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## Refugee Review Tribunal of Australia

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↔1213772 ↔[2012] RRTA 1081 (11 December 2012)

Last Updated: 12 February 2013

↔1213772 ↔[2012] RRTA 1081 (11 December 2012)

### DECISION RECORD

RRT CASE NUMBER: ↔1213772 ↔

DIAC REFERENCE(S): CLF2012/74414

COUNTRY OF REFERENCE: China (PRC)

TRIBUNAL MEMBER: Irene O'Connell

DATE: 11 December 2012

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC) applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2012.

The delegate refused to grant the visa [in] August 2012, and the applicant applied to the Tribunal for review of that decision.

## RELEVANT LAW

3. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

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

5. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

6. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

7. 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.

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

9. 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.

10. 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.

11. 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.

12. 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 being persecuted 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.

13. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

14. Whether an applicant is a person in respect of 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.

## Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## CLAIMS AND EVIDENCE

18. The Tribunal has before it the Department's file relating to the applicant and the application for review. The applicant provided the following relevant information in his application. He stated that he is a [age deleted: s.431(2)] year old single male from Fuqing, Fujian Province. He lists his ethnic group as Han Chinese and does not nominate a religion. He was issued with a student visa [in] June 2007 and arrived in Australia [in] June 2007.

19. In a statement of claims the applicant states that whilst he has been in Australia his parents shop was confiscated by the local authorities and that when his father attempted to resist this his father was arrested, and detained for two weeks and fined. His father sustained injuries and required hospitalization when he clashed with the police. His father unsuccessfully attempted to petition the authorities as he believes the businessman who is acquiring the family property has connections with the local government. The applicant claims that should he return to China he will be questioned and persecuted by the local government.

20. The applicant did not make any written submissions to the Tribunal however he gave oral evidence to the Tribunal at a hearing [in] December 2012 with the assistance of an interpreter.

21. The applicant provided his passport to the Tribunal. His passport was issued [in] March 2007, the applicant stated that this was his first and only passport. He stated that he was granted a student visa [in] June 2007 and



arrived in Australia to study. He stated that he completed Year 11 at [education provider deleted: s.431(2)] in 2008. The applicant stated that thereafter he remained in Australia on a bridging visa.

22. In regards to his family the applicant stated he has one sister. He stated that she could not continue studying after the incident in China and that she moved to Shanxi Province where she currently works in a restaurant and has done so for the past two years and 10 months. The applicant stated that he maintains contact with his sister.

23. In regards to his parents the applicant stated that after the incident they took up farming. He stated that his father is [age deleted: s.431(2)] years of age and his mother is [age deleted: s.431(2)] years of age so they are getting too old for farming. He stated that his parents own the land they are farming.

24. The applicant stated that he maintains contact with his parents and that they continue to be harassed. When asked if he could elaborate on this the applicant stated that after their property was taken they continued to appeal and because they continue to appeal they will also continue to be harassed. The applicant stated that his parents have appealed some six or seven times since the incident but each time that they attempt to lodge an appeal they are simply disregarded.

25. I asked the applicant why he had applied for a protection visa. The applicant stated that he applied because he wishes to bring his parents to Australia so that they can avoid any future harassment. He stated that appealing to the Chinese authorities does not solve any problems for his parents and that the only solution was for them to come to Australia. I pointed out to the applicant that Australia's protection obligations do not extend to his parents. The applicant stated that he also was concerned that he would be harassed if he was to return. I asked him in what way he thought he would be harassed. He stated going back to China would be difficult for him that he would need to go and live with his family and he believed he would face harassment because of this.

26. I indicated to the applicant that his sister has resided in China unharmed and has not been subject to any harassment and therefore it was difficult to see why he would be subject to any harm or harassment. I also indicated to the applicant that I was not satisfied that even if I did accept his claims that the applicant faced harm on return as he had not indicated any events post the initial incidents which would indicate that he would be subject to any harm on his return to China.

## FINDINGS AND REASONS

27. On the basis of the applicant's passport present at the hearing I accept that the applicant is a national of China and find that the applicant does not have a right to enter and reside in a third country. In respect to complementary protection I find the country of reference to be China.

28. I am not satisfied that the applicant is in genuine fear of persecution or that there is a real chance of persecution on his return to China. My reasons for this finding are as follows.

29. The applicant claims to fear harm as a result of his parents encounter with a local official over the confiscation of their property. The applicant's evidence about his parents' experiences was unpersuasive and lacking in detail

such that I do not accept that the applicant's parents have had difficulties with the local authorities as he so claims. Nor do I accept that the applicant faces harm on return by reason of any experiences of his parents. As discussed with the applicant at the hearing the applicant was unable to provide any insight as to why he would face harm given that his sister is currently residing in China had not experienced any threats of harm or actual harm by reason of their parents' claimed experiences.

30. The applicant has not made any other claims for protection. In these circumstances I do not accept that the applicant has a well-founded fear of persecution for a Convention reason on his return to China now or in the reasonably foreseeable future. Nor do I accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to a receiving country that there would be a real risk of the claimant suffering significant harm.

## CONCLUSIONS

31. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

32. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

33. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

## DECISION

34. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.



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# Refugee Review Tribunal of Australia

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←**1216897** → **[2013] RRTA 332 (30 April 2013)**

Last Updated: 18 June 2013

←**1216897** → **[2013] RRTA 332 (30 April 2013)**

## DECISION RECORD

**RRT CASE NUMBER:** ←**1216897** →

**DIAC REFERENCE(S):** CLF2012/180532

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

**TRIBUNAL MEMBER:** Frances Simmons

**DATE:** 30 April 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC) applied to the Department of Immigration for the visa [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] August 2012 and the delegate refused to grant the visa [in] October 2012.

3. The applicant appeared before the Tribunal [in] April 2013 to give evidence and present arguments. 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 her registered migration agent.

## CONSIDERATION OF CLAIMS AND EVIDENCE

4. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

6. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

7. The issue in this case is whether the applicant has a well-founded fear of persecution for one or more of the five Convention reasons if she is returned to China and, if not, there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to China, there is a real risk she will suffer significant harm.

## CLAIMS AND EVIDENCE

8. According to her protection visa application, the applicant is a Chinese national who was born in [year deleted: s.431(2)] and arrived in Australia as a student in September 2011. At the time she arrived in Australia she was married to a Chinese national but her husband was unfaithful and sought a divorce, which she has said was officially granted in [2012]. Shortly after the applicant divorced, she claims she fell in love with a married Australian man and in July 2012 they began living together. In August 2012 she lodged a protection visa application claiming that if she was returned to China her parents would not allow her to keep in touch with her boyfriend and that this harmed her feelings (Department file, folio 37). In a written statement, the applicant expands upon how she met [Mr A] and why she believes they are destined to be together (Departmental file, folio 42-43). She also said her

parents disagree whole-heartedly with her relationship with her Australia boyfriend who is now seeking a divorce.

9. The applicant provided a certified copy of the biodata page of her passport and various identity documents for herself and her boyfriend, a rental tenancy agreement showing she and her boyfriend signed a lease for a property in July 2012, a letter from her boyfriend's solicitor indicating requesting he pay a filing fee for a divorce application and provide his original marriage certificate, and various photos of the applicant with her boyfriend.

10. The applicant supplied a copy of the decision of the delegate with her application for review. The delegate found the applicant has not claimed persecution in relation to Convention reason but had applied for protection because she did not want to be separated from her boyfriend in Australia. The delegate notes that the applicant did not 'claim fear of persecution or physical harm', but rather stated that, if she returns to China, she will be put under pressure by her parents to separate from her boyfriend and prevented from returning to China.

11. The delegate found the applicant did not have a well-founded fear of persecution for convention reason and the evidence she provided did not suggest she would face significant harm under the complementary protection criteria. The delegate's decision record notes:

At the end of the interview the applicant asked if her application assessment could be prolonged as to give her [an] opportunity to wait until her boyfriend divorces his wife. She reiterated that she fears to be separated from her boyfriend and stated that if she marries her boyfriend before returning to China, then no-one will be able to bring them apart (Tribunal file, folio 8).

12. In response to an invitation to attend a hearing [in] April 2013, the Tribunal received a fax [in] March 2013 requesting the hearing be postponed because the applicant's agent was having a medical operation [in] April 2013 and was then travelling to Taiwan for business [in] March 2013. However, as neither the email exchange between the advisor and her doctor for day surgery or her airline ticket booking indicated the advisor was unavailable [in] April 2013, the Tribunal decided not to postpone the hearing and the applicant was advised of this decision in writing. The response to the Hearing invitation indicated the applicant and her advisor would be attending the hearing [in] April 2013 and requesting the Tribunal take evidence from the applicant's boyfriend, [Mr A].

13. [In] April 2013, the advisor contacted the Tribunal and informed the Tribunal that the applicant was unwell and unable to attend the hearing [the next day in] April 2013. After requesting medical evidence, the Tribunal was faxed a medical certificate indicating that that applicant was 'unfit for work' until [a date in] April 2013. The Tribunal informed the applicant that the request for postponement was refused and the applicant was advised the Tribunal would assess her ability to give evidence at the hearing [in] April 2013.

14. The applicant, her boyfriend, and her advisor attended the hearing [in] April 2013. The applicant confirmed her advisor had explained to her the definition of a refugee but indicated she did not understand the complementary protection criteria. The Tribunal explained the complementary protection criteria.

15. The applicant was asked how she was feeling, and she indicated – using hand gestures - her throat was sore and she could not speak. The Tribunal was presented with a copy of a pharmaceutical receipt for a prescription cough syrup. The applicant's boyfriend said her glands were sore. The applicant indicated she was willing to have the Tribunal contact her doctor and seek his opinion about her fitness to participate in the hearing. She said she didn't feel like she could participate in the hearing because she couldn't really talk much.

16. I said I would explain what I considered to be the issues in her application and then I would ask her whether she felt she could address those issues today or whether she would like to come back and address these issues on another day. I informed the applicant that I had read her statement about how she met her boyfriend (Departmental file, folio 42-43). I said that the issue for the Tribunal was not whether she was in love with her boyfriend, but whether Australia owed protection obligations to her. I commented that her written statement did not indicate that she would face harm for a Refugee convention reason if she returned to China. I asked the applicant whether she felt she would face serious harm or significant harm if she returned to China. She indicated she would face harm from her family.

17. I then adjourned the proceedings to another date so the applicant could present evidence in support of her claims that she would face harm if she was returned to China. I invited the applicant to provide a written statement before the hearing resumed in which she set out what harm she believed she would face if she were to be returned to China and how that harm met the refugee criteria or the complementary protection criteria.

18. The Tribunal invited the applicant to a resumed hearing [later in] April 2013. The response indicated that the applicant and her advisor would attend the resumed hearing. It did not refer to the applicant's boyfriend. The Tribunal also received a written statement dated [in] April 2013, in which applicant claimed:

...my parents are very traditional Chinese. They would not allow me to marry an Australian. What makes it worse, [Mr A] has [children]. If I return to China now, they will try their best to prevent me from contacting [Mr A]. They will arrange me to meet other men, and try to marry me to a Chinese man. To me, this is more painful than killing me. The mental suffering is beyond imagination for a couple, who are desperately in love but can never meet again in life. I just experienced a marriage failure last year. It was [Mr A]'s care that reignited my passion for my life and my longing for love. Without him, my life becomes meaningless. This mental persecution is unbearable to anyone.

19. When the hearing resumed [in] April 2013 the applicant said she was feeling better. She confirmed she understood the refugee and complementary protection criteria.

20. The applicant gave evidence that before she left China she was living with her ex-husband. She lived with him for four years. Before that she lived with her parents. She contacted her parents quite often in China and now she speaks to her parents about once a month. She speaks to her mother and her father. She said their relationship was good. She said she normally talked to her mother over the phone because her father doesn't have a good temper. She was introduced to her former husband by her friends. At first she was happy with him but after she travelled to Australia she discovered he was having an

affair and they divorced. In China she worked in sales for [company deleted: s.431(2)].

21. The applicant gave evidence she had planned to return to China but she fell in love with an Australian man and decided to live with him. She indicated her boyfriend has sought a divorce but he is having an argument about property with his ex-wife. She said she is afraid if she returns to China she will face harm because she loves her boyfriend and she believes her parents won't let her contact him. She was asked whether they would harm her any other way. She said they wouldn't let her call her boyfriend and would introduce her to other men and ask her to marry someone else.

22. I put to the applicant and she was a grown woman and she had lived away from her parents. She was asked why her parents would be able to control what she did. The applicant said because she was divorced she had to leave her parents' home. She said in China that's the way. She was asked if she feared any other harm. She said she no.

23. The applicant claimed she would face psychological persecution. She was asked how the harm was linked to a Convention ground. She said she had read the requirements and she believed psychological persecution was a kind of persecution. The applicant asked for a little more time so [Mr A] could settle his divorce. Then they could marry and no one could separate them.

24. I commented that the decision record of delegate notes that the applicant told the delegate while her parents disapprove of her relationship she believes that they might accept her boyfriend after they finally marry. She said her boyfriend is in divorce proceedings and once they marry and they return to China her parents will be have to accept it.

25. I commented that decision record of the delegate indicates that she wanted her protection visa application to be prolonged so she could wait until her boyfriend was divorced (and she made similar representations to the Tribunal). I commented that this may indicate to the Tribunal that she applied for protection, not because she had a genuine fear of persecution in China or that she believed she would be at real risk of significant harm from her parents if she returned to China but because she wanted to find a way to stay in Australia while her boyfriend got divorced.

26. The applicant said in her first statement that she lived with her boyfriend and her parents disagreed. Her mother believed she could find another man. She lodged the application because she was afraid she would be forced to marry another man if she returned to China and that was really persecution. I commented that I did not think she had mentioned that before her statement [in] April 2013. The applicant said when she submitted the first statement in August her parents just knew they lived together and didn't show their strong objection. She said in the intervening period her parents got to know [Mr A] had [children] so they objected quite strongly. She said she really loved her boyfriend and she did not marry anyone else.

27. I put to the applicant that she had not raised her concerns about being forced to marry before [a date in] April 2013, she described her relationship with her parents as good, she had not been subjected to a forced marriage in the past, and that on the evidence before me I may doubt that she would face harm that is sufficiently serious to amount to persecution if she returns to China because of her parents' objections to her relationship with an Australian

man or their desire she marry someone else. I said I may doubt her claims that her parents would force her to marry someone else.

28. I put to the applicant that any mental suffering she would face or any disapproval expressed by her parents about her choice of partner would not seem to be sufficiently serious to constitute persecution and nor did it appear to be harm that was feared for a convention reason. The applicant said psychological persecution was a form of harm. She said she couldn't work were she was working before she left China because she had divorced from her husband and that she would have to go and live with her parents.

29. I put to the applicant that she did not appear to fear persecution for one or more of the five convention reasons. She indicated she did not have anything further to say.

30. I explained the definition of significant harm for the purpose of complementary protection criteria to the applicant. I explained to the applicant, the legal definition of cruel, inhuman treatment and punishment and degrading treatment and punishment indicates that these types of harm must be intentionally inflicted: s5(1) of the Act. I put to the applicant at the hearing being separated from boyfriend would cause harm that was intentionally inflicted upon her or that the harm she feared would be sufficiently serious to amount to significant harm. In response the applicant reiterated she believes that if she can't see her boyfriend in the future and she lives with her parents she will face huge pressure. This pressure, which will come from her family, society and herself will drive her crazy.

31. I commented that the applicant had previously indicated that she wanted her Australian boyfriend, [Mr A], to give evidence in her case. I said the issue for the Tribunal was not whether they were loving relationship but whether she met the criteria for protection as a refugee or under complementary protection. I noted the applicant's boyfriend was not present at the hearing [in] April 2013 and asked whether there was any evidence she wanted him to provide, that she could not provide herself.

32. The applicant said yes. She was asked what evidence this was about. She said her boyfriend wanted to come to the Tribunal today but it was school holidays and he hopes that the Tribunal could wait for him to marry and then they could go back to China together. I commented that it seemed unnecessary for me to talk to her boyfriend as she had given me that information. The applicant nodded and said ok.

33. After an adjournment in which the applicant spoke with her advisor, she said she wanted more time to discuss with her boyfriend what evidence he could give the Tribunal because her evidence did not represent her boyfriend's evidence. The applicant said her boyfriend wanted to be here today because he wanted to give evidence but she was not sure what sort of evidence he wanted to give. She said if he has any other evidence then she would contact her agent. The advisor asked if the boyfriend could submit a statement because he wanted to come to the hearing but he had [kids] to look after so he couldn't attend the hearing.

34. I said to the applicant I had discussed the issue of her boyfriend giving evidence with her earlier in the hearing. I said it was unclear, based on her evidence today, what evidence her boyfriend would be able to provide that would assist her case. I reiterated that the issue was whether she would face harm if she was returned to China, not whether she was in a relationship with



her boyfriend. I said in that context I was not minded to provide further time for her to provide evidence or submissions from boyfriend. I asked the applicant for her comments. She said it was her wish.

## FINDINGS AND REASONS

35. The applicant presented the Tribunal with a passport issued by the People's Republic of China bearing her name and likeness. On the basis of the evidence before me, I find the applicant is a citizen of the PRC and I have assessed her claims for protection against PRC as her country of nationality.

36. The applicant has claimed she will face harm if she returns to China from her parents, who disapprove of her relationship with an Australian man, and because of the 'mental suffering' she will endure as a result of being separated from her Australia boyfriend. The applicant is [age deleted: s.431(2)] and she has said she worked and lived away from her parents since she married her first husband in [year deleted: s.431(2)]. To the extent that the applicant has articulated her concerns that her parents will harm her, she has said her feelings will be harmed by the fact her parents disapprove of her relationship and her parents will try and stop her contacting her boyfriend if she returns to China. In a statement dated April 2013 she also claimed her parents would make her marry another man, a claim she reiterated at the hearing [in] April 2013.

37. On the evidence before me and in the absence of any evidence to the contrary, I am prepared to accept that the applicant is in a relationship with an Australian man and that she wishes to remain in Australia with him. However, based on my assessment of the applicant's evidence, I find that there is no real chance she will face serious harm if she is returned to China because of her parents' objections to her relationship with an Australian man, their desire that she marry another man, the 'mental suffering' she will experience if she is separated from her boyfriend, or for any other reason.

38. I do not accept that the applicant genuinely fears her parents will harm her because she has entered in a relationship with an Australian man, or because they have recently discovered he has children, or because they will force her to marry, or for any other reason. As I put to the applicant, she had not raised the prospect that her parents would make her marry another man before [a date in] April 2013, she has not previously been subjected to forced marriage, and she has been living independently from her parents since [year deleted: s.431(2)] and therefore I doubt her parents would make her marry another man. When asked why she only raised the claims she would be forced to marry [in] April 2013, the applicant indicated her parents did not strongly object at the time she lodged her protection visa application but their objections were now stronger because they discovered her boyfriend had children.

39. The applicant's written statement of claims to the department lacks detail about how and why she believes her parents will harm her and I do not consider this deficiency was remedied by the applicant's evidence to the Tribunal. I also consider the applicant's evidence that she is still in contact with her parents (on a monthly basis), the fact that she indicated she believes her parents will accept her boyfriend once they finally marry, and late introduction of her claim that her parents will make her marry another man,

casts doubt on her claims that her parents will seriously harm her upon return to China.

40. On the evidence before me, I do not accept that the applicant's parents will force her to marry another man, or that they will otherwise harm the applicant (including by restricting her freedom of movement or prohibiting her from contacting her boyfriend) if she returns to China. Having regard to all of the evidence before me, I do not accept that the applicant fears any harm from her parents and I find she has applied for protection in Australia in an attempt to remain in the country with her boyfriend.

41. While I am prepared to accept for the purpose of this decision that that the applicant is distressed by the prospect of being separated from her Australian boyfriend, on the evidence before me, I do not accept that the mental suffering that she says she will endure if she is separated from her boyfriend is sufficiently serious to amount to persecution for the purpose of the Convention.

42. On the evidence before me, I do not accept the harm the applicant claims she fears she would experience if she were to return to China would be essentially or significantly due to one or more of the Convention grounds as required by s.91R(1)(a) or amount to serious harm as required by s. 91(R)(b) or involve systematic and discriminatory conduct as required by s.91R(1)(c). The applicant's fears therefore do not relate to persecution as defined in the Convention and the Act. I therefore am not satisfied that she has a well-founded fear of Convention-related persecution, now or in the reasonably foreseeable future, if she returns to China.

43. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), I have considered the alternative criterion in s.36(2)(aa).

44. 'Significant harm' for these purpose of the complementary protection criteria is exhaustively defined in s.36(2A): s.5(1). As I explained to the applicant at the hearing, a person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment.

45. The definition of cruel or inhuman treatment or punishment requires the relevant act or omission to be 'intentionally inflicted on a person' while the definition of degrading treatment or punishment requires that the relevant act or omission to cause and be intended to cause extreme humiliation which is unreasonable: s 5(1) of the Act.

46. Because I do not accept that the applicants' parents will force her to marry another man, or otherwise harm the applicant (including by restricting her freedom of movement or preventing her from contacting her Australian boyfriend), I do not accept that there is a real risk that she will face significant harm for any reasons relating to her parents' claimed disapproval of her relationship with an Australian man.

47. While I accept that the applicant is distressed at the prospect being separated from her boyfriend, I do not accept that the harm she fears is of sufficient gravity to amount to significant harm for the purposes of the complementary protection criteria and nor do I consider the 'mental suffering' the applicant claims she will experience as a result of being separated her boyfriend would be intentionally inflicted upon her or intended to cause her extreme humiliation that is unreasonable.

48. Although the applicant did not specifically identify the act or omission that was said to intentionally inflict 'mental suffering' upon her, I note that in *SZRSN v MIAC* [2013] FMCA 78 Driver FM confirmed that the act of removal resulting in 'forced separation' (in this case from children residing in Australia from their parents) does not meet the definitions of "significant harm" and, particularly, degrading treatment or punishment [60]-[65].

49. In any event, on the evidence before me, I am not satisfied that any 'mental suffering' claims the applicant would experience if she were returned to China as a result of being separated from her boyfriend as a result of being removed from Australia and/or because of any pressure she claims would be placed upon her by her parents or for any other reason would amount to 'significant harm' as it is defined in s 36(2A) and s 5(1) of the Act.

## CONCLUSION

50. On the evidence before me, I am not satisfied that the applicant meets either the refugee criterion in s. 36(2)(a) or the complementary protection criterion in s. 36(2)(aa). There is no suggestion on the evidence before me that she satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, she does not satisfy the criterion in s.36(2).

51. In assessing the applicant's claims for protection, I considered her request to take evidence from her Australian boyfriend. After initially agreeing with the Tribunal's view that it was unnecessary to take evidence from her boyfriend, after an adjournment the applicant reiterated her request that the Tribunal take evidence from her boyfriend but was unable to indicate what evidence her boyfriend would provide. When I commented it was unclear how his evidence would assist her case, she said it was her wish that he provide evidence. I did not provide further time to provide evidence from the applicant's boyfriend, because I do not accept that such evidence would have assisted the applicant's case.

## DECISION

52. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.



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# Refugee Review Tribunal of Australia

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**RRTA 563**

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←1305188 → **[2013] RRTA 563 (22 August 2013)**

Last Updated: 5 September 2013

←1305188 → [\[2013\] RRTA 563 \(22 August 2013\)](#)

## DECISION RECORD

**RRT CASE NUMBER:** ←1305188 →

**DIAC REFERENCE(S):** CLF2012/223606

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

**TRIBUNAL MEMBER:** Angela Cranston

**DATE:** 22 August 2013

**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.

**Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant**

## STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection

(Class XA) visa under s.65 of the *Migration Act 1958* (the Act). A copy of the law is at attachment 1.

2. The applicant who claims to be stateless because her parents were refugees in Australia, applied to the Department of Immigration for the visa on 7 November 2012 and the delegate refused to grant the visa on 12 March 2013. Her parents had previously arrived in Australia [in] February 2010 and applied for a protection visa on 30 March 2010. The delegate decided to refuse to grant them visas on 26 July 2010 and the Tribunal affirmed that decision on 8 October 2010. A copy of the claims and evidence is at attachment 2.

## CONSIDERATION OF CLAIMS AND EVIDENCE

3. The issues in this case are whether the applicant has a well founded fear of being persecuted in China for one or more of the five reasons set out in the Refugee Convention and, if not, whether there are substantial grounds for believing that as a necessary and foreseeable consequence of her being removed from Australia to China, there is a real risk that she will suffer significant harm.

4. The applicant's mother has stated that she and her husband are from Shenzhen, China and that the applicant cannot return to China because she is Stateless, is the child of a Falun Gong practitioner and will therefore be subjected to persecution. In addition, she has stated if she returns, she will not be registered.

