

060897314 [2006] RRTA 217 (27 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060897314

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Kira Raif

DATE DECISION SIGNED: 27 November 2006

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is 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 Multicultural Affairs to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of China (PRC), arrived in Australia and applied to the Department of Immigration and Multicultural Affairs 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) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204

CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

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

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

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

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

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

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

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

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

CLAIMS AND EVIDENCE

The documentary material before the Tribunal is contained in Tribunal case file 060897314 and the Departmental case file. 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.

Primary application

According to the Protection Visa application, the applicant is a male born in Shandong, China. He has completed twelve years of schooling in City X. He claims to have worked at a railway company for an extended period.

When making the application, the applicant made the following claims:

- At the age of 14 the applicant started to suffer from asthma. He tried various treatments including non-conventional treatments, with no obvious results. At school one of the applicant's classmates, Mr A, had the same illness and the two became friends. After graduation they almost lost contact.
- During the Chinese New Year of 2005 Mr A came to the applicant's home although they had not seen each other for almost 20 years. Mr A told the applicant that he cured his illness through the practise of Falun Gong. He practised it publicly until 1999 when it was banned by the government and subsequently he practised it privately. Mr A suggested to the applicant that he should also practise Falun Gong. He became an instructor for the applicant and taught him the exercises. He also told the applicant about the Zhuan Falun book.
- The applicant kept practising Falun Gong with the support of his family every night. By late 2005 his health improved.
- During the Chinese New Year the applicant went to Beijing to visit his friend, who gave him a copy of the Zhuan Falun book. The applicant read the book and became more familiar with Falun Gong.
- The applicant became a Falun Gong practitioner and Falun Dafa is his life belief.
- The Local neighbourhood committee became aware of the applicant's practise of Falun Gong. One of the Committee cadres was a relative of the applicant's wife and she informed the applicant that police suspected him of being a Falun Gong practitioner. He was advised to stop practising or risk being detained.
- The applicant did not want his illness to return so he continued to practise. In these circumstances his family persuaded him to come to Australia so that he would be able practise Falun Gong without fear.

The applicant included with his application a copy of a Chinese passport, issued sometime in 2001 and which expired sometime in 2006. He also provided a copy of his Chinese identity card issued to the applicant in 1999.

Application for review

When lodging the application for review, the applicant provided the Tribunal with a number of photographs depicting the applicant in various protests against the Chinese oppression of Falun Gong. He has also provided the Tribunal with a copy of his statement, setting out his claims, which was previously provided to the Department of Immigration at the time when the application for the visa was made. Another statement was provided to the Tribunal by the applicant requesting the Tribunal to reassess his claims. In it, the applicant restated the claims he put forward in his earlier statement. He states that:

- he could not provide evidence of being a Falun Gong practitioner because he was warned by his wife's relative, who was a member of the local Committee and a member of the CCP.
- he had been on the police watch list as a suspected Falun Gong believer. If he returns to China, he would continue to practise in private, for example at home. The police will watch him closely and sooner or later he would be detained and sent to a labour camp.
- he has continued to practice Falun Gong after coming to Australia and he has been actively involved in various Falun Gong activities organised by the NSW Falun Gong association. There are CCP spies and agents who collect information about the protesters
- the applicant would immediately return to China when there is a change in China's political situation and Falun Gong practitioners are no longer subject to persecution.

Hearing

The applicant appeared before the Tribunal to give evidence and present arguments. The applicant's evidence at the hearing is summarised below.

The applicant stated that when he came to Australia, he arranged the trip through an agent in Beijing. The tour guide took all the passports after the group went through Customs in Australia, and took them with her. The Tribunal asked the applicant when his most recent passport was issued, as his previous passport expired sometime in 2006. The applicant said that he lost his old passport, so he obtained a new one, which he used to enter Australia. The applicant said that he renewed his passport in early 2006. He stated that he had no problems when renewing the passport.

The applicant confirmed that the contents of the statements outlining his claims, which he provided with his application for the Protection visa and also to the Tribunal and all other information contained in his primary application and the application for review were true and correct and that he did not wish to change anything.

