exited without difficulty because he bought a return ticket.

The Tribunal indicated to him that it had independent country information that criminal suspects would be on an alert list and unable to leave China, and that as he had indicated he was a criminal suspect how he could have exited China. He said if they had solid evidence against him he would not have been able to get bail pending. He said only when the subpoena was issued did they have the evidence.

The representative indicated that the applicant had made a distinction, and that bail is different to the Australian system which means that a criminal suspect has been charged. In the applicant's situation in China he was a criminal suspect but there was no charge. He said if they did not want him to leave they would have confiscated his passport, and the police did not have solid evidence against him until the subpoena was issued.

The Tribunal then took evidence from the witness. He said he had met the applicant when they lived together. He said they are from the same town in China.

The Tribunal asked the applicant why he was travelling a relatively large distance to attend meetings, the applicant said he was already living in the suburb where the meetings took place and had been for over a year before he moved in with his friend. The Tribunal put to him that it thought he had said that his housemate introduced him to Falun, no he said he was introduced by another person. He said he started going to the practice group after he moved in with the witness.

The witness said that he had been accepted as a refugee and that he met the applicant in the mid 2000's and he moved into his address. The Tribunal asked him whether he was a Falun Gong practitioner; he said he did not know what happened before. He said he practised at home, at the group with his friend at another group. The Tribunal asked the witness how he knew the applicant was a genuine Falun Gong practitioner, he said he did not know about that but when he lived at his home, they practised Falun Gong together. The Tribunal asked him whether the applicant had a good knowledge of Falun Gong, and the applicant said that was a matter to him but that they often sat together and talked about Falun Gong. He said in his view the applicant seems a genuine Falun Gong practitioner and he said they learned from each other, in answer to the Tribunal's question on whether he taught him Falun Gong. The Tribunal asked whether the applicant was an experienced practitioner when he moved into the house with him, the witness said yes basically he was very familiar at that time.

The Tribunal put to the applicant that he had said that he became a Falun Gong practitioner when he moved into the house with the witness, he confirmed this and then the Tribunal asked him how he could have been an experienced practitioner as the witness had said he had knowledge, the applicant said maybe he was saying he was experienced in the exercises, maybe he meant that not in 'xinxing'. He said he started doing the exercises when he moved in with the witness but in previously he had contact with other practitioners.

The Tribunal put to him that it seemed a bit strange that he did not become a Falun Gong practitioner until he came to Australia. The applicant said that in China he had seen the propaganda and was not interested. He said after coming to Australia he had seen the truth of Falun Gong in the China Times, Epoch Times and on the website, and was particularly affected by the truth of Sujiaten (organ harvesting place). After seeing and learning that the communist officials are corrupt and after contact with Falun Gong he became interested in it. He said there was much information in the Epoch Times and then he became interested in it and read Zhaun Falun. He said his health was also not good and other practitioners said to him that the exercises would benefit him.

The representative indicated that the applicant knew he could obtain the basic teachings from his former neighbour when he went back and that is why he did not take any Falun Gong material back with him.

The Tribunal said it had concerns as to how he could exit when he had the bail order against him and the inconsistency in the evidence that he said he started to practice when he moved in with the witness, whereas the witness had said the applicant was familiar with the practice when he moved in with him.

The applicant said he first met a woman and they talked about Falun Gong, he said she did not teach him the exercises, but they talked about Falun Gong and attended rallies together.

The representative said he would clarify these issues and needed 14 days. The Tribunal indicated that it would write to the applicant if it had any further concerns.

s.424A Letter

The Tribunal sent the following s.424A letter to the applicant.

The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa as you are unable to show you have a well founded fear of protection for a Convention reason.

- At the hearing [date], you said you knew that your neighbour in the Fuzhou Hou complex was a Falun Gong practitioner, and you got to know her when she returned from the labour camp after [a number of years]. You said she was sent to the Labour Camp in [year].

In your statutory declaration [date] you said you had known [former neighbour] since [year] as she was a previous neighbour of yours.

At the hearing you said you did not move to the [place] until [a number of years] before you left China, which was in [year].

- In your statement attached to your protection visa application you said that you knew some of your relatives in China were Falun Gong followers.

In this statement you did not mention your friendship with [former neighbour] and that she was the Falun Gong practitioner you got to know in China who influenced you.