5. For the following reasons, the Tribunal has concluded that the decision under review should be remitted.

6. The Tribunal does not accept that the applicant is stateless. That is because nationality in China is governed by the *Nationality Law of the People's Republic of China 1980* and Article 5 states that any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national can acquire Chinese nationality at birth even if only one of their parents is Chinese. Accordingly, the Tribunal finds that in the absence of any other evidence, the applicant is a Chinese national and her claims will be assessed against China.

7. The applicant's mother has also argued that the applicant will suffer because the applicant's mother is a Falun Gong practitioner, however the former Tribunal who assessed the applicant's mother's claims was not satisfied that she was a Falun Gong practitioner in China or that she was targeted by the PRC authorities or that the applicant's mother had undertaken Falun Gong in Australia because she was genuine.

8. The Tribunal finds that it does not accept that the applicant's mother was a Falun Gong practitioner in China. That is because the Tribunal finds she provided inconsistent evidence in relation to when she distributed pamphlets, she and her husband provided inconsistent evidence in relation to when they saw each other after she was detained, and her husband stated that he commenced arrangements for her to leave the country two weeks after she was released from detention [in a certain month in] 2010 which is inconsistent with the Department's record of her application for a tourist visa [in the same month] which was less than a week after she allegedly was [released]. In reaching this conclusion, the Tribunal also considers the applicant's mother failed to provide a convincing explanation as to why she was allowed to leave

China even though she was allegedly a convicted person undergoing rehabilitation through labor. The Tribunal also finds she did not disclose to the Tribunal that she had only recently unsuccessfully applied for a 457 visa to come to Australia. The Tribunal is also not convinced that she told the truth in relation to her employment when she applied for the tourist visa.

9. Be that as it may, the Tribunal accepts that a number of years have passed since the applicant's mother arrived in Australia, and during that time, the Tribunal accepts she has participated in Falun Gong events, including Falun Gong practice and protest. In reaching this conclusion, the Tribunal has been persuaded by the evidence of [Mr A] both at the Tribunal hearing on 8 October 2010 and in his statutory declaration dated 26 July 2013. The Tribunal accepts that [Mr A] is a reputable Falun Gong practitioner who has previously appeared before the Tribunal. Indeed, given the statutory declaration of [Mr A] on 26 July 2013, the Tribunal accepts that even after the former Tribunal made its decision, the applicant's mother continued her practice. Accordingly, the Tribunal is prepared to give the applicant's mother the benefit of the doubt and accepts she is now a genuine Falun Gong practitioner who has engaged in genuine Falun Gong practice and activity. Given that, the Tribunal must determine what impact if any, those activities in Australia have on the applicant.

10. The Tribunal accepts the DFAT advice that it is likely that activists who have participated in protest activities against the Chinese government, including members of Falun Gong, will be monitored and questioned or detained on their return to China. Accordingly, given the applicant's mother's activities in Australia, the Tribunal accepts that it is likely she is known to the Chinese government as a Falun Gong practitioner or is perceived to be one. The Tribunal is of the view that the current information regarding circumstances in China for family members of known Falun Gong practitioners indicates that they remain of interest to authorities. Whilst the Tribunal does not think that the applicant herself would be detained, if her parents are or if she is denied a residence, she would become parentless or homeless. The Tribunal believes that there is a real chance that these serious harms could flow to the applicant should she return to China. The Tribunal is satisfied that should these harms eventuate, it would be directed at her by reason of the applicant's membership of her family and her mother's Falun Gong activities in Australia in particular which are Convention related and not subject to section 91S. The Tribunal considers that her mother's Falun Gong activities are the essential and significant reason for the persecution which the applicant fears, as required by paragraph 91R(1)(a) of the Act. 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 her selective harassment for a Convention reason, namely her mother's religion. The Tribunal is also satisfied that the applicant could not avail herself of any State protection as it is clear that the State is the source of potential harm. The threat, in the Tribunal's view, extends throughout the country.

11. In the Tribunal's view therefore, the applicant holds a well-founded fear of being persecuted for reasons of the applicant's membership of her mother's family and that the reason for that harm is her mother's Falun Gong activities in Australia and religion which are Convention related and not

subject to section 91S. In the Tribunal's view, therefore, the applicant holds a well founded fear of being persecuted for Convention reasons if she travels to China. On this basis, she is owed protection obligations by Australia and satisfies the provisions of s.36(2)(a) of the Act.

## CONCLUSIONS

12. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

13. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

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

## DECISION

15. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act.

Angela Cranston  
Member

## RELEVANT LAW

16. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

### Refugee criterion

17. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

18. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

19. 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.

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

21. 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)). Examples of 'serious harm' are set out in 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.

22. 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.

23. 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.

24. 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 being persecuted for a Convention stipulated reason. 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.

25. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the



definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

26. Whether an applicant is a person in respect of 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.

#### Complementary protection criterion

27. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s36(2)(aa) ('the complementary protection criterion').

28. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

29. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

#### Section 499 Ministerial Direction

30. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.

#### ATTACHMENT 2 - CLAIMS AND EVIDENCE

31. At Departmental interview on 20 July, the following conversation occurred between the applicant's mother and the department:

Had you previously helped your uncle with these flyers?

Yes I did

When?

Usually 1-2 times in a week I went over Tuesday and Thursdays

How many times prior had you helped your uncle with these flyers?

2 or 3 times and 3 times altogether

Were they the same pamphlets on previous occasions?

Yes, more or less

So you helped him on 3 or 4 occasions?

Yes...

How did you distribute them?

At night, when we saw that people had gone to bed we went out and put the pamphlets at the door of those people

How often did you do this?

It varied, it was not fixed...

How often did you distribute them?

..Many times, I don't recall...

When did your husband first visit you?

After I was arrested no one was allowed to visit me

When did you first see your husband after you were arrested?

In a week's time, after one week in the detention centre...

Were your travel documents checked before you went to Hong Kong?

Yes

Were there any problems

No problem

32. The following conversation is recorded at hearing between the Tribunal and applicant's mother on 8 October 2010:

You told the delegate at one point that you helped distribute the flyers at 2-3 times in total, and then later you said you did it all the time...

No, I said I helped distribute the flyers 3 times, however I was always involved in arranging the flyers.

33. The following conversation is recorded at hearing between the Tribunal and applicant's father (the applicant's mother's husband) on 8 October 2010:

How long after she was arrested did you get to see her or have contact with her

I think it was a month....

How long after she was released did you decide that you had to leave the country

About two weeks after that.

34. Also on the Department's data base is a file note stating that the applicant's mother's employer was contacted on 12 May 2010 and they stated that the applicant's mother was not an employee of the declared company.

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

We (the parents of [the applicant]) left China because of the fear of persecution, and have been living in Australia since March 2010. [The applicant] was born here in Australia.

[The applicant] will be considered as an illegal person as she is our second child. She will not be registered in the Chinese household register and will be denied or basic rights that are given to other children. She will not be able to study, enrol in any school or get medical care. On top of that we will also be persecuted as we have gone against the official one child policy of the Chinese government by having a second child that too illegally while we were in Australia seeking protection.

The Chinese government because of the well-known one child policy and their active persecution of Falun Gong practitioners and their families.

Because by having [the applicant] we have gone against the official Chinese one child policy and also because of our belief in Falun Gong.

Because the authorities officially persecute Falun Gong practitioners and their families and does not recognise second or subsequent children and they are denied all basic human rights.

36. As the applicant is a baby, the applicant's mother appeared before the Tribunal on 1 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Cantonese and English languages.

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

38. The applicant's mother confirmed that the applicant was born on [date], that the applicant's mother arrived in Australia [in] February 2010, and that she had lived in Shenzhen for 20 years before coming to Australia. She stated all her family were in Shenzhen, that is her parents and brother and her husband had [two siblings].

39. The applicant's mother stated she remarried her husband in 2008. The Tribunal asked what their plans were after they remarried. She stated after they married they had no plans, they just wanted to have a complete family.

40. The applicant's mother stated she was released from [detention in] 2010. She stated that about one month passed between her release from [detention] and her applying to come to Australia. The Tribunal put to her that her husband had told the Department that it was about two weeks after she was released from [detention] that he decided she had to leave. She stated she thought the Tribunal meant when she got the approval. She did know when her husband had applied. The Tribunal put to her that her husband told the department that two weeks after she was released he decided she had to leave but according to departmental records she applied for a tourist visa to come to Australia [in a certain month in] 2010 which was less than a week after she said she had been released from [detention]. She stated her husband had arranged it. The Tribunal also put to her that she and her husband applied for a 457 visa to come to Australia which was rejected in 2009. She stated it might be so but she was not happy to come to Australia because in Shenzhen they had an apartment, a car and job. The Tribunal put to her they had applied to come to Australia 2 months after they had allegedly got back together but she had not mentioned that when the Tribunal had asked about her plans after they got back together. She stated they weren't planning on coming to Australia after they got back together. She stated there were no opportunities where her husband was but she was not eager to come to Australia. She stated if the visa was granted she would have come to Australia, but she did not want to come. She stated they got back together not because they wanted to come to Australia and that if the application was not successful then it didn't matter.

41. The Tribunal put to her the department had said that all of her employment documents in relation to her tourist visa application were fraudulent. She stated because of her association with Falun Gong, then people (including her employers) would not want to be associated with her.

42. The applicant's mother stated she had lived in [a certain suburb] for almost a year with her husband and children and another woman. She paid \$500 per fortnight on rent, and weekly she spent \$50/60 on food and \$25 on telephone. She stated she and her husband were not well and did not work. She stated she received \$150 per fortnight from the Red Cross and the Refugee Relief Centre provided nappies, clothes and food and sometimes irregular payments (during the last year they gave \$1000, \$900, \$400 and \$1800). She stated she and her husband did odd jobs and her son sometimes picked up odd jobs. She did not get money from anywhere else.

43. The Tribunal put to the applicant's mother that on the basis of what she had said she could not make ends meet, that is her expenses were \$325 per fortnight and her income was \$75 a fortnight. She stated before her husband had the [an] operation [last year] he could work but after that he could not work and they had also some money they had brought from China. Before the operation he had irregular work. She stated she regularly worked on weekends

and earned \$80 a week for two days work. She stated her son also worked as a waiter and usually brought about \$100 every week. The Tribunal put to her that she still would not be making ends meet.

44. The adviser then left the room. When the adviser returned, the applicant's mother stated they just made ends meet. The Tribunal put to her that on the basis of her and her son's income they would be short about \$70 per week. She stated her husband made about \$2-\$300 a week. The Tribunal put to her she had said that he did not work. She stated he did not work full time.

45. The applicant's mother stated the applicant could not go back to China because she was not able to survive because she needed medical care and schooling and did not have the Hukou. She would also suffer prejudice. The applicant's mother did not know how much it would cost for her daughter to get the Hukou. She also stated she was Falun Gong and had been apprehended and if she was taken into custody the applicant did not have any chance of surviving.

46. The Tribunal put to her it needed to think about whether it accepted that she was a Falun Gong practitioner in China and/or Australia and whether any of that affected the applicant because the applicant's mother's case had already been assessed and she had been found not to be a refugee. The Tribunal put to the applicant's mother that the previous Tribunal had stated she had not given consistent information about the pamphlets, she and her husband had given inconsistent information in relation to when her husband had seen her after she was detained, at the Departmental interview she seemed to lack any interest in what had happened to her uncle and it was difficult to understand how it was that she left China when she was subject to rehabilitation by labour. The Tribunal put to her it may find the same conclusions. The Tribunal also put to her that her husband had stated two weeks after she was released he decided she should leave China, but Departmental records indicated she had applied for a tourist Visa [in a certain month in] 2010 which was less than one week after she allegedly left detention. The Tribunal also put to her she and her husband had applied to come to Australia on a 457 Visa which had been rejected. The Tribunal put to her it may have formed the view she was not a Falun Gong practitioner in China. The Tribunal said that if it formed that view it still had to think about what she had done in Australia and how that affected the applicant.

47. The applicant's mother stated if the Tribunal only believed her when she was dead then there was nothing she could do. She stated she gave documents about her arrest. The Tribunal did put to her that country information before the Tribunal suggested fraudulent documents came out of China and if the Tribunal did not accept she had practiced in China it may not place any weight on the documents. She stated she did not need to lie because Shenzhen was a special economic zone and the living standards were not worse than in Australia. She stated there was no need to come to Australia because the land was strange, she did not know people and they had spent all their savings and now they had to see psychiatrists and psychologists.

48. The Tribunal put to her that if it did not believe her story about China then it had to think about whether she had practised in Australia. The Tribunal put to her she had provided declarations from people who she said were

providing assistance in Falun Gong practice and sought permission to talk to Falun Dafa about those two people and their statutory declarations.

49. The Tribunal put to her that if it accepted that she had engaged in Falun Gong activities in Australia then these would be relevant to the extent that it affected the applicant. The applicant's mother stated it would affect the applicant because she would be arrested if she went back and who would look after the applicant. The Tribunal put to her that her husband had not practised Falun Gong. She stated he was in poor health and could not help much as he had [health problems]. She stated the applicant would have nowhere to live, she would be discriminated against because her mother was Falun Gong, no children would play with her and she would be abused as her brother had been.

50. The Tribunal talked about the social compensation fee. The applicant's mother stated she would not know where she would go if she went back to China as they had no house and no money to rent. The Tribunal asked if she would go back to where her family was. She stated the family members had their own family. The Tribunal put to her that in order to work out what social compensation fee was payable then it needed to think about where she would theoretically return to if she returned to China because the Tribunal need to think about how much social compensation fee she would have to pay. The applicant's mother agreed she would go back to Shenzhen. The Tribunal put to her that the social compensation fee was \$40 000.00. She said she would be unable to pay it.

51. The Tribunal put to her that it had to think about whether the applicant would suffer harm if the social compensation fee was not paid and whether it was Convention related. The applicant stated there was no way for her daughter to survive as there was no education, no access to medical services and there may be no way for her to survive. She stated they had no money so how could her daughter survive.

52. The Tribunal put to the adviser that the previous Tribunal found that the applicant's mother was not a Falun Gong practitioner and this Tribunal was also looking at whether she was telling the truth in relation to a previous practice in China. The Tribunal put to her she had previously applied to come to Australia before she put in the application for a tourist visa, her husband may have provided inconsistent information in relation to when they started thinking about leaving China, the Tribunal may find she had given inconsistent information in relation to how often she distributed the pamphlets, that she and husband may have given inconsistent information in relation to when they saw each other after she was detained, that is he said it was a month but she stated it was a week, and it may be that she also lacked interest in what happened to her uncle who introduced her to Falun Gong in the first place. The Tribunal put to her all of that may lead the Tribunal to conclude she was not a genuine Falun Gong practitioner in China. The Tribunal put to her that it still had to consider about when she came to Australia and engaged in Falun Gong what would be the ramifications for the applicant but that there may only be ramifications if the Chinese authorities knew. The Tribunal also indicated that if the applicant's mother went to [detention] then the applicant's father may still be able to look after her.

53. The Tribunal also needed to think about family planning legislation and what harm the applicant would face and whether that would be serious enough to warrant to protection.

54. The adviser stated the applicant was stateless, that the applicant had no registration and was a black child. The Tribunal put to the applicant's mother that the applicant would have the same nationality as her parents. She stated the applicant was a member of the family unit of a Falun Gong practitioner and would be discriminated against and her father would not be able to work and she would lose access to health and education.

55. The applicant's mother stated she had continued to practice Falun Gong in Australia and had been exposed to the Chinese government because they had a lot of spies.

56. The Tribunal looked at the social compensation fee and whether non-payment would result in serious harm. The Tribunal noted that her school fees wouldn't be paid and should be discriminated against and her health fees may not be paid. The Tribunal also put to her that I would need to consider whether it was the law that applied to everyone.

57. Also provided at hearing was the following statutory declaration from [name deleted] dated 29 September 2012:

I am an assistant Falun Gong practice at [location deleted]. I met [the applicant's mother in] March 2010 when she came to our [practising site] and joined the group exercises.

After coming to [the suburb], [the applicant's mother] participated in our group activities in the early morning from Monday to Saturday regularly for almost 2 years until she joined to another new practising site at [another location] started around half a year ago.

She also took part in our group book study sessions on Wednesday night and Sunday night (the Sunday night study session is now suspended due to the availability of venue and will resume later).

[In] March 2010, she took part in an event organised by selling Gong practitioners in Chinatown Sydney to support 70,000,000 Chinese people quitting the Chinese Communist party membership. [In] May 2010, she joined upgrade to celebrate the world Falun Dafa Day in Sydney CBD.

Through our conversation, I learned that [the applicant's mother] started practising Falun Gong in 1998 in China. In 2009, she was detained by the Chinese Communist regime and put in labour camps are brainwashing. From a certificate she showed, I learnt that her [detention] is [a certain number of] years from [dates deleted]. To their health condition, she was bailed out for treatment [in] 2010 and supposed returned labour camp after year later. She escaped from [China].

Above is complete and true account of what I know about [the applicant's mother].

58. Also provided was another statutory declaration from [Mr A] dated 8 October 2012 stating the following:

I have been practising Falun Gong since [year deleted], and I am currently the Coordinator of the group studying group practice of Falun Gong in [a certain] area.

I met [the applicant's mother] in March 2010 in [suburb deleted]. [The applicant's mother] is a very good Falun Gong practitioner. I found her often participating Falun Gong activities actively, such as morning group practice [and weekly group practice] and other Falun Gong activities.

## Country Information

### Relatives of Falun Gong

59. According to the US Department of State's *2008 Human Rights Report: China*, "During the year human rights activists, journalists, unregistered religious figures, and former political prisoners and their family members were among those targeted for arbitrary detention or arrest." The US Department of State continues:

The government continued to use house arrest as a nonjudicial punishment and control measure against dissidents, former political prisoners, family members of political prisoners, petitioners, underground religious figures, and others it deemed politically sensitive. House arrest encompassed varying degrees of stringency but sometimes included complete isolation in one's own home or another location under lock and guard. In some cases house arrest involved constant monitoring, but the target of house arrest was occasionally permitted to leave the home to work or run errands. Sometimes those under house arrest were required to ride in the vehicles of their police monitors when venturing outside. When outside the home, the subject of house arrest was usually, but not always, under surveillance. In some instances security officials assumed invasive positions within the family home, rather than monitoring from the outside.

...Family members of activists and rights defenders, Falun Gong practitioners, journalists, unregistered religious figures, and former political prisoners were targeted for arbitrary arrest, detention, and harassment. Some were required to leave Beijing during the Olympics. Rights activist Zeng Jinyan, the wife of Hu Jia, reportedly was held at a hotel in Dalian during the Olympics. After returning Zeng Jinyan to her Beijing apartment, authorities kept her under close surveillance. Yuan Weijing, the wife of legal advisor Chen Guangcheng, continued to be subjected to ongoing harassment, including strict surveillance, confinement to her home, and denial of prison visits (US Department of State 2009, *2008 Human Rights Report: China*, 25 February, Section 1d & 1f).

60. The Falun Dafa Information Center is based in New York and maintained by Falun Gong. The Falun Dafa Information Center receives reports of human rights abuses, allegedly perpetrated by the Chinese Government against Falun Gong practitioners. According to the Falun Dafa Information Center's *Annual Report on Falun Gong in 2008*, "In some cases, family members or co-workers who do not practice Falun Gong have been



taken into custody as well” (Falun Dafa Information Center 2009, *Annual Report on Falun Gong in 2008*, February, p.6).

61. An article dated 30 October 2008 in *The Epoch Times*, which has links with the Falun Gong, reports that “Family members and relatives of Falun Gong practitioners also face the threat of dismissal from work, of having their children expelled from school, and of being evicted from their residences. All these measures serve the same purpose: cutting off all possible sources of income for Falun Gong practitioners in order to force them to give up their belief” (‘Nine Commentaries on the Communist Party’ 2008, *Epoch Times*, 30 October –).

62. According to the Falun Dafa Information Center, “Spouses, parents, children, and siblings of those who practice Falun Gong have suffered various degrees of persecution, ranging from loss of employment to torture.” The Center continues:

When tens of millions of Chinese who practice Falun Gong began being targeted in 1999, even their relatives who did not follow the spiritual discipline were implicated at once. Immediately, the number of people directly hit by the campaign rose into the hundreds of millions.

Relatives were given a painful choice between supporting their loved ones at great risk or following the Party and thus wrecking their families and betraying their kin. The comprehensive campaign left little room for ambiguities.

The Party had three main reasons for targeting the Falun Gong’s relatives.

- First, it sought to deter Chinese people from supporting their family members by opposing the campaign; at minimum the Party demanded quiet acquiescence, though it preferred the kind of proactive support described below.
- Second, the Party feared family members would publicly expose the torture and other abuses their loved ones faced.
- Third, police and jail wardens learned that one way of breaking the determination of jailed Falun Gong is by showing them how miserable their children, spouses, or elderly parents are.

Persecution of relatives has taken many forms, including:

- Spouses are pressured to divorce and threatened with repercussions such as an end to their careers if they do not.
- Relatives are dismissed from their workplaces after their family members petition the government to end the persecution or distribute informational material.
- Sons and daughters are expelled from schools if one of their parents remains an active Falun Gong practitioner.
- Young children have become orphaned or parentless because their mother and father have been killed, arrested, or forced to run from place to place to avoid arrest and torture...Some children live with their grandparents or

other relatives, while others have been left to fend for themselves ('Family and Loved Ones' 2008, Falun Dafa Information Center website, 17 May <http://www.faluninfo.net/topic/34/> – Accessed 21 August 2009).

63. A report by the Falun Dafa Information Center dated 20 May 2009 provides information on the death in custody of a Falun Gong practitioner in Fujian whose parents were reportedly arrested in his hometown in Hubei:

Security forces in Fujian and Hubei province are seeking to cover-up the death of a Falun Gong practitioner who was killed in custody last month two days after being detained while on a field trip with his workplace. They have reportedly arrested his family members, whose whereabouts are currently unknown.

Mr. Fu Ziming (付自明) died in custody on April 19, two days after being detained by police in the vicinity of Wuyi Mountain Scenic Area of Fujian Province, a popular tourist destination in southeast China and a UNESCO World Heritage Site. Fu had traveled to the area as part of a group from the post office where he worked in his hometown of Jianli County in Hubei Province.

On April 17, while visiting the Mt. Wuyi area, Fu wrote in crayon on a rock "Falun Dafa is good; Truthfulness-Compassion-Forbearance is good." With Falun Gong being a permanent taboo in China's tightly controlled media environment, it is a common phenomenon for adherents to counter dehumanizing party propaganda by writing such expressions on a wall, banner, or homemade poster.

Fu's actions were apparently recorded by a nearby surveillance camera and that evening, he was taken from his hotel by agents from the management department of the local police station operating under Wuyi Police Department. Two days later, he had died, reportedly from torture.

...In a further effort to limit publicity, authorities in Jianli county also recently arrested his father and other family members. Fu's father was reportedly taken into custody on April 23 and the remainder of his family the following day. They have since lost contact with the outside world and their exact whereabouts remain unknown ('Police Covering Up Falun Gong Death in Custody at Top Tourist Attraction' 2009, Falun Dafa Information Center website, 20 May <http://www.faluninfo.net/article/883/?cid=84> – Accessed 21 August 2009 ).

### Social Compensation Fee for Shenzhen

64. If a child is born outside family planning quotas, however, the parents may be required to pay a family planning fee before authorities will register a hukou for the child.<sup>[1]</sup>

65. According to a 25 March 2013 All China Women's Federation article, the Population and Family Planning Regulation of the Shenzhen Special Economic Zone stipulates that urban residents who have one more child must pay a minimum social compensation fee of three times the average annual per capita disposable personal income of urban residents in the year prior to the

birth.[2] Both the mother and the father of the child are required to pay the social compensation fee and so the minimum fine for a couple would be 219,030 yuan (approximately AUD39,379) for a child born in 2012.[3]

#### Departure from China

66. In relation to whether people who have been charged with, or convicted of, criminal offences would be able to leave the country, Article 13 of the *Passport Law of the People's Republic of China 2006*, which came into effect on 1 January 2007, indicates that a person who is defending a criminal case or is a criminal suspect, or is serving a criminal sentence shall be refused a passport. The provision does not specifically refer to whether a person with a previous criminal conviction would be refused a passport although a passport can be refused to a person who it is believed will undermine national security or cause major losses to the State's interests. Article 8 of the *Law of the People's Republic of China on the Control of the Exit and Entry of Citizens* also indicates that defendants in criminal cases or criminal suspects, convicted persons serving sentences, persons undergoing rehabilitation through labour, and persons whose departure in the opinion of the relevant authority would be harmful to state security or cause a major loss to national interests are in the categories of persons who shall not be granted approval to leave the country. DFAT has previously advised of reports of Chinese citizens with legally-obtained passports being prevented from leaving China because they were believed to be involved in a sensitive case or would undermine national security, and of cases where dissidents who had received criminal punishment including imprisonment had subsequently been able to obtain passports and leave the country.