The applicant stated that he completed eleven years of high school and he had not done any formal studies since then. The applicant stated that he worked at a Railway company at City

X. He started working there in 1979 when his family returned from the rural area. The applicant started working for the company in 1979 and he worked there right until coming to Australia. He did not take leave when coming to Australia, so he is not sure what happened at his work place. In Australia the applicant finds jobs through the newspaper, for example such as a removalist or working on floorboards. He works three to four days a week. The applicant resided at an address in City X from the time he attended primary school until his coming to Australia. The applicant said that his parents, spouse, child and spouse's family reside in China. The applicant's spouse and child continue to reside at the same address in city X.

The Tribunal asked the applicant how he became involved with Falun Gong. The applicant said that on the third day of the Chinese New Year in 2005 his schoolmate suddenly came to his home. He was surprised because they had lost contact for almost 20 years. The friend's name is Mr A, he works in Beijing. He had asthma, the same problem as the applicant.

The Tribunal asked the applicant how Mr A knew where the applicant lived if there was no contact for 20 years. The applicant said that he knew where the applicant lived since primary school and they were in the same class in high school. On the third day of the Chinese New Year people visit each other. In 2005 Mr A came and they were talking. They both had asthma in school, they had problems breathing in winter and they were taking medication, which the applicant has even now. The applicant asked his schoolmate why he looked so well, the applicant was surprised how he fixed this problem. During the conversation he mentioned Falun Gong. He looked excited and also upset when he talked about learning Falun Gong. In 2005 practitioners had been persecuted, so he looked scared.

The Tribunal asked the applicant why his friend mentioned Falun Gong to the applicant if there was a chance of being persecuted. The applicant said that he pressed him with the questions. They were old school mates and had the same problem. The applicant said that he knew before that Falun Gong had many practitioners and in their area they saw Falun Gong practitioners being arrested by the police. The Tribunal asked the applicant if he had shown any interest in Falun Gong before Mr A came to his home. The applicant said that his interest in Falun Gong was because it could cure his asthma. He had no interest in Falun Gong before Mr A came.

The applicant said that Mr A looked scared and the applicant pressed and pressed. Mr A said that he should practice Falun Gong. The applicant said that it would also be beneficial for his problem, so he begged Mr A to teach him. Because Mr A was a school mate, he agreed to teach the applicant, but asked him not to tell anyone, not even his family. He came to the applicant's home at night. They learned one exercise per night. He drew a sketch on the paper about the movements.

The Tribunal asked the applicant where his family was at the time. The applicant said that they had a two bedroom place. The applicant and Mr A were in the living area while his family was in another room, sleeping. Mr A spent about one hour for each exercise, he taught the applicant for five nights. After that Mr A returned to Beijing to work as he was in City X on holidays.

The applicant said that he continued to practice at night at home after 10 o'clock. When winter came, it was obvious that he was not having as much problem breathing. The applicant said that his family knew about his practice of Falun Gong because they would protect him.

The applicant said that he practiced every night after work. His wife's relative works in the Neighbourhood committee. She came to the applicant in mid-May saying that the local police became aware and that he had better stop practising. The Tribunal asked the applicant why, if he was practising from early 2005, the police only became aware in mid 2006. The applicant said that there were people who do others in, he does not know how they found out. The relative of the applicant's wife told him that he should stop practising, or he would be arrested.

The Tribunal asked the applicant how his wife's relative knew about the police. The applicant said that she was the head of the neighbourhood committee and worked with the police. The Tribunal asked the applicant why, if the police were aware of his practice, he was not arrested. The applicant said that they did not know about him practising, they only suspected him. The Tribunal asked the applicant why there was a need to warn him if the police had no evidence against him other than their suspicions. The applicant said that the wife's relative works in a neighbourhood committee, so if he continued to practise they might arrest him. The applicant said that he was scared after he received the warning because if he was arrested, his family would be ruined. The applicant said that he did not dare to practice. He received a warning in mid-May and stopped practising in June.