At the hearing on [date] and in your statutory declaration [date] you said that you were aware of Falun Gong via your neighbour [name]. When asked why you became a Falun Gong practitioner you indicated that your friendship with her influenced this decision.

- In your statutory declaration [date] you stated [the applicant's housemate] taught you the exercises and meditation and that you began to practise with him.

At the hearing on [date, the applicant's housemate] said that you were an experienced practitioner when you moved into the house with him in [date].

At the hearing you also said that you were taught the exercises at the [suburb] site and by other practitioners, including [name].

- At the hearing you said that you first met [woman] in [year] when she was handing out pamphlets and you talked about Falun Gong, and being interested and started attending rallies.

You submitted to the Tribunal a statutory declaration from [woman] in which it states that she met you in [date and place] and she discovered you were already attending the practise site at [suburb].

- At the hearing you said you were introduced to Falun Gong in Australia by [woman].

[The woman] indicated in her statutory declaration that you were already practising at the [suburb] site when you met in [date].

- You indicated at hearing that you exited China legally on [date].

You also submitted a document named *Division on Bail Pending Trial with Restricted Liberty of Moving* which indicates that you were a criminal suspect for being a Falun Gong practitioner.

Independent country information (referred below) indicates that you would likely be on an alert list and be unable to leave China as you are a criminal suspect.

Country Information on Exiting China

In 2006 The Department of Foreign Affairs and Trade (DFAT) advised that the:

Post can confirm that Chinese authorities check all outgoing passengers against an “alert” list. We do not know how comprehensive this list is. (DIMIA Country Information Service 2006, *Country Information Report No.06/42 – China: Failed asylum seeker return decision*, (sourced from DFAT advice of 7 August 2006), 25 August. – [Attachment 13](#))

In a 2005 advice on passports for Falungong practitioners, DFAT stated:

A.1. China’s Entry and Exit Law states that the following groups of people shall not be given approval to leave China: (1) defendants in criminal cases or criminal suspects confirmed by a public security organ, a people’s procurator ate or a people’s court; (2) persons who, as notified by a people’s court, shall be denied exit owing to involvement in unresolved civil cases; (3) convicted persons serving their sentences; (4) persons undergoing rehabilitation through labour; and (5) persons whose exit from the country will, in the opinion of the competent Department of the State Council, be harmful to state security or cause a major loss to national interests. The Ministry of Public Security (MPS), which administers the law, has advised that these five groups of people are not allowed to obtain passports.

The MPS has wide powers to interpret who may be denied a passport. Local public security organs could conceivably deny a known Falun Gong practitioner a passport.

A.2. If a person was detained and tortured by the Chinese authorities for practising Falun Gong it is conceivable that the local public security authorities would deny him or her a passport should the person apply (DIAC Country Information Service 2005, *Country Information Report No. 05/43 – Chinese passports for Falun Gong practitioners*, (sourced from DFAT advice of 9 August 2005), 10 August).

DFAT has also advised that the Chinese authorities check all outgoing passengers against “alert” lists, which operate at railway stations, airports and border crossings. Although DFAT had not been able to obtain comprehensive information on alert lists, it confirmed that Chinese citizens subject to arrest warrants would be on the lists. It would be likely that people under investigation but for whom a formal arrest warrant has not been issued would also be on the lists (DIAC Country Information Service 2006, *Country Information Report No. 06/42 – China: Failed asylum seeker return decision (CISQUEST ref 8639)*, (sourced from DFAT advice of 7 August 2006), 25 August; DIAC Country Information Service 2006, *Country Information Report No. 06/65 – China: Passport and exit arrangements*, (sourced from DFAT advice of 8 November 2006), 10 November).

Relevance

These internal inconsistencies, inconsistencies with witness evidence and inconsistencies with country information cast doubt on the claim that you are a genuine Falun Gong practitioner, that your fear is well founded and that you will be persecuted if you return to China for being a Falun Gong practitioner. This may lead to a finding that you are not a refugee and that you do not meet the relevant criteria for the grant of a protection visa.

It also indicates that you may not be credible and that evidence has been created and provided to the Department and Tribunal to obtain a protection visa. This may lead the Tribunal to find that you will not be persecuted if you return to China and that you do not meet the relevant criteria for the finding that you are a refugee and the grant of a protection visa.