#### Chinese law relating to a child born in Australia to Chinese nationals

67. Nationality in China is governed by the *Nationality Law of the People's Republic of China 1980*. According to this legislation, nationality is acquired primarily through one's parents, and a child can acquire Chinese nationality at birth even if only one of its parents is Chinese.[4] Article 5 states:

Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.[5]

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[1] Department of Foreign Affairs and Trade 2011, *DFAT Report No. 1261 – China: RRT Information Request: CHN38360*, 30 March <Attachment>; 'The Brutal Truth' 2012, *The Economist*, 23 June <<http://www.economist.com/node/21557369/print>> Accessed 20 August 2012

[2] All China Women's Federation 2013, *Shenzhen Issues New Family Planning Regulation*, 25 March

<<http://www.womenofchina.cn/html/womenofchina/report/150898-1.htm>> Accessed 29 July 2013

[3] All China Women's Federation 2013, *Shenzhen Issues New Family Planning Regulation*, 25 March

<<http://www.womenofchina.cn/html/womenofchina/report/150898-1.htm>> Accessed 29 July 2013

[4] The Embassy of the People's Republic of China, *Note to Department of Foreign Affairs and Trade 2004 Note No. 088/2004*, 21 September – Community Legal Information Centre (undated), *Chinese Nationality*

[http://www.hkclic.org/en/topics/immigration/chinese\\_nationality/index.shtml](http://www.hkclic.org/en/topics/immigration/chinese_nationality/index.shtml) - Accessed 5 August 2011 –

[5] *Nationality Law of the People's Republic of China 1980*, China.org website, 10 September <http://www.china.org.cn/english/livinginchina/184710.htm#> – Accessed 3 April 2007

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# Refugee Review Tribunal of Australia

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## 1304354 [2013] RRTA 645 (24 September 2013)

Last Updated: 11 October 2013

**1304354 [2013] RRTA 645 (24 September 2013)**

### DECISION RECORD

**RRT CASE NUMBER:** 1304354

**DIAC REFERENCE(S):** CLF2012/141400

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

**TRIBUNAL MEMBER:** Kay Ransome

**DATE:** 24 September 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. The [applicant] is a [age] year old citizen of China (PRC), born in Fuqing in Fujian Province. He claims that if he returns to China he will be harmed because of his religious beliefs and because he fathered a child out of wedlock before the marriageable age.

2. The applicant arrived in Australia in August 2007 as the holder of a student visa which was valid until [March] 2010. [In] July 2012 he applied to the Department of Immigration for a protection visa. The delegate refused to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act) on 6 February 2013. The applicant applied to the tribunal for review of that decision on 20 March 2013.

### Jurisdiction

3. There is threshold question in this case of the tribunal's jurisdiction. Pursuant to s.412(1)(b) of the Act and r.4.31 of the *Migration Regulations 1994* (the Regulations), an application for review of this decision had to be made within 28 days after the applicant was notified of the decision in accordance with the statutory requirements.

4. The material before the Tribunal indicates that the applicant was notified of the decision by letter dated 6 February 2013 and the decision was dispatched by registered post. As the review application was not received until 20 March 2013, the Tribunal formed the preliminary view that the review application was not valid as it was lodged outside the statutory time limit. On 5 April 2013 the Tribunal wrote to the applicant inviting him to comment in writing on whether a valid application had been made. The Tribunal noted that the decision was posted to the applicant on 6 February 2013 and, on the basis that 15 February 2013 was the date on which he was taken to have been notified, the last day for lodging the application for review was 15 March 2013.

5. In his response the applicant said that he had not received the decision notification from the Department. He stated that he had received previous notifications from the Department but not the final decision.

6. In his application for a protection visa [the applicant] gave his address as [an avenue]. Departmental records show the address was entered as [a street]. The letter notifying the applicant of the decision to refuse the protection visa was posted to [the street] and not [the avenue]. The letter was returned to the department by Australia Post "unclaimed".

7. The Act requires that the notification will, unless it is being handed directly to the recipient, need to be delivered, dispatched or transmitted to an address, fax number or email address provided to the Minister for the purpose of receiving documents. In this case the address provided by [the applicant] for the purpose of receiving documents from the department was the [avenue] address. That he had in fact received other correspondence which was addressed to [the street] does not subvert the Minister's obligation to send the notification to the correct address.

8. In this matter the letter was sent to an incorrect address and notification was therefore ineffective. A failure to properly notify an applicant does not affect the validity of the primary decision (s.66(4)) but is relevant to the determination of whether a valid review application has been made.

9. The Tribunal accepts the applicant's statement that he was handed a copy of the decision when he attended the Department's offices around 20 March 2013. The Tribunal finds that he was notified of the decision at this time and that the application for review was lodged within time.

## Appearance before the Tribunal

10. The applicant appeared before the Tribunal on 29 August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

## Material before the Tribunal

11. The Tribunal has taken into account the applicant's protection visa application, his statement to the Department, his evidence in his interview with the delegate and at the Tribunal hearing, as well as relevant country information. The Tribunal has also had regard to a statement (a copy of which was provided by [the applicant] in support of his protection visa application) made by the applicant's partner, [Ms A], in support of her own application for a protection visa. The Tribunal also has before it the decision by the Tribunal differently constituted which on review affirmed the decision of the delegate to refuse [Ms A]'s protection visa application.

## CONSIDERATION OF CLAIMS AND EVIDENCE

12. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Regulations. An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

13. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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). Article 1A(2) of the Convention sets out a definition of who is a refugee.

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

15. 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)). Examples of 'serious harm' are set out in 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.

16. 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.

17. 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.

18. 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 being persecuted for a Convention stipulated reason. 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.

19. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

20. Whether an applicant is a person in respect of 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.

21. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

22. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

23. The issues in this review are whether [the applicant] has a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in China and, if not, whether there are substantial



grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China, there is a real risk that he will suffer significant harm.

## Under the Refugees Convention

### The applicant's religious beliefs

24. The applicant advances his claim in relation to religious beliefs on two bases – his own Christian beliefs and his relationship with his partner, [Ms A], who is a Christian.

25. Based on his lack of knowledge of the Christian religion, the delegate did not accept that [the applicant] is Christian. At the hearing before the Tribunal [the applicant] was questioned about his religion. He said that he was not a Christian before he came to Australia and that his partner introduced him to the church. He stated that he had been baptised and attends a church in [a suburb].

26. [The applicant] said that he believes in God and believes God exists. He conceded, however, that he is not very devout, describing himself as “sort of Christian”. He said that he rarely reads the Bible and does not often attend church. His partner goes often but he does not have much time to go and has not been for two months. He said that he stays at home and looks after their child while his partner attends church. He said that he got baptised because his girlfriend asked him to. When asked to describe his Christian beliefs [the applicant] was unable to answer.

27. [The applicant] said that, if he was alone he would not be harmed if he returned to China. However, he now has a partner and child and, if returned to China, he would go to a house church with his partner and then he would have trouble with the police and would be arrested and beaten. He said that Christian churches are not allowed in the area he comes from in Fujian Province, namely Fuqing. He said that [Ms A], who is also from Fujian, had been arrested in China before because of her involvement with a house church and described the events set out in [Ms A]’s statement made in support of her protection visa application.

28. [Ms A] did not attend the Tribunal to give evidence in [the applicant]’s application. [The applicant] said that she had to stay at home and look after their son who was sick and so could not come to the hearing. When asked whether he was aware of the Tribunal’s decision in relation to [Ms A]’s application for a protection visa, [the applicant] said he was. The Tribunal pointed out that her application had been refused because the Tribunal was not satisfied that there was a real chance she would suffer harm if returned to China on account of her Christian beliefs. He said that the information relied upon by the Tribunal in considering [Ms A]’s application was wrong.

29. The Tribunal discussed with [the applicant] a number of issues, based on available country information, which indicate that Christians who attend house churches in China, particularly in Fujian province face a very small risk of being harmed or arrested because of their religious beliefs. The information specifically put to [the applicant] was that:

- large numbers of Christians exist in Fujian and a significant proportion of them worship in unregistered groups or house churches;[1]
- there are few reports of repression of house church Christians in Fujian in general and in Fuqing in particular;[2]
- the authorities in Fujian are one of the most lenient on unregistered Christians in China;[3]
- small groups meeting in private dwellings are not of particular concern to authorities in Fujian; [4]and
- few arrests have been reported[5]

30. In response [the applicant] said that the information the Tribunal has may not be correct. He said that before he came to Australia he knew that people who attended gatherings held at someone's house got arrested because of their Christian beliefs. He said his partner had been arrested before she came to Australia because she was a Christian. He also said that the Chinese media does not report bad news so there would be no reports of people being arrested or imprisoned.

31. The Tribunal accepts that [the applicant] has been baptised and does attend a Christian church in [a suburb] from time to time. As he acknowledged at the hearing, however, his own Christian beliefs are not strong. I find, based on [the applicant]'s characterisation of his own beliefs, that it is very unlikely [the applicant] would engage in active promotion of his own Christian beliefs should he return to China. He also claims, however, in relation to his religion that he will be harmed because he will attend church with his partner if they return to China.

32. I, like the member who determined [Ms A]'s application for review, accept that she regards herself as a Christian and, if she were to return to China, would regularly attend house church gatherings. I also accept that [the applicant] would accompany her on occasions as he has done in Australia. However, I find that the available country information shows that the Chinese authorities exhibit a liberal and tolerant approach to worship at unregistered or house churches in their place of residence. I find that there is not a real chance that the applicant will suffer serious harm or persecution in the foreseeable future by the Chinese authorities due to his own religious activities or because he may be associated with the religious activities of his partner. I therefore find that his fear on account of his and his partner's religion is not well-founded.

#### Fathering a child out of wedlock

33. [The applicant] said that he met his partner, [Ms A], in Australia and they formed a relationship. [Ms A] accidentally became pregnant and gave birth to a son on [date deleted]. [The applicant] was [age deleted] when their son was born and [Ms A] was about to turn [age deleted]. As noted above, [Ms A] did not attend the hearing. [The applicant] told the Tribunal that he and [Ms A] are still in a relationship and hope to marry one day but they do not have enough money to do so at the present time. He also said that they need the blessing of their parents to get married.

34. [The applicant] did not bring any evidence of his relationship with [Ms A] to the hearing and nor did he provide a copy of his son's birth certificate,

despite the veracity of the relationship being an issue in the delegate's decision. I note, however, that [the applicant] gave evidence to the Tribunal at the hearing of [Ms A]'s application and I accept that they are in a relationship, are not married and have a child together.

35. [The applicant] said that because he was under the marriageable age and he and [Ms A] were not married when they had their son, they will be fined a large amount if they return to China. He said that he had heard that the fine would be at least 20,000 RMB.

36. In Fujian it is forbidden to give birth 'before the stipulated time'[6] Article 14(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* states that 'a child is regarded as born before the stipulated time' in the case where 'those who give birth to a child before they get married (including those who become pregnant before they reach legally marrying age)'[7] The legal marrying age is 20 years for women and 22 years for men.[8] I accept that [the applicant] was under the marriageable age in China when his son was born and that he and [Ms A] were not married. The penalty for having a child 'before the stipulated time' is outlined in Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province*. The standard penalty is a fine, often referred to as a social compensation fee. Chinese nationals who breach the family planning regulations while outside the country, and who are not eligible for an exemption, must pay a compensation fee calculated using the average income of the district in which they have household registration.[9]

37. I accept based on the available country information that the birth of [the applicant]'s child was in breach of the family planning laws and he would most likely be required to pay a social compensation fee should he return to Fujian. At the hearing [the applicant] said that he did not live in a city in Fujian but in a small regional place. Article 39(1) of the 2002 *Population and Family Planning Regulation of Fujian Province* calls for a social compensation fee of 60 to 100 per cent of the average local annual income.[10] While local family planning officials have some discretion in determining social compensation fees,[11] the Tribunal put to [the applicant] that in his circumstances the fine would be in the vicinity of 4,456 RMB to 7,427 RMB,[12] not the 20,000 RMB he had claimed.

38. [The applicant] said that, while that may be the amount the law stipulates, in small places the officials take more money than you are required to pay. He said that he and [Ms A] have no savings and would be unable to pay the fine. [The applicant] said that therefore he and his partner and child would not be able to survive in China and would have no place to live or enough to eat.

39. The Tribunal put to [the applicant] that under the relevant laws persons who are unable to pay a fine in a lump sum can apply for approval to pay by instalments and that in Fujian province repayments could be made over three years.[13] [The applicant] responded that he didn't know anything about paying by instalments and, in any event, the official rules don't apply in a small place like the one he comes from.

40. When asked whether he and [Ms A] would be able to work to pay off the fine, [the applicant] stated that only one of them could work as the other would have to stay at home to mind their son. He said it would be hard to find a job as he is not well educated and the pay is low. At another point in the

hearing he did, however, say he would be able to find a job. He said that the price of goods in China is expensive and they need to raise a child and therefore would not have enough money to pay the fine. [The applicant] also said that, while he may be able to get a job, he would not earn enough money. He said that he had worked as a plasterer in Australia but had hurt his back and can't do heavy work anymore. He said that [Ms A] has stomach problems and often gets sick which affects her ability to work.

41. The Tribunal asked [the applicant] about whether he and [Ms A] could obtain some assistance from their families to pay the fee. He said that neither his nor [Ms A]'s family would help them. He said that neither of their families is rich and his girlfriend's father owes money to other people. After having initially said that he speaks with his family by telephone once a month, [the applicant] then said that he does not have regular contact with his family and they wouldn't care if he were alive or dead and therefore wouldn't help him.

42. [The applicant] said that [Ms A]'s father does not approve of him or their relationship. The only contact she has is with her [sibling] and [Ms A]'s family would not help them if they returned to China. He said that both his and [Ms A]'s family are against them because of their relationship.

43. I am not satisfied that the imposition of a social compensation fee upon [the applicant] constitutes persecution. I am satisfied on the evidence before me that China's family planning laws and policies apply generally to the Chinese population. I am satisfied that the family planning laws are not discriminatory in their intent and are appropriate to achieve a legitimate national objective in the context of China's need to control its overall population growth. Despite [the applicant]'s assertions to the contrary, there is no independent evidence before me that the relevant laws of Fujian province will be applied to [the applicant] in a discriminatory manner for any reason or that the laws are selectively enforced.

44. Furthermore, there is nothing in the independent country information before me to support [the applicant]'s statement that because he comes from a small place in Fujian he would be required to pay a fee more than twice that stipulated by law. The applicant himself provided no other information to support this statement. I find that he has exaggerated his claims in this regard and that the amount of the fee, being in the vicinity of 4,500 to 7,500 RMB, would not cause undue financial hardship for him.

45. The country information is clear that a person in [the applicant]'s position is able to apply to pay the fee by instalments over three years. While he states that he is unable to do heavy work because of a back injury, there is nothing to indicate that he will not be able to gain employment on his return and thus earn an income. In fact, [the applicant] conceded at the hearing that he would be able to get a job. He would thus have income from his employment and would be most likely to also have support from his family. [The applicant]'s evidence about his contact with his family was contradictory and I do not accept that he would be unable to obtain support from them if necessary. In light of these conclusions the Tribunal finds that there is no basis to his claims that he and his partner and child will not be able to survive or have a place to live or enough to eat.

46. As such, I do not consider that the application of the family planning laws, including the imposition of a social compensation fee, constitutes persecution for the purposes of the refugee protection criteria.

47. [The applicant] also claims that if he returns to China and is unable to pay the fine, his son will not get registration and will not be able to go to school. He further claims that if he and his family return to China, [Ms A] will be sterilised because she has had a boy child.

48. Neither [Ms A] nor their child is included in this application. [The applicant] has not made any claims that he would suffer harm if he returns to China arising out of the claims that [Ms A] will be sterilised or his child, being born out of wedlock, will not be able to be registered. He stated on two occasions during the course of the hearing that he was not concerned for himself but for his partner and child. As [the applicant] has made no claim that he personally fears persecution for reasons associated with the status of his partner and child I find that these issues do not give rise to a claim that [the applicant] is owed protection obligations.

### Complementary protection

49. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances.

50. The Tribunal notes the explanation of the 'risk threshold' in the Complementary Protection Guidelines, however, in considering s.36(2)(aa) it has proceeded on the basis that the 'real risk' test imposes the same standard as the 'real chance' test applicable in the context of assessment of the Refugee Convention definition following the Full Federal Court decision in *MIAC v SZQRB* [2013] FCAFC 33.

51. As discussed above, the Tribunal has found that [the applicant]'s own Christian faith is weak but he is likely to attend church with his partner should they return to China. On the basis of my findings set out above, I am not satisfied that the applicant's claims give rise to substantial grounds for believing that, as a necessary and foreseeable consequence of the his removal from Australia to China, there is a real risk that he would suffer significant harm on account of his own or his partner's Christian beliefs.

52. In relation to the imposition of a social compensation fee as a result of the birth of the applicant's son out of wedlock and that at the time the applicant was under the marriageable age, I have found above that the fee is not excessive and that the applicant will be able to make arrangements to pay the fee. Therefore, I find that there are no substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm as a result of the breach of the family planning laws.

53. The applicant has not suggested that he would meet with consequences amounting to significant harm arising out of his claims that his son would not be able to be registered and his partner would be sterilised.

### CONCLUSIONS

54. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

55. The Tribunal is also not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

56. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

## DECISION

57. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Kay Ransome  
Principal Member

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[1] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

[2] Fujian is rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China.

[3] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.240-1; Executive Secretary, Hong Kong Christian Council comments reported in Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2005, *CHN100387.E – China: Situation of Protestants and treatment by authorities, particularly in Fujian and Guangdong (2001-2005)*, 7 September; Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April

[4] Schak, David 2011, 'Protestantism in China: A Dilemma for the Party-State', *Journal of Current Chinese Affairs*, Vol 40, No 2, p.92

[5] Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April; see 2 above

[6] *Population and Family Planning Regulation of Fujian Province*, art 14, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld

[7] *ibid*

[8] *Marriage Law of the People's Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People's Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People's Republic of China

[9] Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

[10] Defined by the Regulations as 'the average annual disposable income of the urban residents or the net average annual income of the rural peasants of the county in the previous year when the child is born'. See: *Population and Family Planning Regulation of Fujian Province*, art 39, promulgated 26 July 2002 (effective 1 September 2002), UNHCR Refworld; Department of Foreign Affairs and Trade 2012, *DFAT Report No. 1354 – RRT Information Request: CHN39817*, 23 January

[11] Department of Foreign Affairs and Trade 2013, *DFAT Report 1473 – MRT/RRT Information Request: CHN41439*, 7 February

[12] Based on income levels obtained from the *Fujian Statistical Yearbook 2011* and *China Statistical Yearbook 2012*.

[13] *Measures for Administration of Collection of Social Maintenance Fees* (China), art 6A, Promulgated 2 August 2002, (Effective 1 September 2002), National People's Congress of the People's Republic of China; Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request CHN37505*, 12 November

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# Refugee Review Tribunal of Australia

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◀1219589 ➡ **[2013] RRTA 336 (7 May 2013)**

Last Updated: 18 June 2013

◀1219589 ➡ [\[2013\] RRTA 336 \(7 May 2013\)](#)

## DECISION RECORD

**RRT CASE NUMBER:** ◀1219589 ➡

**DIAC REFERENCE(S):** CLF2011/140402

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

**TRIBUNAL MEMBER:** Patricia Leehy

**DATE:** 7 May 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

## STATEMENT OF DECISION AND REASONS INTRODUCTION

1. There are two applicants in this matter. They are partners. The male applicant was born in Pingtang County, Fuzhou City, Fujian, China, on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants], and lived there all his life until he came to Australia on a student visa [in] June 2007. The female applicant was born in China on [date deleted: s.431(2)] and came to Australia on a student visa [in] May 2007.



The applicants met about the end of 2010 and became lovers. Their student visas ceased at the same time, [in] March 2009, and they have been living in Australia since, without legal status.

2. The male applicant says that he left China to get a better education, and to practise his religion as a Christian more freely than he could in China. He fears that if he goes back to China his religious practice will be restricted by the Communist government. He is also afraid that he will be prevented from expressing any dissident views against the regime if he returns to China.

3. The female applicant did not make her own claims to protection, but relied on her membership of her partner's family unit. She said in a statement that she is also Christian, and that she and her partner were involved in Christian activities together after they met. She had not given oral evidence in relation to her protection claims to either the Department's officers or to the Tribunal (differently constituted) at a previous hearing of this matter [in] May 2012. She did not attend the earlier Tribunal hearing because she was pregnant, and was due to give birth in [month and year deleted: s.431(2)]. She gave evidence at the Tribunal hearing she attended with her partner and their child [in] March 2013.

4. Additional claims were made at the 2013 Tribunal hearing by the female applicant. She said that, apart from her concerns about the consequences of her partner's Christianity, she was also very worried about her child's unregistered status and the consequences of the contravention of the Family Planning laws in China by herself and her partner. She was afraid that the child would be deprived of rights such as education, and was also worried that she and her partner would be penalised by the authorities because they were unmarried.

## APPLICATION FOR REVIEW

5. The applicants are applying for review of the decision made by a delegate of the Minister for Immigration to refuse to grant them Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

6. The applicants had applied to the Department of Immigration for the visas [in] August 2011 and the Delegate refused to grant the visas [in] December 2011. The applicants then applied to the Tribunal (differently constituted) for review of the decision [on a later date in] December 2011. The Tribunal affirmed the decision [in] May 2012.

7. The applicants applied to the Federal Court for review of the Tribunal's decision, and the matter was remitted to the Tribunal for reconsideration [in] November 2012.

8. The applicant's case was also considered under the Ministerial guidelines for stay in Australia under the Public Interest Guidelines Assessment. [In] June 2012 it was found that the case did not satisfy the requirements for consideration of the exercise of the Minister's discretion under Section 417(1) of the Act.

9. The applicants appeared before the Tribunal [in] March 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicants brought their child, born on [date deleted: s.431(2)] in Sydney, to

the hearing. There is no decision before the Tribunal to review in respect of this child.

## RELEVANT LAW

10. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

### Refugee criterion

11. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

12. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

13. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

14. 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.

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

16. 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)). Examples of 'serious harm' are set out in 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.

17. 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.

18. 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.

19. 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 being persecuted for a Convention stipulated reason. 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.

20. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

21. Whether an applicant is a person in respect of 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.

#### Complementary protection criterion

22. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real

risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

23. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

24. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

#### Member of the same family unit

25. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition.

### CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issues in this case are: the applicants' country of reference; whether the applicants are Christian; whether the applicants will be seriously harmed in China for reason of their Christianity; whether the male applicant has publicly expressed any dissident political views against the current regime in China or is likely to do so if he returns; whether the applicants will be penalised because they have contravened the Family Planning laws, and whether any such penalties amount to serious or significant harm in relation to the Refugees Convention or to the Complementary Protection legislation respectively.

27. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

#### Nationality and Country of Reference

28. On the evidence before it, including the evidence of their passports, the Tribunal finds that the applicants are nationals of China, and have no right of entry to any other country. The Tribunal finds that the country of reference for the applicants is China.

Are the applicants Christian?

29. The male applicant in this matter was located by Compliance and interviewed [in] August 2011. When asked whether there were any reasons why he could not return to China, he said that there were not. He loved Australia and did not want to go back to China. The male applicant was then detained.

30. The male applicant submitted to the Department a statement by his mother, undated but translated [in] October 2011, in which she stated that after she returned to China [in November 2010] from Australia, where she had been on a student guardian visa to support her son in his studies, she attended "preaching meetings" which were held twice a week in her home town in Fujian. In mid-June 2011 the meetings were reported to the authorities, and a woman was arrested and detained. The applicant's mother said she then stopped attending the preaching meetings, and with her friends raised money to get the imprisoned colleague released. She said in her letter that she had not wanted to tell her son about this previously, but decided to do so since his interview with a Departmental officer was near.

31. The male applicant also submitted to the Department a statement by a woman named [Ms A] who said she had known him for about two years. She is a friend of the applicant's mother. [Ms A] attended the [Australian church deleted: s.431(2)] from 2008, apart from a short period when she lived in [city deleted: s.431(2)]. She said that she usually saw the applicant participating in a variety of Christian activities and discussing the Bible. She believed him to be a genuine Christian. [Ms A] had applied for refugee status and had been found to be a refugee by the Tribunal in March 2010. The Tribunal, differently constituted, had put it to the applicant at his Tribunal hearing in May 2012 that through his friendship with [Ms A] he would have known about Protection Visas some considerable time before he had lodged his application for protection. The applicant had responded that he knew [Ms A] had lodged an application, but had never asked her about it.