After the applicant stopped, his breathing became not smooth. The applicant could not study or work. After discussing with his family, the applicant decided to come to Australia as Australia is a great country with human rights and freedom of belief. Through an agency which charged money, the applicant was able to come to Australia as a tourist.

The Tribunal asked the applicant if he had read the main book of Falun Gong. The applicant said that he did. In the Chinese New Year of 2006 the applicant travelled to Beijing to see his schoolmate with some City X products. They talked to each other secretly about Falun Gong as they did not dare to speak publicly. They said that the benefits of Falun Gong were quite good. They went for dinner and the friend gave the applicant the Zhuan Fa Lun book, which the applicant took back with him to City X. The applicant said that he had read the book. Mr A did not teach the applicant about the book as he did not have time. The book is now at the applicant's home in China. The Tribunal asked the applicant if he was concerned that the police might find the book if the police come to his home. The applicant said that he is really worried. The applicant said that he did not just leave it at home, but he hid it. One cannot take it or walk with it in the street, so the applicant had to hide it in a very discreet place underneath a cabinet.

The Tribunal asked the applicant if he has been practising since he came to Australia. The applicant said that when he first came, he did not practise because he did not find any fellow practitioners. Now he practises every Wednesday night at Suburb Y at Ms B's place. On Fridays a fellow practitioner drives him to Suburb Z. The Tribunal asked the applicant why he did not provide any statements from his fellow practitioners to indicate that he is practising in Australia. The applicant said that it did not occur to him because for him the exercise is only for the heart and mind, to get rid of stubbornness and bad ideas and desires.

The applicant said that he participates in all Falun activities. Last week the applicant went to City M with other fellow practitioners and the next day he was involved in a big march here. On Sunday there was a big Falun Dafa meeting at the City council, which the applicant also attended. The applicant said that he attends Falun Gong activities.

The Tribunal asked whether the applicant attended any Zhuan Fa Lun study groups. The applicant said that he does on Wednesday nights in Suburb Y at Ms B's home. The Tribunal asked the applicant if during these sessions he practises or studies the book. The applicant said that if he is free, he also does the exercises at night. The applicant said that he does the exercises every night and he also attends study groups. He goes to Ms B's home once a week and he also goes to Suburb Z every Friday. On these occasions the group study the Zhuan Fa Lun book and people talk about their experience.

The Tribunal asked the applicant to explain what Falun Gong means to him. The applicant said that to him Falun Gong means improving his health. It cultivates his heart and his health. According to the characteristics of the universe (kindness, truthfulness and forbearance), Falun Dafa is a good Fa, requiring people to tell the truth. The Tribunal asked the applicant to explain the concept of Falun. The applicant said that Falun Dafa is the characteristics of the universe – kindness, truthfulness and forbearance – there is a need to cultivate one's heart first and then do the exercises. If one does the exercises without cultivating the heart, there will be no improvement. The Tribunal asked the applicant to explain the concept of the Wheel. The applicant said that it has the characteristics of the Universe, which moves. The Master puts the Wheel in one's abdomen, so that it turns automatically, absorbing the energy of the universe. When turning clockwise, it provides salvation to oneself, absorbing the energy of the universe. Turning anti-clockwise it releases the energy and helps others and also self.

The Tribunal asked the applicant to talk about different levels and how these are achieved by practising Falun Gong. The applicant said that everyone has their own levels and Fa respectively. The applicant said that he does not know what level he is at, he is only doing the exercises.

The Tribunal asked the applicant to talk about the five exercises. The applicant stated that the first one is Buddha Extending a Thousand Hands. This requires a wide stretch, to unblock the passing of energy through the Universe. The applicant described the movements associated with the exercise. The second exercise is the Standing Stance of Falun. The verse of the second one is to move the energy and to melt the body and to cleanse the heart. The third exercise is Penetrating Two Cosmic Extremes. Its purpose is to make one still. The applicant said that he could read the character of this exercise but did not know how to write it. The fourth exercise was the Falun Circular Heaven. The Falun turns and the heart returns to the nature, to the truth. There is a feeling of light and rising. The fifth exercise is the Divine Power of Falun. The applicant explained the principles associated with that exercise. The first exercise is a standing exercise which comprises eight movements. The second exercise is a standing exercise with four movements. Only the fifth exercise is performed in a sitting position.