Reply to s.424A and Further Documentation Received from the Applicant

The Tribunal received a submission from the applicant's representative, a further statement from the applicant and a statement from the woman who introduced him to Falun Gong

The representative submitted that no exit permit was required as he had obtained an exit permit with his passport and at the time he applied for his passport he was not a Falun Gong practitioner. He submitted that the Chinese term has been translated as "bail" but this is not the true meaning of the word. It does not relate to criminal proceedings.

The applicant submitted that he obtained his exit permit when he initially left China when he was not a Falun Gong practitioner, and further exit permits are not required. He claimed that when he left he had only been granted bail, and had only been questioned and not charged with any offence. He claimed it was only when the subpoena was issued that he was a suspect in a criminal investigation.

He claimed he became interested in Falun Gong before he started practising. He said he had been reading the Falun Gong information leaflets, newsletters and Epoch Times, Falun Gong instruction VHS tape and DVDs. He claimed he tried to learn himself.

He claimed when his son and he moved in with the witness he found out he was a Falun Gong practitioner and asked him to teach him the exercises. He claims the man is an honourable person and said "I am not a very good practitioner myself, I can't really teach you. We can learn together" he said because they lived in the same house they would practise together.

He said he met a woman who frequently distributed Falun Gong leaflets. He said after he had learned the exercises he approached her one day and told her he had started practising and they learnt they were from the same place in China and she introduced him to the study group.

She said that she had met the applicant when she saw him when she was distributing pamphlets. Sometime later they properly introduced themselves and he indicated he was living in a particular suburb and she asked him if he wanted to join their study group there. She said she introduced him to the group and they take him there and to another group on a different evening. She indicated that she believed he is a genuine practitioner.

The Tribunal received a further statutory declaration in reply to the Tribunal s.424A letter. The previous statutory declaration of the woman was also attached.

The applicant submitted the following:

- It was a mistake that he placed in his statutory declaration that he met his former neighbour in the mid 1990's. He said he moved to the complex in the early 2000's and met her a few years later when she returned from the Labour camp.
- He said he has a relative who practises Falun Gong but that due to the crackdown in China the relative is very afraid and he does not talk to her often. He said his former neighbour was the first person who promoted Falun Gong to him. He said he sent Falun Gong materials to her after he came to Australia, but he has not sent any such information to his relative as she is scared.
- He claims the statement in the protection visa applicant was prepared by a friend of his and he summarised his experiences, and it was not prepared by a migration agent.
- He repeated that he purchased some Falun Gong books and exercise instructions on VHS and DVD. He said he learned the exercises by watching the DVD. He said after he moved in with the Falun Gong practitioner he answered many of the questions that had puzzled him and corrected his movements.
- He said it is basic Falun Gong practise that their is only one teacher, Master Li and as his housemate has the highest respect for Mr Li, he regards himself as a disciple and would not refer to himself as a teacher.
- He referred to the woman's statement as to how they met and confirmed although they met in the mid 2000's they did not properly introduce themselves until some months later.
- He said he believed he was not on an alert list when he left China He repeated that exit permits only need to be obtained on the first exit and this was obtained in the mid 2000's, when he was not a Falun Gong practitioner. He repeated that the Bail decision was not an indication that any charges had been laid against him. The security was a penalty, not a refundable bond.

BACKGROUND INFORMATION

(i) Background to Falun Gong

The practice/philosophy/religion that is known as Falun Gong was founded in 1992 in China by Li Hongzhi, who is known to his followers as Master Li. Falun Gong is based on the traditional Chinese cultivation system known as qigong, but it is novel in its blending of qigong with elements of Buddhist and Taoist philosophy. Other terms such as Falun Dafa and Falungong are used in relation to the movement. The term Falun Dafa is preferred by practitioners themselves to refer to the overarching philosophy and practice (UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April). There

is no question that Falungong promotes salvationist and apocalyptic teachings in addition to its qigong elements. Despite its own protestations to the contrary, it also has a well-organised and technologically sophisticated following and has deliberately chosen a policy of confrontation with authorities (Human Rights Watch 2002, *Dangerous Meditation: China's Campaign against Falungong*, February; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, pp.14-24, pp.91-95).