32. The male applicant submitted to the Tribunal evidence of his baptism together with a letter from [name deleted: s.431(2)], an elder of [Church 1], who said that the applicant had come to the church in 2011, had received basic instruction and had been baptised [in] October 2011. He said that the applicant also studied the bible with the Fellowship at the church. The applicant said at his Tribunal hearing in May 2012 that he started attending church soon after he arrived in Australia. After he and his mother moved to [suburb deleted: s.431(2)], they attended a Gospel Church which the applicant attended on and off for about six months. When he and his mother moved to central Sydney, the applicant attended the [church deleted: s.431(2)] about once a month, because he was working as a [tradesman] and did not have the time to go every week. The applicant delayed getting baptised because he did not think he was a "religious follower" He explained this at his Tribunal hearing in May 2012 as meaning that he did not feel he was religious enough to be baptised.

33. At his interview [in] October 2011 with an officer of the Department in relation to his Protection Visa application, lodged some two weeks after he was first detained, and at his Tribunal hearing [in] May 2012, the applicant said that he began attending Christian church services in China at a Government church with his parents at the age of six, but discontinued

because of a warning from his school to stop attending. He told the Tribunal that he was about 8 at the time. The applicant told the Tribunal that his parents kept on attending a government church, but that they both stopped in July 2011.

34. The Delegate said that the applicant was confused at his interview about the denomination of the church he claimed to have attended since he arrived in Australia in 2007. The applicant said that he had been baptised in October 2011, shortly before his interview. His knowledge of Christian beliefs and practices was considered by the Delegate to be vague. The Delegate in conclusion did not accept that the male applicant was a Christian “whose depth of commitment would bring him to the adverse attention of the PRC authorities should he return to China” The Tribunal (differently constituted) appeared to accept that the applicant was Christian but found that there was not more than a remote chance that he would be harmed for this in his home province of Fujian.

35. At his Tribunal hearing [in] March 2013, the male applicant said that he was currently attending [Church 1] where he goes about once every two weeks. The baby’s birth means that he is unable to go more frequently. The male applicant said that his partner attends church with him. This evidence is supported by a letter dated [in] April 2013, submitted to the Tribunal [the following day], from [Pastor B] of [Church 1]. In his letter [Pastor B] reiterates that in August 2011 the male applicant “took part in a Christian faith course” and was baptised [in] October 2011. [Pastor B] states that the church has a home bible study fellowship program which the male applicant attended, and says that the male applicant “and his wife” have also been attending their Sunday Worship Service.

36. It was put to the applicant that it was surprising that as a practising Christian he did not feel it necessary to marry his partner. He said that they felt married in the sight of God, having sworn in front of the Cross to stay together. It was put to him that a marriage in the sight of God without a formal marriage might not be sufficient for most Christians to feel comfortable. He said that he and his partner did not know how they should go about getting married, and in any event it would be too expensive for them. Their parents would want to attend the ceremony.

37. The male applicant said that his parents were still not attending church in China. They had stopped any church activities after the incident referred to by his mother.

38. When asked why he had not applied for a Protection Visa until he had been located by the Department’s Compliance officers, the male applicant said that in the past he did not know there were so many restrictions on religious practice in China. It was put to him that he must have known about this from [Ms A] who appears to have obtained a Protection Visa on the basis of her religion. The applicant said that although he knew she was a refugee, he only knew about it after he had been located by Compliance.

39. The applicant was questioned about his religious beliefs, with particular reference to the meaning of Easter. He spoke readily about what Easter meant to him and other Christians. He said that he owned a Bible, and read it.

40. The Tribunal read out independent information before it on the treatment of Christians in Fujian in China, from which both applicants come.

It was explained that a 2009 report on the Protestant Church in Fujian Province in a Global Chinese Ministries newsletter confirms [earlier reports] that there are large numbers of independent house churches in Fujian. The report also indicates that '[i]n general, local government in Fujian seems fairly tolerant of unregistered believers as it is rare that one reads of cases of persecution of house-church Christians in this province'[1]

41. The independent information provided to the applicant also indicated that Fujian was rarely mentioned in reports on breaches of religious freedom by the US Department of State, the United States Commission on International Religious Freedom, Amnesty International, Human Rights Watch or the various Christian NGOs that report on China. In November 2007 the Department of Foreign Affairs and Trade (DFAT) advised that they had no information on the treatment of unregistered churches in Fujian and reported on the difficulty in gaining politically sensitive information in China.[2] Nevertheless a few actions against local Protestants in Fujian have been reported, including a December 2012 crackdown on members of a Christian sect, Eastern Lightning, condemned as an "evil cult" by the authorities. [3] Similarly there was a report in 2009 of members of the Local Church, or Shouters, being targeted.[4] Other than these incidents, there were reports in 2006 of police closing unregistered places of worship in various provinces including Fujian, according to the US Department of State.[5]

42. In response to this information, the male applicant said that the churches in Australia are different from the government churches in China. An elder in his church had told the applicant that someone who had translated the Bible had been arrested. The applicant said that the Chinese government thinks it is above everything, including the church.

Will the applicants be seriously harmed in China for reason of their Christianity?

43. On the evidence before it, the Tribunal accepts that the male applicant is a practising member of a Protestant Christian church, and would seek to continue to practise his religion if he returned to China. The Tribunal is not satisfied, however, on the basis of the country information outlined above, that there is a real chance that the male applicant would be persecuted for reason of his Protestant religion if he returned to China. On the applicant's evidence, he might well be reluctant to attend a registered church, but even if he attended an unregistered church, the Tribunal is not satisfied that there is other than a remote chance that he would be persecuted for this reason if he returned to China. The Tribunal is therefore not satisfied that the applicant has a well-founded fear of persecution in China for reason of his religion.

44. The female applicant said at the Tribunal hearing that she was worried that her husband might be harmed because he is a Christian. She said that she herself had not been baptised as a Christian, and did not claim that she thought that she would be harmed because she practised Christianity. She has, however, regularly attended Church services at [Church 1] with the male applicant.

45. On the evidence before it, the Tribunal accepts that the female applicant has attended Church services with her male partner, but it finds that she herself is not a committed Christian. Even if she were, the independent information before the Tribunal indicates that there is not a real chance that she would be persecuted for reason of her religious practice as a Protestant

Christian if she returned to China in the foreseeable future. The Tribunal is therefore not satisfied that the female applicant has a well-founded fear of persecution in China for reason of her religion.

46. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of their being removed from Australia to China there is a real risk that the applicants will suffer significant harm for reason of their religion.

47. The country information set out above indicates that in general Fujian province has a reasonably tolerant attitude towards Protestant churches and their adherents, even though this tolerance does not extend to what the authorities consider to be "evil cults". Having considered the evidence before it, and taking into account the exhaustive definition of "significant harm" in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicants will suffer significant harm because of their religious practice if they are returned to China. It is not satisfied that Australia has protection obligations in respect of the applicants within the meaning of the Complementary Protection legislation for reason of their religious beliefs or practice.

Has the male applicant publicly expressed any dissident political views against the current regime in China and is he likely to do so in future?

48. The applicant claimed in his Protection Visa application that he wanted to talk to the public about his ideas. He believes that he will be monitored by the government for doing this, and that he might be arrested or charged with serious crimes if he expresses his ideas which might be seen to threaten the leadership in China. He reiterated these concerns at his Tribunal hearing in March 2013.

49. The applicant had submitted no evidence that he had been engaged in any demonstrations or protests in Australia against the Chinese authorities. He had not been involved in any dissident activity in China. The applicant said that he had been working hard up to the time of his location by Compliance officers, and since then has been looking after his partner and their child. He has not engaged in any political activities in Australia. When questioned about his political activity at his Tribunal hearing in March 2013, the applicant said that he had not engaged in any activity against the regime, including posting any comments on the Internet. He said that he was afraid of his freedom being restricted and his activities monitored in China. He said that the Chinese government is even above the law in China.

50. On the evidence before it, the Tribunal is not satisfied that the applicant has engaged in any political activity against the Chinese regime in the past. It is not satisfied on his evidence that there is a real chance that he will engage in any political activities against the regime if he returns to China in the foreseeable future. The Tribunal is not satisfied that the applicant will be persecuted in a Convention sense for reason of his political opinion, real or imputed, if he returns to China in the foreseeable future. It is not satisfied that the applicant has a well-founded fear of persecution in China for reason of his political opinion, within the meaning of the Refugees Convention.

51. The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being



removed from Australia to China there is a real risk that the applicant will suffer significant harm for reason of his political opinion, real or imputed, if he returns to China.

52. The Tribunal has found that the applicant has not engaged in any political activity, either on the internet or anywhere else in the past, and on the evidence before it, is unlikely to engage in any political activity if returned to China.

53. Having considered the evidence before it, and taking into account the exhaustive definition of “significant harm” in the Act, and set out above at para 23, the Tribunal does not have substantial grounds for believing that there is a real risk that the applicant will suffer significant harm because of his political opinion or activity if he is returned to China. It is therefore not satisfied that the applicant is a person in respect of whom Australia has protection obligations within the meaning of the Complementary Protection legislation.

Will the applicants be penalised for contravening Family Planning regulations in Fujian?

54. At the Tribunal hearing in March 2013, the male applicant was asked whether he was afraid there might be problems if he returned to China because he had a partner and child, but was unmarried. The applicant said that he was not worried, because he could get a false marriage certificate and other documents and they would not run into any problems.

55. The female applicant at the Tribunal hearing in March 2013 was not present in the hearing room when the male applicant was giving his evidence. She said at the hearing that she was afraid that she and her partner would be penalised for breaking the law in China. This was because, according to Chinese law, her partner had not reached the legal age for marriage, but they had had a child together. The child would not be able to get household registration and would be penalised.

56. It was put to the applicant that her partner had now reached the legal age for marriage, which was 22. It was explained that the country information indicated that the *Marriage Law of the People's Republic of China 2001* sets the minimum marriage age at 20 years for women and 22 years for men.[6] Consequently, the state will not recognise the marriage of younger individuals and where children are born to couples who are too young to marry penalties are imposed.[7] It was put to the female applicant that her partner had said he was not worried about this because he could get a false marriage certificate. The applicant said that she was nevertheless worried about their situation. It was put to the applicant that, according to the country information available to the Tribunal, the worst that could happen to her and her partner was the payment of a fine.

57. The applicant recounted the history of her own family. She said that there were three children in her family, and her parents had had to pay a fine for the second and third children. Not only did they have to pay a fine, but her parents and her grandmother were arrested and detained, and half of their house was demolished. The applicant said that she had been registered and her youngest sister had been registered but the penalty had been more than a fine. It was put to the applicant that this did not appear to be usual in China. The

applicant said that she had read a lot of reports on the internet, and even though people had paid fines for having a child, the mothers were also detained.

58. It was put to the applicants at their hearing that independent information before the Tribunal indicated that it was a breach of the law to have a child outside marriage. According to the 2012 US Department of State's report on human rights practices in China, having children out of wedlock is illegal in 'almost all provinces' of China and doing so attracts a social compensation fee.[8] In Fujian province, DFAT advised in February 2010 that if a couple marries after the birth of a child they will most likely still be charged a social compensation fee. DFAT further noted, however, that in Fujian 'If a child is conceived out of wedlock, but the parents marry prior to the birth of the child, no social compensation fee is charged'[9]

59. The applicant was given a document on Family Planning Fines in Fujian from 1991 to 2012 and it was explained that the tables on fines indicated that rural parents were required to pay a different fine from urban parents for having a child outside marriage[10]. Fines for rural parents ranged from 35116 yuan to 52674 yuan (about \$A5300 to \$A8088). Those for urban parents ranged from 99628 to 149442 yuan (about \$A15,700 to \$A23,600). These fines equate to four to six times the average annual disposable income of urban residents or the net average annual income of rural peasants in the previous year.

60. It was explained that the Tribunal needed to have considerably more information about the financial situation of the applicants and their parents before it could reach any conclusions about their capacity to pay the fines indicated, and whether any incapacity to pay would affect the status of their child as an unregistered or "black" child. The female applicant was also asked to submit any information she had about any punishment imposed on parents beyond fines.

61. The female applicant said that she came from a rural area in Fujian. Her parents ran a stall selling grains and rice. Her parents' income is only just sufficient to live on. Her younger sister is at school, her elder brother is engaged to be married. The applicant said that her parents had paid the fines for children outside the Family Planning regulations by borrowing money from friends and relatives. She and her younger sister are registered.

62. The female applicant said that she had completed two semesters' study in Australia, and then her parents could not afford to pay any more for her to continue studying. The female applicant then worked part-time until she had the baby. The applicants and their child live in two rooms of a house for which they pay rent. They share a kitchen and bathroom with another person. Three of them live in a granny flat behind a house. The applicants are helped financially by the male applicant's family and by her mother. The applicants were asked to submit to the Tribunal by [a date in] April 2013 the following documents: a letter from their church elder about their church attendance in the past year; a submission about their capacity to pay the fines set out in the document given to them at the Tribunal hearing about fines payable for contravention of Family Planning regulations in Fujian; any information they had about penalties imposed on people beyond fines.

63. It was explained to the applicants that the fines set out in the document that they had been given were applicable in the event that they were not

married. The female applicant was asked whether she intended to stay with the male applicant. She said that she did. She was asked why they had not married. She said that they had checked it out, and found it was too expensive to get married.

64. Two extensions of time were granted to the applicants to provide the information asked for by the Tribunal, up to [a date in] April 2013.

65. [In] April 2013, the applicant submitted a significant amount of country information apparently downloaded from *The Epoch Times*, as well as the letter from the [Church 1] elder referred to above at para 35.

66. According to Wikipedia, *The Epoch Times* is often connected with the Falun Gong spiritual group. A 2006 report by the U.S. Congressional Research Service listed the newspaper as a Falun Gong affiliated media source,[11] and Professor David Ownby, an expert on Falun Gong, said that after years of ill-treatment by journalists, "they decided to publish a newspaper by themselves to publicize their beliefs"[12]. According to Wikipedia, "The newspaper is heavily critical of the Chinese Communist Party (CCP) and the policies of Chinese government. In 2004, the newspaper published the "Nine Commentaries on the Communist Party", an in-depth critique of China's ruling regime. The newspaper covers causes and groups opposed to the CCP, including Falun Gong, dissidents, activists, and supporters of the Tibetan government-in-exile."

67. The English-language translation of *The Epoch Times* information submitted by the applicant was extremely poor, to the point of being unintelligible. This, combined with the fact *The Epoch Times* is a publication which is highly critical of the Chinese government and can hardly be considered to be "independent", has resulted in the Tribunal giving the information little weight.

68. The Tribunal attempted to make sense of the information from *The Epoch Times* submitted. One reported incident appears to relate to the selling of babies by family planning party cadres in Fujian. Another related to family planning inspections in Xianyou, Fujian, where the relatives of people who have breached family planning regulations are detained, and women who are pregnant or appear to be pregnant are closely monitored. Other articles submitted from *The Epoch Times* report on forced late-term abortions which appear to have taken place in Fujian in 2012. Other articles appear to be about the fate of those unable to pay fines. Many articles related to events which occurred some ten to fifteen years ago.

69. The Tribunal conducted a search of *The Epoch Times* English language version, and found a number of articles critical of family planning policy in China. However, over a period of some years up to the present there were few references to such matters as forced abortions as a result of the application of Family Planning laws. *The Epoch Times* published an article on 14 June 2012 headed "Late Term Forced Abortion Incenses Chinese Netizens" (<http://www.theepochtimes.com/n2/china-news/late-term-forced-abortion-incenses-chinese-netizens-252090.html>) which reported on the negative reaction of hundreds of thousands of Chinese internet users to a report of a late term forced abortion. Recently, on 5 March 2013, *The Epoch Times* published news that "China's One-Child Policy May Be Relaxed Province by Province" (<http://www.theepochtimes.com/n2/china-news/chinas-one-child-policy-may-be-relaxed-province-by-province-357307.html>).

70. The most recent human rights report by the US State Department (2012 *Country Report on Human Rights Practices*) published in April 2013 for China refers to the country having “a coercive birth-limitation policy that in some cases resulted in forced abortion (sometimes at advanced stages of pregnancy) or forced sterilization”. It states, relevantly:

In 2010 Xuzhou in Jiangsu Province was the site of a high-profile court proceeding in which a 30-year-old female plaintiff sued the local family-planning bureau, claiming that she had been barred from a civil service position in the county government for giving birth to a child before marriage. Although she married the father soon after the child’s birth, the court upheld the family-planning bureau’s decree that the birth of an out-of-wedlock child made her ineligible for the government position.

71. On the evidence before it, the Tribunal accepts that China continues to administer a highly coercive family planning policy which can result in substantial fines for breaches of the law, as well as other penalties, including punishment for unpaid fines which may result in children not being registered. The Tribunal accepts that unregistered children, commonly known as *black children*, do not have the full rights of a registered child.<sup>[13]</sup> In particular, they are not entitled to public education and, as a result, their parents must pay for private education.<sup>[14]</sup> The Tribunal notes that while there are some exemptions to family planning rules for Chinese students returning from study overseas, DFAT advised in February 2010 that the exemptions ‘do not apply to parents who have a child out of wedlock’<sup>[15]</sup> As noted above at para 53, advice from DFAT indicates that even if the parents marry after the birth of their child, a social compensation fee, or fine, is “most likely” payable. In the applicants’ case, the child was born before the male applicant was 22, the legal age for marriage.

72. If the applicants were to return to China with their child, they would need to register the child in order for it to have access to free education and other benefits. The Tribunal accepts that it would quickly become apparent to the authorities that the applicants’ child was born out of wedlock, and before the legal age for marriage of the child’s father. Even if the applicants were to marry immediately, DFAT advice indicates that a social compensation fee is still “most likely” payable. The Tribunal finds that the applicants would be liable to pay a social compensation fee for having their child out of wedlock if they returned to China. The Tribunal does not accept on the evidence before it that they would be liable for any other penalties. The Tribunal accepts that if the applicants were unable to pay the fine imposed on them, they would be penalised by having an unregistered or “black” child. It also accepts that one or both of the applicants could be excluded from government employment, as indicated above at para 70.

73. Although the applicants were asked to provide information following their Tribunal hearing in March 2013 on their capacity to pay any fines imposed as a result of their breaching family planning regulations, the only information submitted in relation to their financial circumstances were two bank statements, one for a joint bank account and the other for a bank account in the name of the male applicant. The bank statement for the joint account gives the balance in the account [in] March 2013 as \$466.39 (credit), but gives no transaction information. The bank statement for the male applicant is for the period from [September] 2012 to [March] 2013, and show a credit balance of \$16.77.

74. The applicants' evidence at the Tribunal hearing indicates that they are currently in poor financial circumstances. The Tribunal accepts that they would be unable by themselves to raise the amount of money required to pay the social compensation fee for breaching family planning regulations, an amount ranging from some \$A5,000 (for rural parents, as in the case of the female applicant's former residence) to an amount of about \$A24,000 (for urban parents, as in the case of the male applicant's former residence).

75. On the basis of the applicants' evidence at their Tribunal hearing, the Tribunal finds that the applicants' families support their relationship, and would therefore be willing to offer them financial assistance. The female applicant's evidence indicated that her parents are unlikely to be able to offer financial assistance, having had themselves to borrow to pay social compensation fees in the past for their children, including the female applicant. They also appear from the female applicant's evidence to be in poor financial circumstances currently. They were unable to support her continued study in Australia.

76. The male applicant's evidence about his family indicates that that his father is not working although his mother now works running a [stall]. The applicant's younger brother is [studying] in China, and his parents own their own home. The male applicant described his family's circumstances at his Tribunal hearing as "just average". No further evidence has been submitted about the financial circumstances of the male applicant's family, and the Tribunal is unable to make a finding about whether his family is likely to be able to raise the money to pay a social compensation fee for the breach of family planning laws.

77. In the worst case, if the applicants are unable to raise the money to pay the requisite fine, their child will be an unregistered or "black" child, unable to access the advantages of a registered child. On the evidence before it, the Tribunal accepts that the applicants may be penalised if they return to China in the foreseeable future, by being unable to register their child. It also accepts, on the evidence before it, that the applicants may be excluded from government employment. The Tribunal does not accept, on the evidence before it, that the applicants will be subjected to any other penalties for having a child born outside wedlock.

Do the penalties for the contravention of family planning laws by the applicants amount to persecution in a Convention sense?

78. The Family Planning regulations in China, while acknowledged to be highly coercive, apply to all its citizens. There is no evidence before the Tribunal to indicate that the applicants would be treated differently from any other Chinese citizen in relation to the family planning legislation. While it has considered whether the male applicant's Christianity would affect his treatment in this regard, the Tribunal does not accept, on the evidence of the country information set out above, that it would make any difference to the authorities' treatment of the applicants for breaching family planning regulations. While the Tribunal acknowledges that these laws place a very heavy penalty on the applicants, it finds that any such penalty would be imposed as a result of the administration of a law of general application, and

therefore any harm to the applicants would not constitute persecution in a Convention sense.

79. On the evidence before it, the Tribunal is not satisfied that there is a real chance that the applicants will be subjected to Convention-based persecution if they return to China in the foreseeable future because they have breached the Family Planning regulations of that country. The Tribunal is not satisfied that the applicants have a well-founded fear of persecution in China within the meaning of the Refugees Convention.

Do the penalties for the contravention of family planning laws by the applicants constitute significant harm for the purposes of the Complementary Protection legislation?

80. The Tribunal has accepted that the applicants are likely to incur penalties as a result of breaching family planning laws in China. It has accepted that the fines are onerous, and that the applicants are unlikely to be able to pay them without substantial assistance from their families, assistance which may not be able to be provided, despite the families' willingness to support the applicants. The Tribunal has further accepted that there are substantial grounds for believing that there is a real risk that as a result of failure to pay the social compensation fees the applicants' child may be an unregistered or "black" child. It has not accepted that the applicants would be subjected to any further penalties as a result of their contravention of family planning policy, but it does accept that having a "black" child would be a source of great distress to the applicants.

81. The Tribunal accepts that the penalties faced by the applicants may well amount to harm, although it does not accept on the evidence that this harm amounts to "significant harm" according to the definition set out in the legislation at s36(2A):s5(1). However, even if it were to accept that the penalty constituted significant harm within the meaning of the legislation, s36(2B) of the Act states that "there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: ... (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally".

82. As discussed above in relation to the Refugees Convention, the Tribunal has found that any penalty incurred by the applicants for breaching the family planning regulations would be imposed on them as a result of the administration of a law of general application. There is no evidence before the Tribunal that the applicants would be treated differently in this respect from other Chinese nationals. It has made this finding having taken into account that the male applicant is a practising Christian, as detailed above at para 73. The real risk faced by the applicants is therefore one faced by the population of the country generally, and for this reason the Tribunal is not satisfied that there is a real risk that the applicants will suffer significant harm if they are returned to China.

83. For the reasons given above the Tribunal is not satisfied that either of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to

satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

## DECISION

84. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

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[1] Global Chinese Ministries 2009, 'The Protestant Church in Fujian Province', OMF (Overseas Missionary Fellowship) International website, April [http://www.omf.org/omf/us/resources\\_1/newsletters/global\\_chinese\\_ministries/gcm\\_newsletter\\_2009/global\\_chinese\\_ministries\\_apr\\_09/the\\_protestant\\_church\\_in\\_fujian\\_province](http://www.omf.org/omf/us/resources_1/newsletters/global_chinese_ministries/gcm_newsletter_2009/global_chinese_ministries_apr_09/the_protestant_church_in_fujian_province)> Accessed 2 November 2009. The information is said to be taken from information has been taken from November 2008 *Tianfeng* and *History of Christian Missions in China* by K.S. Latourette. *Tianfeng* is a Protestant magazine published by the TSPM/CCC and can therefore not be taken to be unbiased in relation to house churches.

[2] Department of Foreign Affairs and Trade 2007, *DFAT Report No.07/83 – China: 'Shouters' Christian group and Fujian Province*, 28 November.

[3] Li, Yao 2012, 'Christians warn against cult influence', *China Daily*, 20 December <[http://www.chinadaily.com.cn/china/2012-12/20/content\\_16033787.htm](http://www.chinadaily.com.cn/china/2012-12/20/content_16033787.htm)> Accessed 18 March 2013

[4] Congressional Executive Commission on China 2009, *Annual Report 2009*, 10 October, pp. 138-139.

[5] US Department of State 2007, *International Religious Freedom Report 2007: China (includes Tibet, Hong Kong, and Macau)*, 14 September, Introduction & Section 2.