The Tribunal asked the applicant how he applies the main principles of Falun Gong in daily life. The applicant said that since he came to Australia, every moment of his life he acts according to the requirements of the Master in the book. He is tolerant, he is doing good deeds and no bad deeds, he is being kind to others. The applicant said that there were nine lectures in the Zhuan Fa Lun book. There were eight characteristics.

The Tribunal asked the applicant why he continued to stay at the same address for months until he came to Australia if he was worried about the police. The applicant said it was not long. The applicant said that he was scared because since 1992 until 1999 when there was a crackdown, he saw his neighbours practising but he did not know what function the practice

had. The applicant saw police coming at night to arrest a neighbour. Six months later when he came back, there was just bones and skin and had scars on his face and he was limping. The applicant did not dare to ask his neighbour what happened and the neighbour did not talk about it. The applicant said that he was scared.

The Tribunal pointed out that the applicant was practising from early 2005 until he left in mid-2006 and nothing happened to him and the police took no action to arrest him. The applicant said that the leaders of the neighbourhood committee, including his wife's relative, were suspicious that the applicant was a Falun Gong practitioner. He was asked to stop straight away.

The Tribunal asked the applicant if he would continue to practice if he returned to China. The applicant said that Falun Gong is a belief to him. If he returns to China, he would continue to practise and to tell the truth. The Tribunal noted that when he was warned by his wife's relative, he said that he stopped practising. The Tribunal asked the applicant why it would be different in the future. The applicant said that he stopped because he was scared at the time. After discussing it with his wife, he wanted to come to Australia. His family supported him because if he was arrested, the family would be ruined. The Tribunal again asked the applicant why he stopped practising before when he was scared, but he would continue to practise in the future if he returned to China. The applicant said that since he came to Australia, since he studied Falun, he realised that it is a good book, teaching people to be kind. It is not what the Communist party said about it being a cult. The benefit of the book is first to improve the health, the book asks one to be a good person, to be kind to others, to do no bad deeds.

The Tribunal asked the applicant how it could be certain that his involvement with Falun Gong in Australia was not for the purpose of his protection visa application. The applicant said that in China he stopped because the local police station suspected him and he was afraid of being arrested by the PSB. When he stopped, he used the time to organise his trip to Australia. The applicant said that before he made his application for the visa, he was photographed before the Australian embassy and that he had provided those photographs. His photograph is on the net in Sydney. The Tribunal again asked the applicant how it could be satisfied that the applicant was not engaging in these activities for the purpose of his application. The applicant said that he participated in these activities according to his heart and he has requested the government to protect him.

The applicant said that he did not participate in any Falun Gong activities in China and had not discussed Falun Gong with anyone other than Mr A. The Tribunal asked the applicant why the involvement in Falun Gong activities became important for him now and not before. The applicant said that he studied the Falun Gong book. It is a good book, it improves health and the heart. It teaches one to return to nature. The Tribunal pointed out that the applicant said that he also studied the book in China. The applicant said that there was a dark force in China, there were no human rights. One would not dare to talk and one could get oneself and family into a lot of trouble. There are no human rights in China and there is no freedom of belief. The applicant said that before he came to Australia, he went to Beijing. He got there on the 27th. He went to his schoolmate's home, but there was nobody there. He does not know what happened to his schoolmate.

The Tribunal asked the applicant how he was able to obtain his passport and the visa if he was of interest to the police. The applicant said that he changed the place, the police and customs were not related. Going to the Department of Entry and Departure and paying money would enable one to get the documents. The Tribunal referred the applicant to the

independent information that indicates that if he was of interest to the authorities, he would have difficulties obtaining the passport and the visa. The applicant said that where he lived, it belongs to the local police station, who were only just suspecting the applicant. The applicant obtained the passport before and when he went to the Department of Entry and Departure, his passport was renewed because he had it before. The applicant obtained the visa through the agency, which organised the tour. The applicant said that he did not have any problems when departing the country.