Falun Gong first came to the attention of PRC authorities after demonstrations by Falun Gong adherents in April 1999 in Tianjin, and later that month outside the Zhongnanhai in Beijing. The initial government crackdown against Falun Gong began in late July 1999, when a number of government departments implemented restrictive measures against the movement, banning Falun Gong and issuing an arrest order for Li Hongzhi. The movement was declared an "evil cult" and outlawed in October 1999 (Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.8-10).

According to the website falundafa.org, accessed on 26 May 2004, Falun Gong is described as:

"It is most accurately described as a "cultivation practice". Practitioners cultivate their mind, body, and spirit by acting in accordance with the principles of: Truth, Compassion and Tolerance.

Practitioners also do five sets of gentle and easy to learn exercises. All practitioners feel peaceful, energized and refreshed after practising and almost every practitioner has reported improvements in both body and mind, as well as a deepened spiritual awareness."

As reported by The Irish Times on 18 November 2004 and re-produced by the Falun Dafa Information Centre on their website:

"Falun Gong, or Wheel of Law, is a spiritual movement that draws on Buddhism and Taoism. Practitioners believe that illnesses are the result of bad karmas, and by becoming a practitioner, a falun (or wheel of chakra) is installed into his or her stomach which eventually eliminates all that is bad."

One of the most distinctive claims about Falun Gong as a cultivation system is that you can cultivate 24 hours per day, even though you are not doing the exercises. The reason for this is that in cultivation Falun Gong practitioners believe that a wheel or "falun" is formed in the lower abdomen. According to Professor Penny the Falun is considered as follows:

... the Falun ceaselessly rotates itself after it is formed, it exists in the form of an intelligent being, regularly and continuously collecting energy from the universe via rotation. This is claimed to be particularly convenient for busy people in the modern world who cannot always afford to set aside a certain amount of time for practice. When you have reached a high level of cultivation wonderful things happen to you. You acquire supernormal capabilities such as precognition, clairvoyance, the ability to transform one kind of object into another kind of object, remote sight, and so on. ... (Professor Penny, *Falun Gong: What is it? And what is it now? A talk for the Refugee Review Tribunal National Members' Conference*, 29 August 2003".

The five Falun Gong exercises are named, pictured and explained in the Falun Dafa website at <http://www.falundafa.org/eng/exercises.htm#EX1>.

As noted by the leaflet supplied to the Home Office by the Falun Gong Association UK in May 2004, adherents undertake five exercises, four standing one sitting.

As noted by the website falundafa.org accessed on 13 July 2004, “The teachings of Li Hongzhi are articulated in two books, Falun Gong (Law Wheel Qigong) and Zhuan Falun (Turning the Law Wheel), which are available in over a dozen languages, including English.”

Sources

UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April ([\\NTSSYD\REFER\Research\INTERNET\UKhome\Bulletins\China-FalunGong-2ndEd-2002Nov.htm](http://NTSSYD/REFER/Research/INTERNET/UKhome/Bulletins/China-FalunGong-2ndEd-2002Nov.htm))

Human Rights Watch 2002, *Dangerous Meditation: China’s Campaign against Falungong*, February (RRT Library – Call no. Human Rights Watch)

Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press (RRT Library: 322.10951 CHA)

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

Founded in 1992, Falun Gong first came to prominence in April 1999 after several thousand Falun Gong adherents staged a sit-in in Tianjin, outside the publishers of the Tianjin University journal that had published an article criticizing the movement. Official attention was heightened when more than 10,000 practitioners coordinated a peaceful demonstration outside Beijing’s leadership compound, the Zhongnanhai, on 25 April 1999. The demonstration was the first major public manifestation of Falun Gong’s popularity in China, and is reported to have caught the PRC authorities unawares. The authorities seemed to be chiefly concerned about the capacity of the group to mobilise such large numbers of followers, and the incident is widely considered to have been the trigger for the initial crackdown against Falun Gong that commenced in July. 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).

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

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

A 2005 DFAT report confirmed that this advice was still valid (DFAT 2005, *Country Information Report No. 05/34: China: Update on Falun Gong*, 30 June – CISNET China CX125116).