[6] *Marriage Law of the People's Republic of China 1980* (China), c II art 6, adopted 10 September 1980, amended by Decision Regarding the Amendment of Marriage Law of the People's Republic of China 2001, 28 April 2001, Ministry of Foreign Affairs of the People's Republic of China <<http://www.fmprc.gov.cn/eng/3625/3630/t18322.htm>> Accessed 10 May 2006; see also US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186268>> Accessed 6 February 2013

[7] Department of Foreign Affairs and Trade 2010, *DFAT Report 1210 – RRT Information Request: CHN37505*, 12 November

[8] US Department of State 2012, *Country Reports on Human Rights Practices for 2011 – China*, 23 May, Section 6 <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186268>> Accessed 6 February 2013

[9] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February

[10] *Population and Family Planning Regulation of Fujian Province* (China),

- Promulgated 26 July 2002, (Effective 1 September 2002), UNHCR  
 <<http://www.unhcr.org/refworld/pdfid/4242b7394.pdf>> Accessed 7 April 2005 ;  
*Fujian Province Family Planning Regulations* (China), Promulgated 28 June 1991,  
 (Effective 10 July 1991), Immigration and Refugee Board Canada
- [11] Thomas Lum (August 11, 2006). "China and Falun Gong". Congressional Research Service
- [12] Radio Canada ombudsman report, Pg10
- [13] Zhou, Y 2005, *Uncovering Children in Marginalization: Explaining Unregistered Children in China*, 14 June, International Union for the Scientific Study of Population, p.2 & 5  
 <<http://iusp2005.princeton.edu/download.aspx?submissionId=50479>> Accessed 2 August 2007
- [14] Zhou, Y 2005, *Uncovering Children in Marginalization: Explaining Unregistered Children in China*, 14 June, International Union for the Scientific Study of Population, pp.4-5  
 <<http://iusp2005.princeton.edu/download.aspx?submissionId=50479>> Accessed 2 August 2007; Department of Foreign Affairs and Trade 2007, *DFAT Report 691 – RRT Information Request CHN32173*, 31 August; Department of Foreign Affairs and Trade 2004, *DFAT Report No. 327 – China: RRT Information Request: CHN17017*, 7 October
- [15] Department of Foreign Affairs and Trade 2010, *DFAT Report No. 1104 – China: RRT Information Request: CHN36059*, 12 February





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# Refugee Review Tribunal of Australia

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## ◀1310089 ➡[2013] RRTA 611 (10 September 2013)

Last Updated: 17 September 2013

◀1310089 ➡[\[2013\] RRTA 611](#) (10 September 2013)

### DECISION RECORD

**RRT CASE NUMBER:** ◀1310089 ➡

**DIAC REFERENCE(S):** CLF2013/32425

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

**TRIBUNAL MEMBER:** John Blount

**DATE:** 10 September 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

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

2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration for the visa [in] March 2013 and the delegate refused to grant the visa [in] July 2013. [On a further date in] July 2013 the applicant applied to the Tribunal for review of that decision. The case was constituted to this Member [in] July 2013.

3. The applicant appeared before the Tribunal [in] August 2013 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's paternal uncle, [name deleted]. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

4. The applicant was represented in relation to the review by his registered migration agent, [name and firm deleted].

## RELEVANT LAW

5. The relevant law is set out at Attachment A.

## CLAIMS AND EVIDENCE

6. The applicant is a [age deleted] Chinese man from Fuqing in Fujian province, who arrived in Australia with a student visa in January 2007. The applicant remained unlawfully in Australia after his visa ceased in March 2009. When apprehended and detained in February 2013 the applicant initially provided a false identity. The applicant shortly thereafter applied for a protection visa.

7. 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 country information cited in the decision made by the delegate and in submissions made by or on behalf of the applicant.

8. The applicant's circumstances and claims were in the first instance provided to the Department in his protection visa application [of] March 2013, an accompanying claims statement of the same date and at an interview [on a later date in] March 2013.

### Protection visa application

### Protection visa application and claims statement, [in] March 2013

9. The applicant stated that in around October 2012 his father was advised that the Chinese authorities were going to resume his land for construction of a new highway. He would be compensated 180,000 RMB, which (the applicant stated) was unreasonable and was barely enough for his parents to purchase land or a new house. His father queried the compensation with village leaders but was told they had no power to increase the amount. Their neighbours were also being compensated only a small percentage of what their land and house was actually worth.

10. The applicant stated that [on a date in] December 2012 his parents were evicted from their house so that it could be demolished.

11. [On the following day] his father went to the local government to complain about the inadequate compensation and accused them of retaining

some of the amount that was actually awarded to him and said he would take the matter to court and expose their corruption. The officials became angry and beat his father and he was detained at the local police station. When his mother enquired with the local government about his whereabouts she was told they did not know where he was. About 5 days later an officer from the police station telephoned his mother to inform her that her husband was detained and that she would need to pay a significant (but unspecified) amount of money for his release.

12. The applicant stated that when his mother went to the police station she was told that she needed to pay 5000 RMB but that her husband would not be released for another 10 days. He was released [in] January 2013. His father then consulted a lawyer about court proceedings against the local government for beating him and retaining some of the compensation amount and an application was lodged at a court in Fuqing.

13. [On a further date in] January 2013 when his father went to a shop to photocopy some documents for the case, he was approached and beaten by 4 or 5 men whom (his father believes) were hired by the local government. Her father was taken to hospital with concussion, a broken leg and severe bruising to his internal organs and (at the date of the statement) was still in hospital for observation.

14. The applicant stated that when [in] February 2013 he was caught and detained by the Australian authorities for being unlawful, later that day he telephoned her mother to inform her where he was and that he might be deported back to China. It was only then that his mother had informed him of the events involving his father. She told the applicant that he could not return to China "as there was a high chance I would be beaten and harassed by the Local Government and Chinese authorities for my association with my father" She had not informed him until then as she did not want to worry him and thought that the issue would have been resolved.

15. The applicant stated that he fears that if he returns to China the authorities will harass, torture and detain him for his father's actions and for wanting to seeking redress against the authorities. As his parents' land has been taken without proper compensation, he would be struggling to provide financial support for himself and his parents to cover necessities and to save enough money to purchase a house and land. He would not be able to stand by while his parents' land is taken without adequate compensation; it is unreasonable for him not to seek redress on behalf of his father against the local government and then would face the same treatment as his father.

16. The applicant provided with his protection visa application an (untranslated) "letter from government" and "father's medical records".

#### Protection visa interview, [in] March 2013

17. The applicant repeated his claims at a subsequent interview with the delegate [in] March 2013 (although he now stated that his father had been detained [in] December 2012). He had been in regular contact with his parents over the internet and by telephone since arriving in Australia but said he had not contacted his parents over the internet in the preceding 6 months. Asked how the documents submitted were sent to him from China, the applicant first said they had been posted to him by his family. He then said they had been

emailed to him by his family. Reminded that he had said that he had not contacted his parents over the internet in the preceding 6 months, the applicant then said that they had been emailed to a friend as he did not have an email address.

18. The applicant stated that the authorities will impute to him a political opinion by virtue of him expressing his opposition to government land acquisition policies and that he will be arrested and detained.

19. [In] April 2013 the applicant's adviser provided the following documents, with translations:

#### Compensation & relocation agreement

Issued by the local authorities, this advised the resumption of the father's property and stated that total negotiated compensation shall be RMB 180,708. It appears that this agreement was signed [in] October 2012.

#### Medical documents relating to applicant's father

There is what appears to be an admission record dated [in] January 2013, stating that the patient had been beaten up and had "multiple tissue torn in the head; red and swollen right leg; sore eyes; lung and heart; abdomen: and suggesting immediate x-ray of right leg. A "diagnosis report" dated [in] March 2013 stated that the applicant's father has "head injury, broken right femur". There is also a hospitalisation receipt of the same date.

#### Civil complaint filed on behalf of applicant's father

The court was requested to order the authorities to pay the applicant's father "the difference in compensation according to law" of RMB274,427.50 for housing demolition and RMB101,170.27 for land-use right, as well as RMB112,679.28 as compensation for the plaintiff's economic loss. The document was dated [in] February 2013.

#### Delegate's decision, [in] July 2013

20. In rejecting the applicant's claims, the delegate set out a number of matters which led him to characterise the applicant's responses as evasive and illustrative of poor credibility. In relation to the documents tendered, the delegate also noted evidence concerning the ease with which fraudulent Chinese documents can be obtained.

#### Review application, [in] July 2013

21. A copy of the delegate's decision record dated [in] July 2013 was provided to the Tribunal by the applicant with his review application.

22. In response to the Tribunal's invitation to a hearing [in] August 2013, the applicant [on a date prior to the hearing] requested that the Tribunal take evidence from three persons: an uncle resident in Australia and two persons resident in China (his father and a "village leader"). Telephone numbers were provided. No indication was given of the evidence they might provide other than, in each case, "This person will give evidence in support of my claims" The Tribunal in [response] requested that statements be provided in writing by the two proposed witnesses who are in China (noting that emailed statements would be acceptable).

#### Submission, [in] August 2013

23. A submission from the applicant's adviser dated [in] August 2013 was received by fax the afternoon before the scheduled hearing.

24. It was stated that the applicant's family business went bankrupt in about June 2007 (while the applicant was studying in Australia). His parents could no longer continue to financially support the applicant who stopped attending classes to work in order to support himself and his family. His student visa was cancelled and he subsequently became an unlawful non-citizen. [In] February 2013 the applicant was located and detained.

25. In October 2012 the Applicant's father received notification that his land was being resumed for a highway project, but the amount of compensation offered was far less than the market value of the property and he refused to sign the compensation agreement.

26. It was stated that [in] December 2012 government officials and police officers came to evict the applicant's parents and prepared to demolish the house. The Applicant's father objected but was dragged from the house by one of the police officers. He fought back and a fight ensued between the Applicant's father and several police officers. Eventually, the Applicant's father agreed to leave.

27. [Two days later] the applicant's father went to the local government where he complained to the officials that the amount that they were planning to compensate him was not enough to build a new home or purchase land. He accused the local government of retaining some of the amount that he was entitled to and said that he would submit the dispute and expose their corruption.

28. It was stated that [on a date in] January 2013 the applicant's father consulted a lawyer about lodging a dispute against the Local Government. The applicant's father having been notified that the demolition would commence on that day he went there to take photographs of the forced demolition with his mobile phone but demolition labourers grabbed his phone and destroyed it. It was stated that this particular incident was not included in the applicant's earlier statutory declaration or in his evidence at his PV interview because he then had only the account of the incidents recounted to him by his mother via telephone on just a few occasions.

29. [On a further date in] January 2013 about 30 people, including government officials, police officers and demolition labourers, arrived to continue the demolition. When the applicant's father attempted to block the demolition, several demolition labourers and police officers beat him with batons and rods. The applicant's father attempted to defend himself but eventually surrendered as there were too many of them and was arrested and taken to the police station and given 15 days detention. It was stated that the applicant also failed to include this incident previously because he was not aware of it until a teleconference was held between him, his father and his migration agent [in] August 2013.

30. [In] January 2013 the applicant's mother got together 45,000 RMB from savings and borrowing and went to the police station to secure the applicant's father's release by bribery. However, prior to his release he was forced to sign the compensation and relocation agreement. He was also informed that the amount of compensation would be approximately 35,000 RMB less than what was originally offered, for physically harming the demolition labourers and government officials.

31. It was stated that later that same day (that is, [in] January 2013), the Applicant's father was at a store near his house taking photographs of the demolition when he was approached by about five of the demolition labourers who severely beat the applicant's father with batons and rods. He was not at the store to photocopy some documents as indicated in the earlier statutory declaration. Shortly after, the applicant's mother was informed of the incident and came and took the applicant's father to the hospital, where he was informed by the medical staff that he had sustained a concussion, broken leg and severe internal bruising.

32. When the applicant's mother arrived home from the hospital, she received a telephone call from an unknown male to the effect that if they continued to cause trouble, more of this would happen.

33. It was stated that when he was detained [in] February 2013, asked why he wanted to remain in Australia the applicant (then unaware of his parents' dispute with the local government) had said he needed to remain in Australia in order to financially support his parents, because of their bankrupt business. It was only when the applicant telephoned his mother that evening, to inform her that he might be deported, that he found out that his parents' land had been seized by the local government and that his father had been injured. Prior to this telephone conversation, the applicant last spoke to his mother [on a date in] February 2013 but she had not informed him of the issues they were facing in China.

34. [On a further date in] February 2013 a civil complaint against the local government was lodged at the court but the applicant's father has not heard any updates about this complaint and believes that it has been refused.

35. [In] March 2013 the applicant's father was released from hospital.

36. It was stated that during the interview with the delegate [in] March 2013, the delegate had requested medical documents to support the applicant's father's injuries. On the same day the applicant spoke to his father and asked him to provide medical documents but was told by his father that it would be difficult to retrieve these medical documents and that it would take a while to obtain them. The applicant therefore arranged with his cousin in China to obtain fraudulent documents which were received [in] April 2013. The migration agent had been told that these were genuine medical documents.

37. [In] August 2013 a telephone conference was held between the applicant, his father and the migration agent, during which the applicant found out more details about the incidents involving his father.

38. [On a further date in] August 2013 the applicant advised his migration agent that the medical documents he previously provided in support of his father's injuries were fraudulent. The applicant told his agent that genuine documents would be provided in support of his father's injuries shortly.

39. It was acknowledged that the delegate had had concerns about the applicant's credibility based on the applicant's false identity documents; the applicant's specification of an inconsistent date; varying accounts of how the applicant received the documents submitted; and whether the documents submitted by the applicant are genuine. With regard to the applicant's migration history and possession of false identification documents, it was submitted that these were not material facts in determining the truth of his account of the incidents involving his father.

40. With regard to the date of his father's detention it was stated that the applicant had said "on or around" the particular date, based on a telephone conversation with his mother. It was not until the conversation with his father that the applicant found out in detail what occurred to his father and the exact dates that they occurred.

41. It was stated that the documents which were submitted with the protection visa application had been emailed by the applicant's cousin [the one who provided the fraudulent documents] [on two dates in] March 2013 to a friend of the applicant at Villawood. (Printed screen shots of these emails were attached to the submission.)

42. The delegate had refused to give any weight to the documents provided by the Applicant on the basis of country of origin information that any official document can be either bought or forged. It was submitted that this does not necessarily mean that all Chinese documents are therefore bought or forged. While the applicant has admitted to providing fraudulent medical documents, he asks that when considering whether the remainder of his documents are genuine the Tribunal take into account that he has admitted to this prior to the hearing.

43. It was submitted that the applicant has a well-founded fear of persecution on the basis of his political opinion. Upon return to China, the applicant will seek redress for just compensation on behalf of his father, who still has an outstanding debt from his bankrupt business. This is properly regarded as an expression of political opinion. The Applicant fears that whilst seeking redress, he will experience beatings, imprisonment and harassment by Chinese authorities. There is therefore a real chance that the applicant will face significant harm on return to China for reason of his political opinion.

44. In relation to complementary protection, it was submitted that the mistreatment or harm, which the applicant would face, in the event he is removed from Australia, would amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. It was asserted, without further elaboration, that the circumstances in which there is taken not to be a real risk (Section 36(26) of the Act) do not apply to the applicant.

45. There were attached to the submission:

- A copy of a signed "Compensation and Relocation Agreement dated [in] October 2012, with a translation;
- A copy of a brief letter signed by a person said to be the local village head, and that person's identity document, with translations;
- A copy of a statement by the applicant's father (see below), and his identity document, with translations;
- A copy of a civil complaint dated [in] February 2013, with a translation;
- Copies of what appear to be two screen shots of emails dated [on two dates in] March respectively, attaching (illegible) documents.

#### Statement by former village leader

46. This letter, dated [in] August 2013, and signed by "former leader, village committee", states briefly that the applicant's father had suffered a forced "demolish and relocate" [in] December 2012 due to a highway construction project and had been hospitalised for injuries inflicted upon him

by the demolition/relocation personnel and was then coerced into signing the compensation agreement.

Statement by applicant's father, dated [in] August 2013

47. The applicant's father stated that [in] December 2012, when a highway construction project came to his village, his home was designated for demolition. They had to move out [three days later].

48. The government's compensation offer of ¥147,700 was more than 700,000(RMB) short of its market value. He argued that the compensation should be based on current market value but the authorities refused, resulting in continued disagreement and an unresolved dispute.

49. When forced demolition began [in] January 2013, he tried to take pictures with his cell phone, but they grabbed the phone to destroy evidence. [On the following day], over 30 people from the relocate-for-demolition office, the local government and the local police came again to carry out the demolition. As he tried to block them from carrying out the demolition, he was beaten up and taken into custody and given 15 days detention. He managed to get released 5 days early because the sum of ¥45,000 was paid via connections. Prior to his release, at the local police station he was coerced into signing the "Agreement on Compensation for Demolition-Relocation" before they would let him go.

50. The applicant's father stated that (afterwards) when he tried to take a photo from a neighbour's shop, he was discovered and beaten up again. His leg was broken and he was taken to the hospital the same day, and was not discharged until [a date in] March 2013.

51. During his hospital stay, he asked his brother to file a civil lawsuit but the case was not accepted by the court, for reasons unexplained.

RRT hearing, [in] August 2013

52. The applicant appeared before the Tribunal in Sydney [in] August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was accompanied by his agent, [name and firm deleted]. Evidence was also provided by a witness, the applicant's paternal uncle, [name deleted].

53. The applicant confirmed that he came to Australia on a student visa in January 2007, attended an English language college in Sydney for 6 months, and remained living in Australia unlawfully for 4 years after his student visa ceased in March 2009, until he was apprehended and detained in February 2013.

54. The applicant stated that his family had received a notice about relocation and compensation. They believed the house was of greater value; the compensation was not enough to build another house. People came to the house asking them to move. After they moved out, his father went to get some legal advice, whether he could sue the government or not. After a few days the applicant's father took his mobile phone to take photos of the house as evidence of its value but the relocation workers smashed his phone. His father went to the house again on a second day and had an argument there. There



were 20 to 30 people. They hit his father and he was taken to the local police station and detained there. His father was supposed to be detained for 15 days but his family spent 45,000 Yuan to bail him out so he was released after 10 days.

55. The Tribunal asked about the clash when they were first evicted, [in] December. The applicant replied that it was only a verbal argument on that day. The Tribunal referred to paragraph 26 of the submission [of] August 2013, stating that his father was dragged from the house but “fought back” and “a fight ensued”. The applicant replied that he had not been there, he had heard from his mother that then they had not physically hurt his father.

56. The applicant stated that his father was taken to the hospital straight away after he was released from detention, where the doctor examined him and said he had a broken foot. Queried, the applicant confirmed that when his father was released from detention, they took him straight to the hospital. The Tribunal then drew the applicant's attention to paragraphs 33 and 34 of the statement [of] August 2013, recounting an incident after the applicant's father was released, “later that day” when he was taking photographs and was severely beaten and was then taken to the hospital. The applicant said he had heard that information from his mother earlier, but had since spoken to his father. The applicant repeated that his father was taken to the hospital straight after his release. The Tribunal enquired when his father's injuries had been sustained if this was the case. The applicant replied that these were the injuries he had suffered previously and also he was abused by them in prison. The Tribunal commented that this latter claim had not been mentioned previously. The Tribunal asked if he was saying that the second incident when his father was beaten outside the shop after he was released did not occur: the applicant confirmed that this was the case, there had been no such thing.

57. When the applicant's father was released, at the police station before he went to the hospital, he was forced to sign something about the compensation.

58. The applicant stated that his father was still living with a brother in Fuqing.

59. Asked about the court case, the applicant stated that because they had no money they did not complete the proceedings and lodge the document.

60. The Tribunal asked why, if these events involving his father occurred as he now said, they would in the future result in harm directed against himself. The applicant replied that if he went back he would also ask for their money back. They had suffered financial loss; if he goes back to China how can he survive. The Tribunal put to the applicant that no other family member was said to have been harmed save for his father, who was actively pursuing allegations of corruption against local officials. His father had owned the land, the case was in his name and he was the one who clashed with those seeking to evict the family, and he was the one who went and threatened the local officials. The applicant was not in the same situation and on the face of it, it was speculative that he would do something similar on return. The applicant replied that he would surely sue the government on his return. The Tribunal commented that his father had owned the land and house and was offered the compensation, it was not clear what legal standing the applicant himself would have to sue. He replied that the land had belonged to his father who had built

the house and would have passed it on to the applicant. If he did not go back and sue them, he cannot survive.

61. The Tribunal put to the applicant that if he was concerned about possible harm by particular local officials acting corruptly, why could he not go and live elsewhere in China to avoid this, outside the local town where his family lived (and where he had not lived himself for a number of years). Even Fuqing itself was a geographically large and populous city, where he could live apart from that local town area. The applicant replied that he did not have the hukou (household registration) elsewhere so he cannot live there. The Tribunal noted that on the last information it had seen, well over 100 million Chinese were living in areas where they did not have a local hukou; this did not appear to be a real barrier especially in urban areas. The applicant acknowledged this but said that he had no educational qualifications and there is great competition for labouring jobs, he could not survive and support his family. The Tribunal observed that economic difficulties on return seemed to be a separate issue from whether he was owed protection because of persecution. The applicant said it was true he did not have any money, that was why he would ask the government for the money taken away by the government.

62. The Tribunal put to the applicant that there were some self-evident differences between his earlier claims statement, yesterday's submission and his evidence at the hearing. The applicant agreed and said this was because he had learned the previous information from his mother and later from his father. The Tribunal pointed out that there were also differences between yesterday's submission (after he had spoken with his father) and today's evidence. The applicant said he did not think there were any major differences. The Tribunal reminded him of the differing details concerning when his father sustained the injury and was taken to hospital.

63. The Tribunal put to the applicant that given that he was in regular telephone contact with his parents, it was hard to understand that the initial resumption and dissatisfaction with the compensation offered back in October 2012 had not been mentioned to him, or his parents' eviction, or his father's detention and hospitalisation, all of which occurred prior to his own detention. The applicant replied that because he was working in Australia, his parents did not tell him because they did not want to disrupt him. There was no point telling him as there was nothing he could do.

64. The Tribunal then turned to the documents which had been submitted earlier, in particular the compensation and relocation agreement, the civil complaint and the medical documents. The applicant admitted that the medical certificates are forgeries, he said because the delegate had told him at the interview that time was really tight so he had no option. The Tribunal put to the applicant that the medical documents were in fact submitted before his interview with the delegate, who had simply asked for translations of the documents earlier submitted. The applicant repeated that the fraudulent documents were only received and provided after the interview. The Tribunal stated that it was clear from the file that the medical documents had been referred to in his claims statement dated [in] March 2013 and that the untranslated copies had been provided with his protection visa application [three days later]. The delegate had asked at the interview [on a further date

in] March 2013 for *translations* of these documents which were submitted subsequently.

65. The Tribunal advised the applicant that even prior to his admission it had had serious concerns regarding the medical documents which it now accepted are fraudulent. This raised the question as to why, given his history of submitting fraudulent documents, the Tribunal should accept any other documents submitted by him. Further, if he was prepared to submit fraudulent documents, it also raised the question as to whether he would be prepared to ask someone to write or say something untrue on his behalf.

66. At this point, the Tribunal invited in and took evidence from the witness (in the presence of the applicant).

67. The witness confirmed that he is the brother of the applicant's father. He had arrived in Australia about 10 years ago. He had visited China most recently in January and February 2013 and had gone to see the family in February.

68. The witness stated that he had gone to see his brother in hospital in February 2013 (shortly before he returned to Australia [in] February 2013). His brother had then told him that his house had been demolished and that he had argued with the government because of the demolition. His brother had not told him a lot of detail about what had happened, but had said that his injuries (the broken foot) were as a result of the argument with the government because he did not want the house to be demolished and had also resulted in him being detained. He was detained for about 10 days and then released after a payment of 45,000 Yuan. Asked if his brother had told him when the injuries occurred, the witness said he thought it was in January, about 10 days earlier. Asked if this was before or after his brother was detained, the witness said it was before.

69. He had told the applicant about this on his return to Australia, after the applicant's arrest when he had telephoned him from the detention centre.

70. The Tribunal then resumed taking evidence from the applicant.

71. The Tribunal put to the applicant that he had made no mention previously of receiving information about events at home from his uncle, only from his mother and later from his father. The applicant stated that it was because he had learned from his mother first and his uncle had visited him at the detention centre and also mentioned the family information.

72. The Tribunal noted that it would be giving careful consideration to credibility, including in relation to the matters raised only for the first time after he was detained and the weight to be given to the various documents submitted. It would also be considering possible issues in relation to the Convention and to complementary protection.

73. The adviser was invited to provide any further information or written submissions not later than [a date in] September 2013.

Post-hearing submission, [in] September 2013

74. The applicant's adviser provided submissions in relation to possible relocation, arguing that relocation within China would not be reasonable, in particular due to limited employment opportunities which would affect the applicant's ability to sustain himself.

75. In relation to the question of whether the applicant would have any legal standing to sue the local government and thus attract adverse attention on return, it was submitted that in the event that the applicant returns to China he will also protest/petition against the local government about the acquisition of his father's land and the insufficient compensation. Such actions would give rise to a real chance of harm.

## FINDINGS AND REASONS

### Country of Reference.

76. The Tribunal accepts that the applicant is a national of the People's Republic of China and is not a national or citizen of any other country. Nor does he have an established right to enter and remain in any other country. The country of reference is therefore the PRC.