The Tribunal asked the applicant if he had contact details for Ms B. The applicant said that he did not have her contact details. The applicant said that he had not been in Australia long and he does not pay attention to these things. The Tribunal asked the applicant if he has details of any Falun Gong practitioner with whom he had practised in Australia. The applicant referred to Mr C, with whom the applicant practises at Ms B's place and who takes the applicant to Ms B's place. The applicant said that Mr C also participates in Falun Gong activities.

During the hearing the Tribunal telephoned Mr C and took oral evidence from him with the consent of the applicant. Mr C knows the applicant since about June. He said that the applicant started practising after he came to Australia, he does not know about whether the applicant practised in China. The witness said that he and the applicant usually practise in Suburb N or Suburb Z. He takes the applicant to practise every Friday. The witness stated that he had also gone to City M and City O with the applicant on the 16th and 17th of last month and also to a meeting at Suburb K. The witness stated that the applicant also practises every day at home and on Friday they attend the meetings. The Tribunal asked the witness if the applicant had ever discussed with the witness why he was practising. Mr C stated that he did and it was because of his asthma.

The applicant stated that he is scared if he returns to China. The applicant said that he was involved in activities in Australia, his picture is on the internet, he is part of it. It is impossible that the Chinese authorities would not know about him at all. The applicant said that he had not thought about his family if he were to be granted protection in Australia. When he talks to his family, they ask him to keep healthy but they do not dare to talk about anything else.

Evidence from other sources

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. 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.¹

The movement was branded a "threat to social and political stability" and was banned on 22 July 1999. From July 1999 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

¹ 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

China's public institutions, highlighting the alleged dangers of Falun Gong and attempting to justify the crackdown. 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.”²

A 2005 DFAT report confirms that this advice is still valid.³ 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.⁴

With respect to exit procedures operating in China, the available sources indicate that freedom to travel overseas is generally the case, although passports are difficult to obtain for certain classes of dissident. More recently, following the defection in May 2005 of a political affairs counsellor at the Chinese Consulate in Sydney and his applying for asylum in Australia, the media reported that China's rules for issuing and renewing passports was becoming more stringent.

The sources also indicate that the Chinese government maintains lists of people wanted by the authorities for whom arrest warrants have been issued. These lists are usually called “wanted lists” or “most wanted lists”.⁵

² DFAT, 2002, Country Information Report No 136/02, Falun Gong Practitioners, 20 June – CISNET China CX64757)

³ DFAT 2005, *Country Information Report No. 05/34: China: Update on Falun Gong*, 30 June – CISNET China CX125116. See also 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; DFAT, 2002, *Country Information Report No 136/02, Falun Gong Practitioners*, 20 June – CISNET China CX64757; DFAT 2005, *Country Information Report No. 05/34: China: Update on Falun Gong*, 30 June.

⁴ US Department of State 2005, *International Religious Freedom Report 2005: China (includes Tibet, Hong Kong, and Macau)*, 8 November; UK Home Office, 2002, *Revolution of the Wheel – the Falun Gong in China and in Exile*, April; Chang, Maria Hsia 2004, *Falun Gong: The End of Days*, New Haven, Conn., Yale University Press, p.24-31.

⁵ Human Rights Watch 1995, *China: Enforced Exile Of Dissidents: Government "Re-entry Blacklist" Revealed*, Vol. 7, No. 1, 6 January, p.3
<http://www.hrw.org/reports/1995/China.htm>; ‘Second List of Banned Dissidents Found’ 1995, *Eastern Express* (Hong Kong), 6 January; Shea, Nina 2002, ‘China's crackdown on Christians’, *China Brief*, Volume 2, Issue 2, 17 January; ‘Illegal Use of Residents' ID Cards Analysed’ 1994, *Zhongguo Xiangzhen Qiye Bao* (Beijing), 27 August

FINDINGS AND REASONS

The applicant travelled to Australia on a Chinese passport and claims to be a national of China. The applicant provided the Department of Immigration with a copy of his old passport indicating that the applicant is a citizen of China. The Tribunal accepts that the applicant is a national of China and has assessed his claims against P.R. China as his country of nationality.