Sources

Human Rights Watch 2002, *Dangerous Meditation: China's Campaign against Falungong*, February (RRT Library – Call no. Human Rights Watch)

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 (<\\ntssyd\refer\research\internet\eastasia\chn-drpenny-falungong-paper-29aug03.doc>)

Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press (RRT Library: 322.10951 CHA)

DFAT, 2002, *Country Information Report No 136/02, Falun Gong Practitioners*, 20 June – CISNET China CX64757 (<//NTSSYD/REFER/Research/Response/PACKAGE/China/China-Falungong2002.ap4.doc#CX64757>)

DFAT 2005, *Country Information Report No. 05/34: China: Update on Falun Gong*, 30 June (CISNET China – CX125116)

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

The crackdown against Falun Gong commenced in July 1999. From that time on, Falun Gong protests were countered by police roundups in which thousands of practitioners were detained in police lockups and makeshift facilities for short-term “reeducation” The crackdown was accompanied by a coordinated media campaign by China’s public institutions, highlighting the alleged dangers of Falun Gong and attempting to justify the crackdown. From July 1999 until the end of 1999, a “legal infrastructure” to counter Falun Gong was erected: the banning of CCP members, civil servants and members of the military taking part in Falun Gong activities; the introduction of restrictions on legal officers representing Falun Gong practitioners and a circular calling for confiscation and destruction of all publications related to Falun Gong. Falun Gong internet sites also came under attack.

Measures used against the Falun Gong have included severe sentences, allegedly incorporating the use of psychiatric institutions to detain and “re-educate” Falun Gong practitioners; an increase in systematic and state sanctioned violence against practitioners; an escalated propaganda campaign against Falun Gong, repeatedly reinforcing the government’s message that the group was an “evil cult” which posed a threat to Chinese society; and the utilisation of state institutions such as the police and universities to combat Falun Gong. Reports suggest that PRC authorities also attempted to restrict the movement of suspected practitioners within China; to prevent the international press from covering the activities of the Falun Gong movement, and launching an offensive against the internet structure underpinning the effectiveness of the Falun Gong organisation in China. In recent years there has been a dramatic abatement in the visibility of Falun Gong activities within China, with many practitioners performing the exercises at home instead of in public. But there have been regular public demonstrations, and the arrest, detention, and imprisonment of Falun Gong practitioners has continued. There have been credible recent reports of deaths due to torture

and abuse. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons, labour camps, and extra-judicial “legal education” centres. Falun Gong cases are reportedly handled outside normal legal procedures by a special Ministry of Justice office, known as the 610 office.

On 1 March 2005, new religious affairs regulations came into effect which bring regulatory practices within a legal framework and into compliance with China’s Administrative Licensing Law. The new regulations protect the rights of registered religious groups, but critics say they give the authorities broad discretion to define which religious activities are permissible. Only groups which meet government requirements can be registered, and the government tends to perceive unregulated religious groups as a potential challenge to its authority. The Falun Gong and other groups labelled as “cults” remain banned, and Premier Wen Jiabao’s 2004 Government Work Report emphasised that the Government would “expand and deepen its battle against cults”, including Falun Gong (US Department of State 2006, *International Religious Freedom Report 2006: China (includes Tibet, Hong Kong, and Macau)*, 15 September; UK Home Office, 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.24-31).

Sources

US Department of State 2006, *International Religious Freedom Report 2006: China (includes Tibet, Hong Kong, and Macau)*, 15 September
([\\NTSSYD\REFER\RESEARCH\usdos\irf\irf06\China-irf06.htm](#))

UK Home Office 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April ([\\NTSSYD\REFER\Research\INTERNET\UKhome\Bulletins\China-FalunGong-2ndEd-2002Nov.htm](#))

Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press (RRT Library: 322.10951 CHA)

FINDINGS AND REASONS

On the basis of the applicant’s passport presented to the Tribunal at hearing, a certified copy of which is on file, the Tribunal finds that he is a citizen of the People’s Republic of China and assesses his claims against that country.

The primary applicant claims he fears persecution in China because of his belief in and practise of Falun Gong. He claims he began practising in Australia while looking after his son who was studying. He claims that after he returned to China a Decision on Bail Pending Trial with Restricted Liberty of Moving was issued against him because the authorities suspected him of being a Falun Gong practitioner. He claims a subpoena to present himself to the authorities was issued against him by the authorities after he left China. He claims he fears return because he will be persecuted.