### Claims

77. The applicant has essentially claimed that:

- if he returns to China the authorities will harass, torture and detain him for his father's actions
- he would complain and seek redress on behalf of his father against the local government and then would face the same treatment as his father
- he would be struggling to provide financial support for himself and his family
- the authorities will impute him with a political opinion by virtue of him expressing his opposition to government land acquisition policies and he will be arrested and detained
- In relation to complementary protection, he would face mistreatment or harm which would amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment.

78. In considering an applicant's account, undue weight should not be placed on some degree of confusion or omission to conclude that a person is not telling the truth, especially in the context of entry interviews constrained by time and the inherent limitations of interpretation and often before an applicant fully appreciates what is relevant and the degree of detail required. But nor can significant inconsistencies or embellishments be lightly dismissed. The Tribunal is not required to accept uncritically any and all claims made by an applicant.

79. In this instance, as will be evident from the subsequent discussion, the Tribunal had significant difficulties with the applicant's credibility in relation both to the events said to have occurred in China and to the well-founded fear this was said to have given rise to for himself.

80. There were some fundamental issues with the applicant's credibility and good faith flagged by the delegate which were of concern to the Tribunal and which it sought to explore at hearing.

81. The applicant remained unlawfully in Australia after his student visa ceased in March 2009 and only applied for a protection visa after he was apprehended and detained four years later in February 2013. He also, when

detained, sought to present a false identity, supported by fraudulent documents. The delegate's stated concerns about fraudulent documents were borne out when the applicant subsequently acknowledged that the medical documents provided by him to substantiate his account of his father's injuries were fraudulent. The applicant further muddled the waters by providing conflicting and inaccurate information about when these documents had in fact been provided to the Department (see para 64 above). No evidence was subsequently provided in relation to the claimed hospitalisation of the applicant's father other than the evidence at hearing by the applicant's uncle.

82. Given the applicant's history of submitting fraudulent documents, and having regard to evidence cited by the delegate concerning the high incidence of fraudulent documents available in China, the Tribunal was not prepared to simply accept at face value any documents submitted by the applicant. It also caused the Tribunal to approach other supporting evidence with caution: if the applicant was prepared to submit fraudulent documents, it might be reasonable to suspect that he would be prepared to ask someone to write or say something untrue on his behalf.

83. The Tribunal found it highly unlikely that the applicant would have been (as he claimed) completely unaware of the family's eviction and his father's arrest and hospitalisation in December 2012/January 2013 until after his detention [in] February 2013 had these events actually occurred, given that he claimed to have been in regular contact with his family in China and, he said, had last spoken with his mother a little over a week earlier.

84. It will also be clear from the material recounted in detail that there were significant variations - indeed, substantial inconsistencies - in the evidence provided by the applicant. For example, the dates given for his father's detention varied substantially. The original date said to have been provided to the applicant by his mother [in] February 2013 was [in] December 2012 (although at the protection visa interview the applicant said [three days later]). However the submission [in] August 2013 stated that the applicant's father was detained [on a date in] January 2013 and released [ten days later]. Such a substantial variation for a significant event said to have occurred so recently (at the time that the applicant first spoke to his mother) is not adequately accounted for by the assertion (at para 40 above) that the date provided by his mother was only "on or around" the particular date and that he later found the exact date from his father.

85. There were other inconsistencies which in the Tribunal's view cannot be adequately accounted for by the explanation that the applicant obtained a more accurate account once he had spoken with his father [[in] August 2013 and apparently not previously]. For example, the central issue of when and in what circumstances the applicant's father's injuries were sustained which resulted in him being hospitalised. The father's statement dated [in] August 2013 and the submission [of a further date in] August 2013 both refer quite specifically to the father's injuries having been sustained after he was released from police detention when he was taking photographs from a neighbour's shop and that he was taken directly to hospital immediately afterwards. At the hearing, the applicant stated (and explicitly confirmed) that when his father was released from detention he was then taken straight to hospital with his prior injuries. He now stated that the incident outside the shop subsequent to his father's release from detention had not occurred at all: his father had been

injured during the earlier clash which resulted in his detention and he was also abused while in detention. (See para 56 above). It is difficult to reconcile the evidence deliberately provided just days apart.

86. Another significant inconsistency was that although it was stated [in] August 2013 submission that the applicant's father had heard nothing more about the civil complaint lodged [in] February 2013 and believed it had been refused, and the father's statement dated [in] August 2013 stated that the case had not been accepted by the court "for reasons unexplained", the applicant stated at the hearing a week later that they did not complete the proceedings and lodge the document because the family had no money.

87. The various inconsistencies highlighted by the Tribunal at hearing were not addressed in the post-hearing submission.

88. After careful consideration, and having regard to issues in relation to the applicant's credibility and good faith, the Tribunal found itself unable to rely on his account of events involving his father. While it is plausible that land was resumed and compensation offered which the family thought inadequate, the Tribunal does not accept that the applicant's father was involved in a confrontation which resulted in him being detained and hospitalised. The Tribunal does not accept the evidence offered to the contrary. The Tribunal further finds that it is not the case that the applicant, on return to China, would himself sue or confront the local authorities leading to harsh treatment of himself.

89. The Tribunal is satisfied that the applicant concocted the account now presented to the Tribunal subsequent to his apprehension and detention in order to found a claim for protection.

90. The Tribunal is satisfied that the applicant's apprehended financial difficulties on return to China do not arise for any Convention reason and do not of themselves amount to a well-founded fear of persecution.

91. The Tribunal is satisfied that the applicant does not have a well-founded fear of persecution for a Convention reason.

### *Complementary Protection*

92. Relevant law is set out at Attachment A. The Tribunal has carefully considered whether the applicant's circumstances as set out and discussed in this decision amount to, or give rise to, substantial grounds for believing that he would face a real risk of significant harm should he return to China.

93. Having regard to all the relevant matters including those already discussed, and in particular the Tribunal's findings at para 88 above, the Tribunal is satisfied that the circumstances relied upon by the applicant do not provide substantial grounds for believing that he would face a real risk of significant harm should he return to China.

94. The applicant therefore does not meet the complementary protection criteria.

## **CONCLUSIONS**

95. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations

under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

96. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

97. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

## DECISION

98. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## ATTACHMENT A

## RELEVANT LAW

1. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

### Refugee criterion

2. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

3. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

4. 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.
5. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
6. 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)). Examples of 'serious harm' are set out in 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.
7. 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.
8. 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.
9. 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 being persecuted for a Convention stipulated reason. 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.
10. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
11. Whether an applicant is a person in respect of 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.



## Complementary protection criterion

12. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

13. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

14. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## Section 499 Ministerial Direction

15. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under consideration.



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# Refugee Review Tribunal of Australia

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## 1303760 [2013] RRTA 686 (11 September 2013)

Last Updated: 25 October 2013

**1303760 [2013] RRTA 686 (11 September 2013)**

### DECISION RECORD

**RRT CASE NUMBER:** 1303760

**DIAC REFERENCE(S):** CLF2012/208286

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

**TRIBUNAL MEMBER:** Gina Towney

**DATE:** 11 September 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to [section 431\(2\)](#) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

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

2. The applicant, who claims to be a citizen of China (PRC), applied to the Department of Immigration for the visa [in] October 2012 and the delegate refused to grant the visa [in] February 2013.

#### Written Statement

3. The applicant submitted a written statement (undated) with his original application (date stamped [in] March 2013). The statement recorded the following (in summary):

- The applicant is scared of returning to China because he helped refugees from North Korea. The applicant set up a factory in [date deleted] with 40 employees and an annual turn-over of [sum deleted] before he left China in 2008;
- In 1996 the applicant saw a man in dirty clothes in front of his factory who asked for food and help. The applicant gave the man food, a shower, and clothes and arranged a medical examination. Later the man told the applicant that his name was [name deleted] and he was from North Korea. The man was married with one child, and his child had died of [starvation]. The man and his wife had travelled to China in 1996, where the wife had been kidnapped by people who were pretending to help them. The applicant felt sorry for the man and let him stay in the factory and gave him work;
- The applicant later received other refugees from North Korea and gave them work in the factory. In order to protect the refugees he had to bribe local police and do them favours, such as lending them his car. The applicant had [a number of] refugees in his factory in 2001. The local police told him to reduce the number so he sent [some] to work in another factory in August 2001. In January 2002 those [number deleted] were taken by the police and locked up. The applicant visited them and saw the distress in their eyes. The applicant was later told that the [female refugees], along with 30 other refugees, were received at the frontier and had iron wires placed on their arms by the North Korean police. After this the applicant made his mind up to take good care of the [remaining refugees] and send them to South Korea as soon as possible. The applicant assisted another refugee from North Korea by assisting him to obtain a fake passport and travel to [Country 1] where he entered the South Korean consulate. The applicant and his wife fought regarding the applicant's actions and the risks and expenses involved, and their marriage ended in divorced in 2007;
- Before the Olympic Games in Beijing in 2008 the Chinese government strengthened the policy of arresting refugees from North Korea and sending them back and some of the Chinese people who helped refugees were arrested too. A friend of the applicant told him that some North Korean refugees stowed away from China to South Korea during the ceremony for the Olympic torch relay in North Korea and the government believed that this could damage their image. The applicant was warned that he may be in trouble because he had been harbouring refugees for more than 10 years and the police were aware of this;

- In June 2008 the applicant [moved] the [remaining refugees] out of his factory into the countryside and found an agent. As the applicant was worried about his own safety he obtained his passport and applied for a visa to Australia. The applicant was told a fishing boat could carry the [refugees] to South Korea on the evening of [October] 2008. The applicant then bought himself a ticket and travelled to Australia [in] October 2008. [In] October 2008 the agent took the refugees to depart, but their plan was delayed because of maintenance on the boat. After the applicant made contact with people in China he was advised that the boat had left [in] October 2008, but had been intercepted by the Marine police and the [refugees] had all been detained;
- [In] October 2008 the police made enquires with the applicant's son and demanded that the applicant return to China for investigation regarding assisting North Korean refugees to exit. The police also searched his factory, employee dormitory and his home. Since this time the applicant's clients knew the reason why he left China and stopped doing business with him and his factory lost more and more business and is on the brink of bankruptcy;
- The applicant has become aware that the police have information on him and he is scared to return to China. He had owned his own factory and had a good income and did not plan on staying in Australia permanently, he had just hoped to hide for some time. The situation regarding North Korean refugees appears to be worse, with the North Korean authorities moving to punish those who leave and the Chinese authorities maintaining a policy of returning North Korean refugees;
- The applicant has been in Australia for almost 4 years and the police in China have never given up monitoring his home and trying to find him. In July people from the Department (the Department of Immigration and Citizenship) went to the applicant's home, but luckily he was not home at the time, so he escaped arrest but his passport was taken away. This incident made the applicant realise that he was in danger of being deported because his visa had expired. The applicant had been hoping to return to China to continue his career but now he does not have any hope and he is scared of being returned and persecuted by the Chinese government.

## Hearing

4. The applicant appeared before the Tribunal [in] August 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages. The applicant was represented in relation to the review by his registered migration agent.
5. At the commencement of the hearing the applicant confirmed that he feared returning to China because he feared the Chinese authorities and police, based on his assisting North Korean refugees in China. The applicant also explained that he feared because he lived in an area called Shenyang where a lot of Chinese Korean people live, and therefore there are a lot of Chinese Korean businesses. The applicant believes that the local restaurants are run by

North Korean agents, and their purpose is to monitor North Korean refugees and Korean Chinese people, and therefore people there have to be careful. The applicant referred to two examples of people he believes suffered negative consequences due to being monitored.

6. The applicant said that he left China because he was fearful. He said when he travelled to Australia he also considered travelling to the United States (US) or South Korea, but it was difficult to get a visa to the US and South Korea was too close to China. The applicant said that he planned to return to China when the situation was better, possibly after one to two years. The applicant confirmed that he had entered Australia on a Tourist Visa and told the Australian authorities that he planned to stay for three months. Asked why he had provided false information to the Australian authorities, the applicant said he was confused and he was actually planning on going to the US or somewhere else.

7. The applicant said that his Tourist Visa had expired in January 2009. Asked if he had taken any steps with the Australian authorities to regulate his status, the applicant said he couldn't think properly and had financial issues, and when he thought his factory was gone he thought he may as well stay in Australia. Asked whether this meant his factory was no longer operating in January 2009, the applicant responded by saying that it was suspended and although it was not bankrupt, no one had worked in the factory since two months after he left China. The applicant also said that he used his own genuine passport to leave China.

8. Asked what role he played in assisting the North Korean refugees, the applicant said he provided food, shelter and employment, therefore everything. Asked whether he had engaged in large-scale trafficking or one-on-one assistance, the applicant said he tried to keep in touch with people from North Korea and help them in his factory and through the church he attended, which had connections to South Korean. Later in the hearing the applicant said that he did not earn any money from assisting the refugees, and he instead financially supported them.

9. Asked which church he had attended in China, the applicant said it was in Shenyang in an area called [name deleted]. Again asked which church it was, the applicant said it was a Christian church. Asked which branch or denomination of Christianity it belonged to, the applicant said it was Christian but he was not sure which denomination, but it was not Catholic. Asked over what period he attended the church, the applicant said about three years, but he did not attend on a regular basis. Asked why he did not mention his involvement with the church and his religion in his statement, the applicant said he is not religious and does not have a strong belief. The applicant said that he also attended church in [Suburb 2] whilst in Australia. Asked which church, the applicant said [Church 3]. Asked when he attended [Church 3 in Suburb 2], the applicant said that he used to attend a smaller church with Chinese Korean people but because of the small number of people attending it closed. Again asked when he attended [Church 3 in Suburb 2], the applicant said that he attended since 2010, and he attends the Korean language service at 12 noon on Sundays. Asked if he had attended regularly since 2010, the applicant said no, he could not attend regularly and he has not gone many times. The applicant said that he used to attend the smaller church regularly, but it closed in 2009, and since that time he has not attended church regularly.

10. Asked why he had submitted that the Chinese police have been monitoring him since 2008, the applicant said that someone in China asked his brother when he would be returning, and the applicant believes that it was a policeman. The applicant also said that the pressure on people helping North Koreans had increased. Asked if there was any further indication that the authorities were monitoring him, the applicant said people kept calling his son, but his son has since changed his number and moved house. The applicant said that the person who called his son identified himself as a policeman. Asked if his son had been able to avoid the police by moving, the applicant said yes because China is a huge country. The applicant said that his son moved in early 2009.

11. Asked what he had been doing in Australia since he arrived, the applicant said he did not work. When questioned further by the Tribunal, the applicant said that he did not engage in paid employment during his first four years in Australia, and lived off AUS\$20,000 that he brought to Australia and a further AUS\$5,000 transferred to him by his brother and ex-wife. The applicant also said that he assisted his landlord with [Occupation 4] on four or five occasions at the end of 2009, and although he was not paid, his rent was reduced and the landlord bought him dinner. The applicant said that he started work as [Occupation 4] after he applied for his Protection Visa, and he currently earns \$170 per day.

12. Asked what he actually did with his time during his first four years in Australia, the applicant said he spent time on his computer, reading the news and following the circumstances in China and his factory.

13. Asked what action, if any, he had taken to continue to support refugees from North Korea during his time in Australia, the applicant said he hadn't taken any particular action, but he once attended a church and told people about the refugees and that they need help. Asked how he had advised the people at the church how they could help the refugees, the applicant said he suggested they could help them financially.

14. The Tribunal raised that the fact the applicant had been in Australia for four years yet he did not take any action to assist refugees that he had allegedly assisted in China, despite the fact that he was financially stable and not working, undermined his overall claims. The Tribunal explained that this indicated that he was not motivated to assist refugees from North Korea. The applicant responded by saying that this was not the case, and he wasn't sure how long he would stay in Australia and his boss had to go to China to get some money.

15. The Tribunal again explained that the applicant's lack of action in assisting refugees whilst he has been in Australia undermined his claims, as it would be difficult for the Tribunal to accept that he assisted North Korean refugees in China in the circumstances that he has described and this led to him leaving his country, as he had not provided any such assistance during his first four years in Australia. The applicant said that he has not looked after all North Korean refugees, he just looked after eight or five refugees, and he couldn't contact them to provide any further help.

16. The Tribunal raised that the applicant had arrived in Australia in 2008 and his visa expired in January 2009, but he did not apply for a Protection Visa until 2012, and that the delay in applying undermined his claims to genuinely fear returning to China. The applicant said he had spent time at his

computer checking the status of North Koreans in China and to see if the Chinese or North Korean policies changed. The Tribunal raised that according to the applicant's own evidence he had applied for a Protection Visa once he had been followed up by the Department of Immigration and Citizenship in July 2012 at his own residence. The Tribunal said that this may indicate that he was motivated to apply for a Protection Visa only when the Australian authorities pursued him and not because he had a well-founded fear of persecution. The applicant responded by saying that he had been thinking of staying in Australia, but once he realised that he may be sent back to China he knew that it would be the end of everything. The applicant also said that it cost money to prepare a visa application and he didn't have enough money, and he thought that he might just stay in Australia or return to China.

17. The Tribunal raised that country of origin information suggested that people who are involved in small-scale assistance of North Korean refugees may be subject to a fine, and only large-scale organisers or people traffickers may be subject to larger fines or jail terms. The Tribunal put to the applicant that as he had claimed that he only assisted refugees on a small-scale he may be subject to a fine, but he would not be subject to harsher penalties. The applicant said that he assisted people to leave by boat and assisted another person to access South Korea through [Country 1], and people who assist others during monitoring seasons, such as the time of the Olympics, received harsher penalties.

18. The Tribunal asked the applicant if it would be possible for his to relocate within China, noting that his son had avoided being pursued by relocating in 2009. The applicant said this would not be possible because he is afraid that he would be photographed when he returned.

19. The Tribunal raised that the applicant had exited China using his own valid passport via legal channels and that this indicated that he was not of interest to the Chinese authorities due to his assisting Korean refugees or for any other reason. The applicant again referred to information recorded in his written statement, reiterating that the North Korean refugees he assisted were due to leave China before him but they actually left after him and were intercepted by the Chinese authorities, and therefore he was not of interest to the Chinese authorities when he exited [in] October 2008.

20. The Tribunal raised that according to the applicant's own evidence the Chinese authorities had been aware that he had been harbouring refugees over 10 years. The applicant responded by agreeing. The Tribunal raised that the fact the applicant said that the police were aware that he had been harbouring refugees over 10 years indicates the two following possibilities: firstly, the applicant fabricated his evidence that he ever harboured or assisted such refugees or; secondly the police were aware of this and were not interested. The applicant said he disagreed and said he was assisting the refugees, but after 2008 the pressure increased because of the Olympics.

21. The Tribunal again stated that it found it difficult to accept the applicant's claims, including that he assisted refugees. The Tribunal said that one reason for this is that according to the applicant's own evidence he left China to avoid the crack-down and the police made inquiries with his son and demanded he return to face investigation in October 2008, yet he did not apply for a Protection Visa until 2012. The Tribunal also added that another reason for doubting the applicant's claims was that he has taken little to no action in

Australia to bring the plight of the refugees to people's attention, and this raised doubts in the Tribunal's mind that he was ever motivated to assist them in whilst in China. In response the applicant said in 2002 there is one refugee who went to South Korea via the embassy in [Country 1], and he invited the Tribunal to check this information. The Tribunal stated that it was the applicant's role to present evidence and establish his case. The Tribunal also said that the issue in this matter was not the general plight of refugees in China, but instead it was whether or not the applicant was involved with such refugees.

22. The Tribunal stated that it found it difficult to accept that the applicant had arrived in Australia over four years previously but not worked prior to lodging his Protection Visa application, apart from limited work for his landlord. The applicant responded by saying he brought money to Australia, and there was no opportunity for him to help people in China because he had limited contact. [The applicant was offered an adjournment but declined].

23. Asked if he would like to say anything further, the applicant said he would like to emphasise that North Korean refugees are not treated well in China and people take advantage of them. The applicant said that he is the same nationality as these refugees and he would like to help them. The applicant also said that he requested a Korean interpreter (who was supplied) because he could not express this type of attitude in front of the Chinese interpreter. The applicant said in China North Korean people are supposed to live the poorest areas.

24. At the end of the hearing the Tribunal stated that it was not requesting any further information but it would consider anything that it received before making a final decision.

## CONSIDERATION OF CLAIMS AND EVIDENCE

25. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

26. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).

27. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').



28. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

## Findings

29. The Tribunal finds the applicant to be a national of China. This finding is based on the evidence before the Tribunal, including a copy of the applicant's passport, which was issued by the Exit and Entry Administration Ministry of Public Security of China.

30. The Tribunal finds that the applicant is not a credible witness. This is because the Tribunal found the applicant's evidence to be implausible, contradictory and changing throughout the hearing. In relation to the applicant's evidence being implausible, the Tribunal does not accept that the applicant assisted North Korean refugees over a ten year period by providing food, shelter, employment, medical assistance, obtaining travel documents and organising travel, in the circumstances that he described, that is, whilst paying bribes to the authorities and under threat, but that he would then do very little to nothing to assist the refugees during his time in Australia. That is, the Tribunal does not accept that the applicant was motivated to assist North Korean refugees over a ten year period in China, as he has not demonstrated any such motivation during his time in Australia, despite his own evidence that he was not working and he had a total of AUD\$25,000 to support himself, and the lack of any obvious threat to the applicant if he took such action in Australia. In making this finding the Tribunal considered the applicant's evidence that he once attended a church and told people they could help the refugees with financial assistance, he wasn't sure how long he would stay in Australia, his boss had to go to China to get money, he only helped a limited number of refugees and there was no opportunity for him to help people in China because he had limited contact. However, in light of the overall evidence before it the Tribunal does not accept these reasons as credible.

31. Nor does the Tribunal find it plausible that the applicant became of interest to the Chinese authorities in October 2008 and/or that the applicant's son received an inquiry notice from the Chinese police demanding the applicant return to China for investigation regarding his assisting North Korean refugees, but the applicant delayed in applying for a Protection Visa until four years later in 2012. In making this finding the Tribunal notes the applicant's evidence that he hoped that things would change and/or the cost was prohibitive, but in light of all of the evidence before it the Tribunal does not accept this evidence. The Tribunal instead finds that the timeline of events in the current matter suggests that the applicant was motivated to apply for a Protection Visa because officers from the Department of Immigration and Citizenship visited his residence and he wished to remain in Australia.

32. In relation to the applicant's evidence being contradictory and changing throughout the hearing, the Tribunal refers to the applicant's

evidence regarding his attendance at Church in China and Australia. During the hearing the applicant gave evidence that he attended church in China for a three-year period. However when asked to name the Church and/or the denomination the applicant was unable to, (although he did name the area that it was located in). The applicant also indicated that he had attended church in Australia, but again when asked for further details, he provided vague and contradictory answers that did not answer the questions asked by the Tribunal. That is, he said that he attended church in [Suburb 2], but when asked for further information he referred to a church that he had previously attended which had since closed. Overall the combination this evidence leads the Tribunal to find that the applicant was not being truthful in providing his evidence and was instead fabricating evidence in an attempt to further his refugee application.

33. As a further example the Tribunal also refers to the applicant's evidence regarding his employment in Australia. When asked if he had been employed in Australia the applicant initially said only after he applied for his Protection Visa. Questioned further, the applicant said that he did do some work for his landlord, but only after extensive questioning did he specify that he had done 4 to 5 days [Occupation 4] for his landlord, and although he was not paid he received a reduction in his rent and food. The difficulty that the Tribunal had in extracting this basic information indicated to the Tribunal that the applicant was not being truthful and forthright in providing his evidence, but was instead fabricating his evidence in an attempt to further his refugee application.

34. A further example of the applicant being contradictory and changing his evidence is in relation to the applicant's finances. The applicant gave evidence during the hearing that he had arrived in Australia with AUD\$20,000 and then had a further \$5,000 sent from China. The applicant also initially indicated that the money was sent through the bank, however when questioned further he said it was sent electronically and not through an Australian bank. The Tribunal indicated that it had doubts as to this evidence, and advised the applicant that he could provide Australian bank records to demonstrate his finances during this period, but he has not done so.

35. The Tribunal does accept that the applicant exited China using his own genuine passport via legal channels, and finds that this indicates that he was not of interest to the Chinese authorities (Annexure 1). The Tribunal acknowledges the applicant's evidence that he was not of interest to the Chinese authorities at that time, but became the interest at a later date when refugees he had assisted were caught leaving China illegally, however the Tribunal does not accept this evidence as credible.

36. Overall the Tribunal does not accept that the applicant assisted North Korean refugees in China through providing food, shelter, employment or assisting them to travel overseas or providing false passports; and/or that he came to the attention of the Chinese authorities for this reason and/or that his son and/or brother were notified that the Chinese authorities were searching for the applicant. Nor does the Tribunal accept that the police were aware that the applicant was harbouring refugees. Nor does the Tribunal accept that the applicant has a well-founded fear of persecution due to his being perceived as harbouring/assisting/trafficking North Korean refugees.