The Tribunal is concerned about some aspects of the applicant's evidence. The applicant stated that he came to the attention of the authorities because of his practice of Falun Gong, however there is no evidence that the authorities took any action against the applicant. This is despite the fact that the applicant continued to reside at his home and to work at the same place of work for several weeks after he was warned by the relative of his spouse. The applicant could not explain to the satisfaction of the Tribunal how his practice of Falun Gong came to the attention of the authorities or how he was able to renew his passport, obtain the Australian visa and depart the country without any adverse action from the authority. For these reasons, the Tribunal cannot be satisfied that the applicant came to the attention of the authorities because of his practice of Falun Gong.

Despite these concerns, the Tribunal accepts that the applicant is a genuine Falun Gong practitioner. The applicant provided detailed evidence about Falun Gong exercises and its philosophy and was able to demonstrate his knowledge of these subjects. The applicant presented evidence in a credible and forthright manner. The Tribunal accepts that the applicant may have practiced Falun Gong in China privately and that he continues to practice in Australia. In reaching this decision, the Tribunal has had regard to the oral evidence of the witness given in the course of the hearing and also to the photographs of the applicant participating in Falun Gong activities, which he provided to the Tribunal.

The Tribunal questioned the motivation of the applicant in engaging in the practice of Falun Gong in Australia. The Tribunal accepts the applicant's evidence that he did not participate in any activities in China and did not discuss Falun Gong with anyone because he was fearful for his safety. The Tribunal accepts the applicant's evidence that the applicant has engaged in Falun Gong activities in Australia because he considers these to be intrinsic to his beliefs. The Tribunal is satisfied, for the purpose of s 91R(3) of the Act, that the applicant's conduct in practicing Falun Gong and participating in Falun Gong activities in Australia has been engaged in for a purpose other than the purpose of strengthening his claim to be a refugee.

The Tribunal accepts that, if he were to return to China now or in the reasonably foreseeable future, the applicant will wish to continue to practise Falun Gong. The Tribunal has had regard to independent country information, referred to above, concerning the treatment of Falun Gong practitioners in China. The Tribunal accepts that practitioners of Falun Gong are subjected to persecution and repression by the Chinese government and that this applies to practitioners as well as to the leaders of Falun Gong. The Tribunal accepts that the applicant may be imprisoned, tortured or be required to undertake re-education in a re-education camp. The Tribunal finds that the persecution that the applicant fears involves 'serious harm' within the meaning of s 91R(1)(b) of the Act and that the applicant's religion or membership of a particular social group (Falun Gong) is an essential and significant reason for the persecution which he fears. The Tribunal also finds that the persecution which the applicant fears involves systematic and discriminatory conduct in that it is deliberate or intentional and involves selective harassment for a convention reason (religion or membership of a particular social group).

The Tribunal finds that the applicant is outside his country of nationality. For the reasons stated above, the Tribunal finds that the applicant has a well-founded fear of being persecuted for reasons of his religion if he returns to his country of nationality. The Tribunal finds that the applicant is unwilling, owing to his fear of persecution, to avail himself of the protection of the government of the People's Republic of China. Nothing in the evidence before the Tribunal suggests that the applicant has a legally enforceable right to enter and reside in any country other than China. The Tribunal finds that the applicant is not excluded from Australia's protection by s 36(3) of the Act.

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. The applicant satisfies the criterion set out in s 36(2) of the Act for the grant of the protection visa.

CONCLUSION

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. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

<p>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 <i>Migration Act</i> 1958.</p> <p>Sealing Officers ID: PRRTIR</p>