The Tribunal has considerable doubts about some aspects of the applicant’s evidence. There were inconsistencies about who introduced him to Falun Gong in China and when this was. The Tribunal considers as doubtful that he would be able to exit China if the authorities had issued him with a Bail Pending Trial with Restricted Liberty of Moving and has considerable doubts as to whether either of the documents he submitted are genuine. The Tribunal has

doubts as to whether he was ever investigated by the authorities for being a Falun Gong practitioner.

Although his evidence as to who introduced him to Falun Gong and who taught him Falun Gong prior to moving in with his housemate, and when his relationship with the woman he met when she was distributing pamphlets began was confusing, the Tribunal accepts his explanation in the reply to the s.424A letter.

Notwithstanding, at hearing the applicant displayed a strong and thorough knowledge of Falun Gong and appeared to have a genuine commitment to it. In these circumstances while it appears that some of the applicant's evidence has been embellished the Tribunal is prepared to extend the benefit of the doubt to the applicant and accept that he is a Falun Gong practitioner and began practising in Australia. The Tribunal is satisfied he has attended study groups and a number of Falun Gong protests and public demonstrations. The applicant has submitted a number of photographs of his activities as well as received support from a number of other Falun Gong practitioners. The Tribunal finds the witnesses' evidence that he is a genuine practitioner particularly persuasive as both have been found to be refugees on the basis of their Falun Gong belief. According to Doctor Benjamin Penny, a specialist in Chinese History and Religion at the Division of Pacific and Asian History in the Research School of Pacific and Asian studies, ANU "if I really wanted to know if person x was a genuine practitioner I would ask one of my genuine ones to talk with person x. They would be able to tell in about thirty seconds." RRT, Falun Gong Seminar, Melbourne, Friday 14 July 2006.

On the basis of the Tribunal accepting his claim that he is a genuine Falun Gong practitioner, and on his evidence that he will continue to practise Falun Gong if returned to China, the Tribunal accepts that if the applicant returns to China now or in the reasonably foreseeable future he will wish to continue practising Falun Gong. Country information indicates that the Chinese Government's repression of Falun Gong continues unabated and it extends to rank and file followers of Falun Gong who are not prepared to renounce their beliefs (US State Department, *International Religious Freedom Report 2005* in relation to China, Section II. Status of Religious Freedom - Restrictions on Religious Freedom; Human Rights Watch, *Dangerous Meditation - China's Campaign Against Falun Gong*, February 2002, Chapter V, 'Falungong in Custody: Competing Accounts' - 'Re-education through Labor; Transformation Centers').

The Tribunal accepts that he is and was a Falun Gong practitioner and finds that if he were to return anywhere in China now or in the reasonably foreseeable future there is a real chance that his continued practise of Falun Gong would be detected and he would be detained and tortured for reasons of his beliefs. It finds the following even though he most likely managed to continue practising Falun Gong in private in China without being detected when he last returned.

The Tribunal considers that the persecution which the applicant fears clearly involves 'serious harm' as required by paragraph 91R(1)(b) of the Migration Act in that it involves a threat to his life or liberty or significant physical harassment or ill-treatment. The Tribunal considers that the applicant's religion (his belief in Falun Gong) is the essential and significant reason for the persecution which he fears, as required by paragraph 91R(1)(a). The Tribunal further considers that the persecution which the applicant fears involves systematic and discriminatory conduct, as required by paragraph 91R(1)(c), in that it is deliberate or

intentional and involves his selective harassment for a Convention reason, namely his religion.

The Tribunal finds that the applicant is outside his country of nationality, the People's Republic of China. For reasons given above, the Tribunal finds that he has a well-founded fear of being persecuted for reasons of his religion if he returns to that country now or in the reasonably foreseeable future. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail herself of the protection of the Government of the People's Republic of China.

There is nothing in the evidence before the Tribunal to suggest that the applicant has a legally enforceable right to enter and reside in any country other than his country of nationality, the People's Republic of China. Accordingly, the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act.

It follows that the Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the applicant satisfies the criterion set out in paragraph 36(2)(a) of the Migration Act for the grant of a protection visa.

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)(a) for a protection visa.

DECISION

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

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

Sealing Officer's I.D. prrt44