37. Nor does the Tribunal accept that the applicant has a well-founded fear of returning to China due to there being a lot of Chinese Korean people where he lives, and the local restaurants being run by North Korean agents with the purpose of monitoring North Korean refugees and Korean Chinese people.

This is because the Tribunal did not find the applicant's claims to be credible.

38. Therefore overall the Tribunal finds that the applicant does not have a well-founded fear of serious harm or persecution based on his race and/or political opinion or any related claims.

39. In addition, the Tribunal notes that the applicant made some references to his attending church in China and Australia, and it notes the possibility of an implied claim in relation to religion. However, the Tribunal is not satisfied that the applicant was involved with any religion in China and/or Australia, based on the vague evidence provided by the applicant in relation to such, and therefore the Tribunal finds the applicant does not have a well-founded fear of serious harm or persecution based on his religion.

40. Having found the applicant does not meet the refugee definition, the Tribunal considered complementary protection. As noted above, the Tribunal has found that the applicant is a national China. The applicant passport records that it was issued in Liaoning, China [in] July 2012, with the date of expiry being [in] July 2018. The applicant has given evidence that he left China using his genuine passport via legal channels, and the Tribunal has found that this indicates he was not of interest to Chinese authorities for any reason. The Tribunal has not accepted the applicant's claims that he assisted North Korean refugees in China, or that he was of interest to the Chinese authorities for this or any other reason. Overall, based on the evidence before it, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm.

41. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

42. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

43. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

## DECISION

44. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Gina Towney  
Member

Annexure 1

45. The Tribunal has referred to several sources of country of origin information, in which other reputable sources were referred to. The first of these is from the Refugee Review Tribunal and is titled 'China – CHN37292 – Court of People's Prosecution – Record of Convictions – Departure – Criminal Offences' and dated 17 September 2010. This document has been selectively quoted from below (footnotes removed):

(Ques 2) - Please provide up-to-date information on departure checks in China and whether people who have been charged with, or convicted of, criminal offences would be able to leave the country.

...

China is reported to have developed a national computer network for policing named the Golden Shield Project. ... The Chinese police were in charge of entry and exit administration and the police units in charge of examination at all ports of entry including international airports could connect to the system. ... in May 2009 that China's Public Security Departments had nationwide computer information sharing networks.

...

Article 8 of the *Law of the People's Republic of China on the Control of the Exit and Entry of Citizens* also indicates that defendants in criminal cases or criminal suspects, convicted persons serving sentences, persons undergoing rehabilitation through labour, and 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" are in the categories of persons who shall not be granted approval to leave the country.

46. The second document is also from the Tribunal and is titled China – CHN35881 – Local Church – Fujian and dated 10 January 2010. This document has also been selectively quoted from below:

(Answer 5), Reports suggest that the Chinese government may maintain a "blacklist" of individuals, both within China and overseas, who are considered suspicious by the government, such as members of unregistered religious groups. Reports suggest that Chinese nationals who are engage in prohibited religious groups in Australia may be placed on such a blacklist. This may result in them being questioned and potentially arrested upon return to China.

47. The Tribunal also had regard to information from the US Department of State, *Country Reports on Human Rights Practices 2012 – China (includes Tibet, Hong Kong, and Macau)* This information was accessed at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> The quote below is from Sections 2 (d) (emphasis added by Tribunal):

Foreign Travel: The government permitted legal emigration and foreign travel for most citizens. Some academics and activists continued to face travel restrictions, especially around sensitive anniversaries (see section 1.e.). The government exercised

exit control for departing passengers at airports and other border crossings and *utilized this exit control to deny foreign travel to dissidents* and persons employed in sensitive government posts. *Throughout the year lawyers, artists, authors, and other activists were at times prevented from freely exiting the country. Border officials and police cited threats to “national security” as the reason for refusing permission to leave the country. Authorities stopped most persons at the airport at the time of the attempted travel* Well known artist Ai Weiwei was denied a passport to attend an exhibition of his work in the United States in October. Some foreign travel restrictions on certain dissidents were relaxed. A Charter '08 signatory from Hangzhou, who had not been allowed to leave the country for several years, was permitted to attend an academic conference abroad in May.

Most citizens could obtain passports, *although those whom the government deemed potential threats, including religious leaders, political dissidents, petitioners, and ethnic minorities, reported routinely being refused passports or otherwise prevented from traveling overseas.*

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# Refugee Review Tribunal of Australia

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**RRTA 741**

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↩**1218579** ➡ **[2013] RRTA 741 (10 October 2013)**

Last Updated: 18 November 2013

↩**1218579** ➡ **[2013] RRTA 741 (10 October 2013)**

## DECISION RECORD

**RRT CASE NUMBER:** ↩**1218579** ➡

**DIAC REFERENCE(S):** CLF2012/161127

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

**TRIBUNAL MEMBER:** Andrew Mullin

**DATE:** 10 October 2013

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the Applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The Applicant, who claims to be a citizen of the People's Republic of China, applied to the Department of Immigration for the visa [in] August 2012 and the delegate refused to grant the visa [in] October 2012. The Applicant applied to the Tribunal for review of the delegate's decision [in] November 2012.

## RELEVANT LAW

3. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.
4. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of 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).
5. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
6. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

## CLAIMS AND EVIDENCE

7. The Tribunal has before it the Departmental and Tribunal files relating to the Applicant. The Tribunal also has had regard to the material referred to in the delegate's decision record and other material available to it from a range of sources.
8. In his protection visa application the Applicant claims, in summary, that:

- He was born in Hebei, China, in [a certain year] and lived at an address in [Gucheng County], Hebei Province from 2002 to [2011]. He is a Christian. He received twelve years of formal education in Hebei, [final year given], and was self-employed as a [business] owner from [that time] to [Year 1]. He was married in 1994 and his parents, wife and two [children] live in China.
- He and his wife were in trouble with the authorities in [Year 1] because they had a second child, outside the provisions of China's One Child Policy, despite his having undergone a forced 'tubal ligation' (sic) The local Family Planning Bureau fined them Rmb 50,000 and demanded forfeiture of his[business].
- He appealed the forfeiture to the town government but was unsuccessful. He appealed many times to the Shijiazhuang government, submitting petitions to them. He was caught every time and sent back to the Town Public Security Bureau (PSB) Each time he was detained for several days or a week until he paid a fine.
- His father was unwilling to accept this situation and went to the Shijiazhuang court to seek compensation from the government. The court refused to accept the case and sued his father for disrupting official business. His father was detained and he had to pay Rmb 10,000 for his release.
- From 2008 his father continually appealed to the city government but they only wanted money. His father was detained many times.
- He was eventually fined for the breach of the One Child Policy and his [business] was forfeited. He was impoverished and unable to raise his children.
- A Christian 'sister' named [Ms A] offered him food and took him to her family church, where the brothers and sisters sympathized and prayed for him. They also donated money to him. He felt the warmth of Christianity and through the church gatherings he began to believe in Jesus. He knew that if he believed in Jesus he would live forever. He ceased to suffer despair and the anger in his heart disappeared. 'I believe that there is heaven, hell and purgatory to reward the good and punish the wicked.'
- From 2010 the family church where he and the brothers and sisters worshipped was regarded as a cult (Shouters) by the local government and police. They were no longer permitted to hold gatherings. The police often searched his home and those of the other brothers and sisters to check whether gatherings were being held. They wanted to catch people, fine them and send them to the detention centre. Some of the brothers and sisters died in PSB custody after they were caught.
- He had to leave his home town and find a new place to live. He did not believe the government and feared he would be persecuted once more for participating in the family church. He was very fearful because he knew he would die if caught again.
- In another city he saw an advertisement for Australian visas. He borrowed a large sum of money from his relatives for the visa and,



with God's blessing, arrived in Australia at the end of 2011. He can attend church freely here.

- After arriving in Australia he telephoned his father and was told that police from the town police station often enquire as to his whereabouts and ask whether he is a traitor.

- He will die if he returns to China. The police will say that he is bringing superstition from overseas to disrupt social stability. He will definitely be imprisoned, rather than being placed in detention.

9. The Departmental file indicates that the Applicant was invited to discuss his claims at an interview on 29 October 2012. He did not attend the interview and did not provide any reason for his non-attendance.

### **Tribunal hearing**

10. The Applicant appeared before the Tribunal on 22 August and 8 October 2013 to give evidence and present arguments. The hearings were conducted with the assistance of interpreters in the Mandarin and English languages.

11. At the first hearing:

- Asked what he feared would happen to him if he returned to China he said he would be persecuted by the government and his safety would be at risk because of the One Child Policy. Asked if there was any other reason he said there was not – it was just because of the One Child Policy that he had been persecuted. If he returned to China he would be jailed or fined. He would be jailed if he could not afford to pay the fine.

- Asked about the circumstances in which he had breached the One Child Policy he said his wife fell pregnant accidentally. Asked when this occurred he said it was in 1995. Asked if he meant it was seventeen or eighteen years ago he then said it was in [Year 2], agreeing he meant it was [a certain number of] years ago. She was told to have an abortion but ran away to another place to give birth. Asked where this was he said it was her [relative]'s home in Shijiazhuang City.

- Asked the name of this second child he gave it as [name & gender given]. Asked the birth date he gave it as [Year 2] in the lunar calendar. He confirmed he was sure she had given birth in [Year 2]. I put to him that this was inconsistent with his protection visa application in which he claimed the child was born [in Year 1]. He said he did have a second child. I put to him that it did not sound very likely that he would be so uncertain of the date. He said he had many mental pressures in China, leading him to run away to Australia. This was why he had trouble remembering birthdates. I put to him that I found it difficult to believe he we believe his [second child] to have been born in [Year 2] if he was born in [Year 1]. He said he knew his second [child] was [a certain age] and his first [child] was [a certain age].

- He had to pay a fine of Rmb 50,000 in instalments. His [business] was confiscated. Asked why there would still be any outstanding amount he said that because his [business] was confiscated he could not survive. Asked again he said the fine was too large to pay

at one time. I recalled his evidence that he had paid it in instalments. He said that according to them he had not paid it all. Asked when the [business] was confiscated he said it was after his wife gave birth to their second child. Asked a number of times for a more precise timing he eventually said it was in [Year 3].

- He had no source of income between the loss of his [business] in [Year 3] and his departure for Australia in [2011]. Asked how he had survived he said he did some casual work and also borrowed from his relatives. Asked how much he had borrowed he said he could not remember. In such a situation relatives were not willing to lend him any money. Asked again he said it was a lot, including the money for him to come to Australia. Asked how much 'a lot' was he said it was more than Rmb100,000. Asked again he said it was nearly Rmb 150,000 to 160,000.

- I asked the Applicant why he would not have used this money to pay the fine and avoid being arrested. He said he had already been attacked and he would not want to continue living in China. I recalled his claim that he came to Australia because he feared being arrested. He agreed this was so. I put to him again that he could have avoided arrest by using the money to pay the fine. He said that as a farmer he would not be able to repay his relatives. Asked if he meant he wanted to come to Australia to work so that he could repay his relatives he said he wanted to stay here. Asked if it was preferable to be in debt to his relatives than to go to jail because he could not pay the fine he said a third choice was to go to Australia.

- Asked again if he had feared harm in China for any other reason he said he did not.

- Asked where he was living just before leaving China to come to Australia he said he was not at home – he was staying with relatives or in rented rooms because of his fear. His home in Shijiazhuang City was vacant and his wife and children were living elsewhere with a relative in the City. His first [child] had dropped out of school and his second [child] was studying in a private [school]. He could not attend a public school because the authorities would investigate his household registration. His wife was working to pay for his tuition.

- Asked if the authorities were pursuing his wife he said she had already escaped to another place. I asked if he meant that, although she was working, they could not track her down. He said she was working for a private company. I suggested this would not prevent them from finding her. He said she had not committed any offence but could not stand the pressure and had moved. I noted that under China's family planning laws both parents are held guilty of a breach. He said they did focus on her but as she was breast feeding at the time they were unable to take her away. Asked why they would not have done so after she stopped breast feeding he said it was because she went away. I put to him that it seemed difficult to believe they would be unable to find her in the circumstances he had described. He said he could not care for them very well as he was in Australia – this was why he had applied for a protection visa.

- Asked if there was an arrest warrant current for him he said there was not. Asked why he would be arrested he said officers from the local family planning bureau wanted to get money from him.
- Asked about the visa for Malaysia in his passport he said it happened a long time ago – he had wanted to take a trip to Malaysia before his second child was born and when his financial situation was good. I put to him that this was not true as the visa was issued [in] May 2008. He said he obtained the visa in order to come to Australia. Noting again that it was issued in 2008 I asked what it had to do with coming to Australia. He said he gave his passport to an agent who helped him obtain the Malaysia visa. I observed that he had given two completely different stories about the visa and that this could cast doubt on the credibility of his claims. He said to obtain an Australian visa it is necessary to get another visa from a small country – this is what local agents do. Asked if he meant it was a way of deceiving the Australian government he said it was not trickery – it was all done by local agents. He had simply wanted to come to Australia, no matter what method the agent employed.
- Noting, from visa stamps in his passport, that he had not left China for more than two weeks after his Australian student visa was granted [in 2011], I asked why he would have delayed in this way if he genuinely feared harm. He said he had to farewell his family and friends.
- I put to him that his delay of eight months in seeking protection after arriving in Australia, only a few days before his visa was due to expire could cast doubt on the truth of his claim to fear harm in China. He said he had a student visa and he was legally in Australia. Asked if he had studied at all with this student visa he said he had not as he could not pay the tuition fee. He could survive only by working. He agreed he known, from the time he entered Australia, that he could not renew his student visa because he was not studying. Asked again why he would not have applied for protection straight away he said that when he arrived he did not know much about protection visas and it was only later, when he consulted a lawyer, that he lodged the application. I put to him that he would have known about the possibility if he had come to Australia to find protection. He agreed this was so.
- He agreed that, in applying for his student visa, he had submitted documents showing that he had access to a large sum sufficient to cover his tuition and living costs. I asked how, if he had been living in poverty in China, he had been able to find this money. He said he borrowed it from his friends and relatives. Recalling his evidence that had already been borrowing from them for five years I asked if they had been prepared to advance him this further large sum. He said he was under a lot of pressure and his life would be threatened if they did not give it to him. I put to him that these must have been very good friends and relatives, and that if they were so willing to keep advancing him money it was difficult to understand why he would have had any problems. He said he had no education and it was difficult for him to manage in China. Asked if this was the reason he

had come to Australia he said he just wanted to be here and did not want to return.

- Asked if there was anything he wished to add he said there was not.

12. At the second hearing:

- Asked if he feared harm in China for any reason other than his problems with local officials over his breach of family planning regulations he said he had suffered [an injury] in an [accident] in China which prevented him from undertaking any heavy labour. Asked what he was doing in Australia he said he was working doing odd jobs. Asked the nature of these jobs he said he was working as a [occupation deleted]. He was not earning enough to send money back to China and his family was surviving on casual work obtained by his wife.

- Asked again if he feared harm in China for any other reason he said he did not. Noting that in his protection visa application he claimed to have been involved with members of a Christian church in China I asked why he would have made no mention of this at the hearing. He said I had not asked him anything about his involvement in a Christian church, so he did not talk about it. I noted that he had been given a number of clear opportunities to explain the reasons why he feared harm in China, at both hearings, and that he had stated just as clearly that he did not fear harm for reasons other than those he had already mentioned. He said he was converted to Christianity in 2010, mainly because he was fined for breaching the One Child Policy.

- Asked if he did, in fact, fear harm in China because of this involvement he said the authorities think Christianity is an evil cult and they do not permit people to believe in it.

- Asked again why he had not mentioned this previously he said that, no matter the reasons, he could not stay in China as an 'average person.' Noting that there are many million people living in China who might be described as 'average persons' I asked why he could not stay there. He said the officials continued to fine him over his breach of the One Child Policy. Chinese officials are corrupt. He had converted to Christianity.

- Asked what Christian denomination he had been involved with he said it was 'just Christianity.' Asked if he knew anything more about it he said he prayed every day. Asked again he said he had not had time to attend a church because of the hours he worked, and there was no church near his home. Instead he read the New Testament at home. Asked if he had ever attended a church service in China he said there were only small family gatherings, every one or two weeks on Sundays. He attended these from 2010 –sometimes they were every three weeks. Asked what happened in these gatherings he said they just prayed and sang hymns. He himself was unable to sing any of them. He was not baptised as he was not 'qualified.'

- Asked who had founded this church he said he knew only that it was organized by 'big sister' [Ms A], the person who had introduced him to it. He did not know anyone else who had founded it before her. Asked if other people had a name for it he said no individual is allowed to believe in Christianity in China. Asked if people outside the church

called it anything he said they did not. Asked what he knew about the life of Jesus Christ he said He ascended into heaven forty days after the crucifixion. Asked if he could tell me anything else about Jesus he said he had read many books but could not put it in a clear way. Asked if he could tell me any of the Parables he said one can only get eternity by believing in Jesus Christ. Asked again he said he had no idea. Asked how long ago, roughly, Jesus Christ lived he said he could not remember. Asked if he could say anything else about Jesus he said he only knew the ten 'rules' and he prayed every day.

- He had not had time to attend a church in Australia and there was no church nearby. Recalling his claim that he was employed only doing odd jobs in Australia I asked why this would not allow him sufficient time for church. He said his [job] coincidentally required him to work on Sundays.

- I put to him that, based on the evidence he had provided, I had strong doubts as to the truth of his claim to have had any contact with Christianity, either in China or in Australia. He said that in Australia he only read the New Testament, in private. I noted that in his protection visa application he claimed to have been involved with members of the Shouters church (Hu Han Pai) in China but that his responses at the hearing indicated he had no idea about such a church. He said he had nothing else to say. He had a simple belief in Christianity and did not think about it very much.

- I explained to him that if I came to believe he had not, in fact, had anything to do with Christianity this would lead to a conclusion that he would not involve himself with it if he returned to China and would not suffer harm for such a reason. He said he did not want to go to China. Even if Christianity were not a factor, he had had to pay a fine there and the government was corrupt.

- Asked if there was anything he wished to add he said he liked Australia and did not want to return to China. He was stressed psychologically and physically by the authorities in China. He did not want to lie and he hoped the Australian government would allow him to remain.

## CONSIDERATION OF CLAIMS AND EVIDENCE

13. On the basis of his passport which he submitted at the Tribunal hearings I accept that the Applicant is a citizen of the People's Republic of China and that his identity is as he claims it to be.

14. The Applicant claims to fear harm in China because of his religion, as a member of the Shouters church. He also claims he will be harmed because he has been unable to pay a fine, or fines, imposed on him and his wife for breaching China's family planning regulations by having a second child. He does not identify a Convention nexus for this harm but I accept that an imputed political opinion adverse to the government may be inferred as the reason for it.

### *Political opinion*

15. I have strong doubts as to the credibility of the Applicant's unsubstantiated claim to fear harm in China for breaching family planning regulations.

16. The Applicant's account at the hearing of the reason for his alleged difficulties with the authorities over the regulations was notably vague, confused and inconsistent. His claim that his second child was born in [Year 2] is inconsistent with the [Year 1] date given in the protection visa application and I am not satisfied that he offered any convincing explanation for it. His evidence concerning the payments he had allegedly made toward settling a fine imposed on him for this reason cast no light on why it was that any of it would remain outstanding. He provided no clear information as to how much of it remained to be paid. He appeared to have little or no idea as to when it was that his [business] was allegedly confiscated. His claim that he was living in poverty after losing his [business] appears inconsistent with his evidence that he had relatives and friends who were willing and able to continue to support him to meet his day-to-day living costs, to the amount of Rmb 150,000 to 160,000, and also to provide him with the large sum required to obtain a student visa and travel to Australia. These are not minor or marginal matters but instead lie at the heart of his claim to fear harm in China for breaching the One Child Policy. I am not satisfied that his evidence at the hearing reflected any genuine, authentic experience of such circumstances and I find that this casts doubt on the credibility of his claims.

17. The Applicant's evidence at the hearing that his friends and relatives in China were able to provide him with these large sums appears inconsistent with the claim that he feared harm because he was unable to pay a fine which amounted to no more than Rmb 50,000. Had such a fine ever been imposed on him I am not satisfied he could not have paid it promptly if he had had the means to raise the much larger sums he mentioned. When this was put to him at the hearing he suggested that even if he had paid the initial fine, corrupt officials would continue to fine him. He offered no explanation as to why he would be targeted for extortion in this way and I am not satisfied that this claim, which was raised for the first time at the hearing, was more than an improvisation.

18. Taking these matters together I am not satisfied as to the credibility of the Applicant's claim that he was punished by the authorities for a breach of the family planning regulations with a fine and the confiscation of his [business]. Nor am I satisfied that he is at any risk of harm on return to China for such a reason or because he faces other fines imposed on him by corrupt officials.

### *Religion*

19. When he was asked at the Tribunal hearings why it was that he feared harm in China the Applicant raised the matter of his alleged unpaid fine for breaching the family planning regulations and, later, [an injury] which he said prevented him from engaging in heavy labour. He was asked a number of times, at both hearings, if he feared harm for any other reason and his clear response was that he did not. He did not volunteer at any point that he had been involved with the Shouter church in China, that he and his father had suffered harm there as a consequence, that he had been forced to live in hiding

and had later had to flee to Australia or that he feared arrest and imprisonment on return for such a reason. It was only when he was asked, toward the end of the second hearing, why he had not mentioned his religious involvement that he confirmed that he had been involved with a church. He attributed his failure to mention it to the fact that he was not asked about it. Having considered this response, however, I am not satisfied it explains why he would not have volunteered details of a faith which is said in his protection visa application to have been highly important for him and which caused him to suffer serious harm over an extended period. I find that this casts strong doubt on the credibility of his claims of religious involvement and suffering in China.

20. The Applicant does not claim to have attended religious gatherings of any kind in Australia, although he said at the hearing that he reads the New Testament in private. His account of his alleged involvement with the Shouters sect in China was, like his account of his alleged problems with local officials, vague and largely devoid of circumstantial detail despite the importance this activity is said in his protection visa application to have had for him. Having considered these responses carefully I am unable to be satisfied that he was ever involved with a branch of the Shouters, or with any other Christian denomination, while he was in China, or that he embraced Christianity there. This being the case, I do not accept that he or his father were subjected to the various forms of harm he claims they suffered as a result of such an involvement, or that these forced him to flee to Australia.

21. I am reinforced in this conclusion by the Applicant's two-week delay in leaving China after his student visa was granted. I am not satisfied that such a delay is consistent with his claimed fear of imminent harm at the hands of the authorities. I have considered his response when this matter was put to him at the hearing – to the effect that he had wanted to farewell his family and friends - but I am not satisfied that it resolves my concerns about the delay.

22. Finally, I am not satisfied that the Applicant's delay of some eight months in applying for protection in Australia is consistent with his claimed fear of harm in China. At the hearing he claimed he did not need to apply for protection as his student visa was still valid. However, he acknowledged that he had not studied at all in Australia, and that he had known it would not be possible to renew his student visa. I do not accept that he can have been ignorant of the possibility of claiming protection until he had been in Australia for some time if, as he claims, his reason in coming to Australia was to seek protection.

### **Summary – refugee claims**

23. In the light of all the information before the Tribunal I am not satisfied that the Applicant was a member of the Shouters sect or any other Christian church in China, or that he was ever harmed for such a reason. Nor am I satisfied that he was ever harmed for a breach of the One Child Policy, that he has an unpaid fine in China or that an adverse political opinion was imputed to him in such circumstances. I am not satisfied there is a real chance that he would suffer serious harm for these reasons if he were to return to China. He does not claim to fear harm there for any other Convention-related reason and no other reason is apparent on the face of the information before the Tribunal.

24. I am not satisfied that the Applicant has a well-founded fear of persecution because of his religion, his political opinion or any other Convention reason should he return to China, now or in the reasonably foreseeable future, and I am not satisfied that he is a refugee.

### **Complementary protection**

25. For the reasons given above I am not satisfied that the Applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the Applicant does not satisfy the criterion set out in s.36(2)(a). )

26. I have also considered the alternative criterion in s.36(2)(aa) of the Act. However, having considered the Applicant's claims individually and cumulatively, and having found that he does not face harm of any kind for the reasons he has claimed, I am not satisfied there are substantial grounds to believe that as a necessary and foreseeable consequence of his being removed from Australia to China, there would be a real risk that he would suffer harm which would amount to significant harm in terms of s.36(2)(aa). For the sake of completeness I note in this context his claim at the hearing to have suffered an [injury] which would prevent him from engaging in heavy labour. However, as this injury has clearly not prevented him from working as a [occupation deleted] I am not satisfied that it would, in fact, have any impact on his ability to subsist in China.

27. There is no suggestion that the Applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the Applicant does not satisfy the criterion in s.36(2).

### **DECISION**

28. The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.

Andrew Mullin  
Member

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# Refugee Review Tribunal of Australia

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## ←1201599 →[2012] RRTA 1024 (9 November 2012)

Last Updated: 30 January 2013

←1201599 →[\[2012\] RRTA 1024](#) (9 November 2012)

### DECISION RECORD

**RRT CASE NUMBER:** ←1201599 →

**DIAC REFERENCE(S):** CLF2011/178934

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

**TRIBUNAL MEMBER:** Tony Caravella

**DATE:** 9 November 2012

**PLACE OF DECISION:** Perth

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the

Migration Act 1958 as this information may identify the applicant ] October 2011.

3. The delegate refused to grant the visa [in] January 2012, and the applicant applied to the Tribunal for review of that decision.

## RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.

6. 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.

7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink\_findacts">222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

8. 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.

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

10. 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.

11. 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.

12. 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.

13. 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 being persecuted 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.

14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. 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.

## Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## CLAIMS AND EVIDENCE

19. 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.

### Background and protection claims

20. The applicant has declared in his written application for a protection (Class XA) visa (Form 866C) that he was born in Hebei, China, in [year deleted: s.431(2)] and that he has lived in Hebei until October 2008. He claims his religion to be Christianity. He declares that he arrived in Australia [in] October 2008 and entered this country as the holder of a visitor visa. The applicant declares that he also travelled to Hungary and Austria [in early 2008]. He declares his occupation to be that of a small business owner.

21. In response to the question asked in the application form as to why the applicant left his country the applicant states:

I was born in a Christian family and believed Christianity since I was a child. Nearly all of my relatives are Christian, including my parents and my grandparents. I believed that God could give us peace and guide us to reach the final paradise of heaven.

But in China churches were often under the surveillance of the government. We always suffered oppression from government and our daily life was always interrupted. I was the organiser of our house church on Thursday evening, my family suffered much more harsh oppression than other villagers.

The police came to my house frequently since I began organising house church. Sometimes, they suddenly broke into my house when we were praying or studying the holy Bible. When that happened all church members were asked to show their ID card and were threatened not to take part in such activities. We would then suspend our practice for a period of time and then resumed when all felt safer. Sometimes we would argue with police and even fight with police, and then would be detained for a few hours.

In late 2007, the local government tightened their control on the family churches. In January 2008, the local police broke into my home again when we were praying to God. They searched every corner of my house. I was so angry and argued with them. Several members also followed me. The police arrested us and we were detained for about two weeks with the charge of illegal gathering. I was forced to sign a confession letter and was warned not to organise or attend to family churches. After release, I decided to go overseas. I could not survive in China where people even do not have free religious beliefs. I asked an agent in China to get a visitor visa for me. [In] October 2008 I left China and arrived in Australia [in] October 2008.

After arriving in Australia, I attended church activities regularly. I appreciate that I am safe and can have freedom in religious belief in Australia. I received baptism in the [Church 1] of Perth [in] February 2009, and I felt the peace and happiness deep in my heart. I hope that Australia government could protect me free from prosecutions of Chinese Government and enable me to live in Australia permanently.

### **The delegate's decision**

22. The delegate found that the applicant arrived in Australia [in] October 2008 on a subclass 676 tourist visa allowing him to stay for a period of three months. The delegate found that the Department's records showed the applicant lodged a protection visa application [in] January 2009 which was found to be invalid as the application had no claims. The delegate found the applicant lodged a valid application for a protection visa [in] October 2011.

23. The delegate accepted that the applicant is and has been a practising Christian. The delegate was also ready to accept that the applicant was detained for two weeks following a house break in as country information suggests that authorities do sometimes harass underground churches and detained church members.

24. The delegate found the applicant provided a vague account of the service and was unable to describe the service to an extent that the organiser of a house church would be expected to do. The delegate found the applicant did attend house churches but found it implausible to accept that the applicant was a house leader/house organiser because of his lack of knowledge of the church service and the length of his detention in January 2008 by the authorities.

25. The delegate also considered the applicant's travel to Austria and Hungary after his detention by the authorities in February 2008 and that he re-

entered the PRC without any apparent difficulties. The delegate considered that if the applicant feared being harassed and arrested by Chinese authorities, it would be illogical for the applicant to return to the PRC.

26. The delegate also found that the applicant is not a person of interest to the Chinese authorities and if he was he would have been detected by the PRC authorities at the airport when he exited the PRC to travel to Austria and Hungary and also when he left the PRC to come to Australia.

27. The delegate also found that the applicant waited seven months after he was released from detention to leave the PRC and that during this time the applicant was not detained by the authorities. The delegate put the delay in leaving the PRC to the applicant at the protection interview and the applicant replied that when the authorities came to harass him he would run from the back door and hide. The delegate was not satisfied with the applicant's explanation considering that if he was genuinely persecuted by the PRC authorities those authorities would have detained him in the seven-month period before the applicant left the PRC.

28. The delegate also considered that the applicant's passport expired [in] February 2011 and that the applicant obtained travel document from the Chinese authorities in Australia and that the applicant told the Chinese authorities he would return to the PRC. The delegate found that the claim that the Chinese authorities were willing to cooperate with the applicant contradicts the applicant's claim that he will be harassed and arrested by the PRC authorities upon return.

29. The delegate considered the three-year delay between the applicant arriving in Australia in October 2008 and the lodgement of a protection visa application. The delegate refers to the applicant lodging an invalid protection visa application in January 2009 which indicated that the applicant was aware of protection visas. The delegate writes that the applicant replied that he did not lodge any protection visa application in January 2009 nor received any letter from the Department. The delegate notes that the Department's records showed the applicant did lodge a protection visa application [in] January 2009 and the application was found to be invalid as it had no claims and that a notification letter was sent to the applicant [in] January 2009. The delegate concluded that the applicant could not provide a valid explanation as to why there was a delay in lodgement of a valid protection visa application and that this suggests the applicant's fear of persecution in his home country of the PRC is not genuine.

### **Application for review by this Tribunal**

30. [In] February 2012 the Tribunal received an application for the review of the delegate's decision.

### **Tribunal hearing**

31. The applicant appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

32. The applicant was represented in relation to the review by his registered migration agent. The representative did not attend the hearing. At

the hearing, the applicant told the Tribunal that his representative would be available to speak to the Tribunal via telephone. The Tribunal called the representative at the start of the hearing and asked him if he wanted to participate by telephone. The representative told the Tribunal that he was too busy because he had four other cases to submit by 4pm that day and added that he would like a copy of the hearing recording and that he would provide written comments within 2 weeks. After the hearing a copy of the hearing recording was despatched to the applicant's representative.

33. The Tribunal opened the hearing by asking the applicant why he feared returning to China. The applicant replied that he believes in God and that he was involved in forming a church group. He said that the police then began bothering him. He said that he would get locked up for one or two hours and once he was locked up for two weeks. He said the police would abuse him and not give him food for a whole day while he was in custody. He said that he has been beaten.

34. The Tribunal asked the applicant to provide more details. He said that in China he was the host for a home church service every Thursday night and that the police had visited them regularly. He said the police work for the government and when they visited they would ask everyone to show their ID. The applicant said that his wife and two sons are both born in [a certain year] making one son [age deleted: s.431(2)] years of age, and the other [age deleted: s.431(2)] years of age. He said they all live in the same house.

35. The Tribunal asked the applicant how he became involved in Christianity. He replied that it was because his parents and grandparents are Christian. The Tribunal asked what denomination of Christianity he follows. The applicant then looked through a copy of the Bible that he had with him but was unable to explain what denomination he followed. He then produced a card saying he is now attending the Baptist Church in Australia.

36. The applicant said that his grandfather believed in God and their whole family is involved in religion. He said his grandfather and his mother passed away due to health problems and that his father is very old and that because of this the applicant became the family Church host. The applicant told the Tribunal that he is the youngest of his siblings. He said his father used to be the Church host before and that it is usually the owner of the house who takes the role of the host. He said that his house is bigger than others and they could cope with up to 20 people or so.

37. The Tribunal asked the applicant whether he holds a formal leadership position within the church; he replied that he does not hold any formal position but he is only a host. He added that he is not a priest.

38. The Tribunal asked the applicant what happens when people come around to attend the meetings on Thursday nights. He replied that they gather together and everyone brings delicious food which they share and they also share evidence and play music and sing to their God. He said it is not like a Sunday service when they go to church. The Tribunal asked the applicant how the meeting on Thursday nights is different from church service on Sundays. The applicant told the Tribunal that at church they sing, drink grape juice and have little cookies. He said that they also make donations and share their experiences. He said the donations are to help run the church and that the pastor is in control of the donations received.

39. The applicant told the Tribunal that the police asked him to fill in a form to declare his religion but he refused to fill in the form.

40. The applicant told the Tribunal that he attends church in Tianjin city on Sundays and described this as being adjacent to Heibei province. He said that they secretly gather at the house church in [District 2] on Sundays because it is bigger than his house.

41. The applicant told the Tribunal that he has experienced the church in Australia and that compared to China the church there is not as well organised as the Australian church. He said that most of those who attend his church in China are farmers and are not educated very well.

42. The Tribunal asked the applicant whether he is a small business owner or a farmer. He replied that in China farmers are allowed to do some small trading. He said his wife once rented their land out and they therefore took to selling [goods] at the local market in rural areas which moves around from village to village according to the Chinese lunar calendar.

43. The Tribunal asked the applicant why he thinks that the authorities would want to harm him if he returns to his home in China. He replied that something happened in the past and that the authorities would search his house and rip up the Bibles. He said that the police only believe in the Communist Party and do not want people to believe otherwise. He said that he has an ongoing argument with the authorities and that he had been held by them for one or two hours but on one occasion he was detained for two weeks.

44. The Tribunal asked the applicant to provide more information on his detention. He said that on the occasion he was held for two weeks he was locked up at the police station which had responsibility for his village. He said that he and two other people were held on that occasion. The Tribunal asked whether he was charged with any offence, to which the applicant replied he had not been charged. The Tribunal asked the applicant why the police detained him; he replied that in January 2008 during the Olympic period, the authorities were very strict and were controlling the community. He said that the authorities came to his house used abusive language, searched the house and tore up their Bible. He said that he was beaten on the face and head and he was beaten because he was arguing with the authorities. He said he used his hand and arm to shield himself but then he was accused of fighting so he and two others were locked up. He provided the names of the two others who were locked up as [names deleted: s.431(2)].

45. The Tribunal asked the applicant what happened during the two weeks he claims he was locked up. He replied that during this time he was asked what his purpose was because the police thought that he wanted to do something harmful for society. He said he told the police they only believe in God and they had no political desires, but one of the police hit the applicant in the face and told him he was lying.

46. The applicant told the Tribunal that while he was in detention at the end of the day when the police locked the door where they were being detained, the police would tell them that as they believed in God then God should provide their meal and so they did not provide them with food. He told the Tribunal that in the room in which he was held there was no bed but only a small sofa so that they had to sleep on the sofa. He said that sometimes the police did not even provide water. He said that in the room there was a pot in which to pass urine.



47. The Tribunal asked the applicant what he was told when he was released from the two-week detention. He replied that firstly the authorities could not find any evidence that they were a threat to society or to the country. Then they were forced to sign a confession that he would not host future house church meetings in his home. He said that one of the police told them that the next time he is caught he will not be let out so easily and also the family would have to pay 10,000 RMB to bail him out. He said that he was not sure whether this was a genuine threat. He said that as he was scared he started to look at holding house church meetings at other places and they would then change from house to house and that when police came he would usually hear them because they arrived by car and he would leave the meeting before they entered.

48. The Tribunal asked the applicant whether he had made an earlier application for a protection visa in January 2009. He replied that he was asked the same question when he was interviewed by the Department. He said he could remember that he used to live in a rental house and there was a roommate who was not his friend and that the roommate asked him for a tax file number. The applicant said he did not know what a tax file number was at the time but he gave his personal information to the friend and also he showed him his passport. The particular friend then moved out of the house. He said that he now thinks that person might have applied for a tax file number and that it may be linked to an earlier protection visa submitted to the Department. The applicant said that he had not received any correspondence from the Department about this. The Tribunal asked the applicant whether he had a migration agent at the time and whether the agent might have submitted a protection visa on his behalf. He replied that he had no idea that he was able to migrate to Australia at that time and he was only planning to stay away from China for a while. He said he did not know he could apply to stay until someone introduced him to his representative and through him learned about protection visas.

49. The applicant told the Tribunal that when he came to Australia he had been to countries on tourist visas. He told the Tribunal that he entered Australia on a tourist visa and found Australia to be such a great country and found an immigration lawyer who could help him stay. The applicant told the Tribunal that he did not know Australia could provide protection and that he thought that protection may be only for rich people.

50. The Tribunal asked the applicant why he did not stay in Hungary or Austria as he had travelled there previously. He replied that the purpose in his going to Hungary and Austria was only to travel and relax. He said that he was not well emotionally at that time. He said that he had overheard that Austria was a place full of music and he loves music and so that is why he decided to go to Austria. The Tribunal asked the applicant if he was so worried about going back to China then why did he not remain in Austria or Hungary. He replied that the reason he went to Austria and Hungary was purely for a break and that he still had hope that after he returned to China that police would not continue troubling him. He said that he then came to Australia and found it to be a great country and then he started going to church in Australia and made many friends here.

51. The Tribunal referred to delegate's decision record where the delegate found the applicant did not appear to be an organiser in the church. The

applicant commented that he provided sufficient reason and evidence to the Department and if they did not believe him then it is their problem. He said that his house church was built up and there is no way that the government would approve that. The Tribunal asked whether the applicant had any evidence that he hosted and organised church meetings. He replied that all the evidence was taken by the police and also because it was illegal there is no evidence.

52. The Tribunal asked the applicant how those attending his house church knew the house. He replied that it started after he had done preaching on a door-to-door basis. He said he would tell people that the church meeting was held on Thursdays. He said that in China it is different because everyone knows each other in their villages and they had been there for several generations. He added that they are all farmers.

53. The Tribunal asked the applicant to comment on how he was able to leave, return, and leave China again without problem and suggested that this indicates that he is not a person of interest to the Chinese authorities. The Tribunal invited the applicant to comment on this. He replied that he is not the most wanted person in China and he is not registered in the authorities' computer. He told the Tribunal that he believes he was mistreated in the past and asked whether he needs to be made disabled or whether he needs to self-harm. He said that he was locked up for one or two hours and on one occasion for two weeks and that has severely affected his life and he could not freely practice his religion. He said that if he could not get out of his country he could not apply for a protection visa.

54. The applicant told the Tribunal that he has been told that the police visited his house and talked to his wife and asked when the applicant will be returning to China. The applicant added that he reads the newspapers in Australia that people in China who practice Falun Gong are mistreated. He added that he also has heart trouble and that he does not think he can go through the same experience again. At this point the applicant showed the Tribunal a bottle which appeared to be medicine. He said the medicine is called [name deleted: s.431(2)]. He said that this is for his [health] condition. He told the Tribunal that he thinks his life would be ended if he was detained by police again.

55. The Tribunal asked the applicant whether he believes he would be safe by relocating to another part of China. The applicant said that he does not believe that there is anywhere safe in China. He said that the police only beat people in his area and in other places could be worse because they might beat him with batons. He said that in Australia he has heard stories about Falun Gong followers and he has also heard where police force people from their houses because they want to redevelop the land. The applicant said that he is not Falun Gong practitioner although there are some Falun Gong practitioners in his area. He said that his case is not about redevelopment but he was just giving this to illustrate what the government does.

56. The Tribunal asked the applicant why he does not follow one of the religions which are accepted in China. The applicant said that the Christian Church there are government approved and are not genuine and he does not believe in them. He said that there is a saying that those in the registered churches over drink, over eat, gamble, and use prostitutes and use the church to cover up their wrongdoings.

57. The Tribunal asked the applicant whether he works in Australia. He replied that he works in Australia in construction and that he has some friends who have a construction contract and they asked him to assist them. He said he is paid weekly. [Details of work deleted: s.431(2)]. He said he does not know the deal between the contractor and house owner. He said that if he has something to eat, somewhere to stay, and is free, then that is all he wants.

58. The Tribunal asked the applicant who introduced him to [Church 1] which he claims to attend in Perth. He replied that a friend took him to a church near where he lives once and then another friend took him to [Church 1]. He told the Tribunal that he goes to [Church 1] even though it is spoken in English. He said he goes to this church because he feels comfortable there.

59. The Tribunal asked the applicant to describe what happened at his baptism. He said he was baptised in Australia and that his friend interpreted for him. He said that he believes God led him to this church. The Tribunal asked the applicant whether he had been baptised in China. He replied that in the Bible he could not see anywhere that said that a person cannot be baptised twice. He said that in China baptism was under Yue Han whereas in Australia it is under Jesus. He said that he wanted to be baptised in Australia and he wanted to show that he is a real Christian. He said he goes to church every week unless there is a phone call from his boss to advise him that there is an urgent job to be done, otherwise he is at the church every week even if he is sick. He said that he goes to church [every Sunday]. He said he goes with a friend called [name deleted: s.431(2)].

60. The Tribunal asked the applicant whether his wife is involved in the church. He replied she is involved but she is very quiet and nice and she would not talk when police entered the church house. He said that she stays in a corner and that she has been very lucky not to have been harmed. He told the Tribunal that he speaks to her once or twice a week after work during the evening or at night. He said that she is very busy during the day and that she works for [a certain] company and has a heavy workload and works in [District 2] in Tianjin. The Tribunal asked the applicant why his wife did not come to Australia with him. He replied that she did not come because in the past the police never bothered her. He repeated that he has a [health] condition. He said that last year his wife telephoned him and said she wanted to come to Australia as a tourist but then she got caught up with work. He said he misses her.

61. At the end of the hearing the applicant handed over two newsletters dated April 2012 and July 2012 from [Church 1] in [Western Australia].

### **Post hearing correspondence**

62. [In] May 2012, the Tribunal sent the applicant, through his representative a letter inviting the applicant to provide further information or submissions on any claims the applicant might wish to make on complementary protection. The letter states, in part:

....

The purpose of this letter is to invite you, pursuant to s.424 of the Migration Act 1958 (Cth), to provide any further information or submission in support of the applicant's

application for review. Furthermore, the Tribunal invites you to make any relevant submission in respect to the complementary protection provisions of the Migration Act 1958 (Cth) which came into force on 24 March 2012. These provisions provide, at section 36(2), that a protection visa is to be granted not only to non-citizens to whom Australia has protection obligations under the Refugees Convention, but also to non-citizens with respect to whom:

the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

Section 36(2A) provides that a non-citizen will suffer 'significant harm' if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

The terms 'torture', 'cruel or inhuman treatment or punishment', and 'degrading treatment or punishment' are defined in section 5(1) of the Migration Act.

Section 36(2B) provides that there is no 'real risk' of significant harm if:

- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
- (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

According to section 36(2C), an individual is ineligible for a visa on complementary protection criteria if:

- (a) the Minister has serious reasons for considering that:
  - (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
  - (ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

If you wish to make any written submission in respect to these provisions please do so in writing in accordance with the date set out below.

The information should be received at the Tribunal [by] June 2012. If the information is in a language other than English, it must be accompanied by an English translation from an accredited translator.

If you cannot provide the information [by] June 2012, you may ask the Tribunal for an extension of time in which to provide the information. If you make such a request, it must be received by the Tribunal [before] June 2012 and you must state the reason why the extension of time is required.

63. [In] June 2012, the Tribunal received a letter from the applicant's representative requesting an extension of time to provide supporting documents from the applicant from China. The letter states that some of the documents are in Chinese and the representative required extra time to have them translated. The letter states that the representative expected the documents would be provided by [mid] June 2012.

64. [In] June 2012, the Tribunal received a further submission and attachments from the applicant's representative, the attachments comprise:

- A translated person statement (summarised in the following paragraph);
- A letter [dated] May 2012 from [a Pastor] of [Church 1] Perth, which states that the pastor has known the applicant since he joined the church when he was baptised [in] February 2009. It also states that the applicant attends church every week on Sundays, except on a few weekends when he is working. It also states that "He seems sincere in his desire to follow the Christian faith.";
- A newsletter for [Church 1] Perth, [dated] 2010, and a copy of a [magazine] both of which include photographs of church congregations which also depict the applicant in the congregation.

The Tribunal summarises the submission referred to above in the following paragraphs.

65. In respect of the applicant's second baptism, in Australia, the applicant claims that he thought he would wash off his sins. He states he was unlawful at the time without a visa, and thought that might also be a sin. He writes that

with the second baptism he thought he could be more absorbed into the Australian church. He claims that he spoke to some church members about the second baptism who told him that a second baptism is not necessary but if he is baptised a second time it is not a big issue.

66. The applicant also writes that he has been unable to provide evidence to prove his church experiences and the experience of being detained by the Chinese government. He refers to the Department's decision where the delegate indicated he believed what the applicant had experienced. He claims he wanted to contact his wife to see if she could provide some further evidence but is worried about her well-being and does not want his wife and his family to be affected.

67. In response to the question about whether he will be persecuted if he returns to China, the applicant states that he cannot say this will happen for sure, but adds that it has happened to him before. He writes that the Chinese government still does not recognise the legitimacy of house churches and the media reports of house churches being persecuted in various areas in China. He states that the Chinese media reports on good things, but they cannot cover up the truth. He refers to the recent media coverage about a blind lawyer Chen Guangcheng being rescued by the US embassy and also the case involving a high ranked official Bo Xilai whose wife murdered a British businessperson.

68. The applicant writes that in Australia he can enjoy democracy and freedom. He writes that he used to be unlawful but he applied for a protection visa and was given work entitlements and Medicare. He refers to how members of the church gave him a lot of help and that if the Chinese government protection of human rights could reach half the Australian level he would return to China without hesitation as his family is in China. He concludes by stating that for now he could only stay in Australia and he wishes his protection visa could be approved so he can bring his family here.

### **Independent country information**

69. Some house church members in Hebei province currently experience ill-treatment from government officials in the form of administrative detention, arrest, and re-education in labour camps. Missionary activity by independent church members was the target of police action in one location in Hebei (Baoding City) in 2003. While it is unknown whether similar forms of treatment against house church members are common across Hebei, in general, officials in this province are reported to strictly enforce the Communist government's religious policy that the practice of Christianity be limited to officially registered church associations.[1] No specific information was found on the treatment of house church members in the applicant's home town/village.

70. In January 2010, 30 house church leaders in Handan city in southern Hebei (approximately 200 kilometres south of Gaocheng City) were detained during a Bible study meeting. The members were accused of participating in an illegal meeting. Three were sentenced to administrative detention for periods of between 10 and 15 days. The remaining leaders were either released or their treatment by officials is unknown.[2] The detentions were reported by Reverend Zhang Mingxuan, pastor and president of the Chinese Home Church

Alliance (CHCA),<sup>[3]</sup> a body established to defend the specific rights of house church Christians.<sup>[4]</sup>

71. The China Aid Association reported on the arrest of 43 house church members between January 2007 and December 2009 in three cities (Hengshui, Baoding, Zhouzhou) in Hebei. These individuals were involved in house church meetings, and Bible and marriage classes.<sup>[5]</sup> Treatment of these individuals after arrest is not known. Nine Protestant leaders from the province were also detained in July 2007 after conducting a Sunday worship service together at a home. Administrative courts in Enshizhou, in Hebei, found the Christians guilty of “engaging in organizing and making use of [an] evil cult organization to undermine the enforcement of State laws” Those sentenced were later placed in forced labour camps.<sup>[6]</sup>

72. In addition to targeting house church members, authorities in Hebei also target those undertaking missionary activities. In 2003, an internal document reportedly issued by the Public Security Bureau in Baoding city ordered that police take action to stop illegal Protestant groups in the area, including those working as “independent missionaries” who attempt to evangelise. No reports were found on the results of this police action in Baoding. An article from the *South China Morning Post* reported on these events as follows:

Activists say that police in Hebei were ordered to spy on worshippers and to isolate rogue Christian groups. Police were ordered to isolate unofficial Christian groups in Baoding city, Hebei province, and spy on people worshipping at their churches, a group of religious activists has claimed.

Quoting a classified document issued by the Public Security Bureau in Baoding city in August, the New York-based Committee for Investigation on Persecution of Religion in China said police had been instructed to separate activities by the officially-sanctioned Protestant Church and other groups....

The document – entitled “Work Plan on Terminating Illegal Christian Activities” – recommended all officers in Baoding city to heighten their vigilance against “illegal Christians” between August and October last year.

The crackdown coincided with the lead-up to the 16th Communist Party Congress, a key event in the political calendar. However, in addition to a specific action plan for the three-month period, the document also laid down general guidelines that could signal a hardening of the government’s position towards Protestant groups deemed a threat to the authorities.

During the crackdown, the city’s police chief, Li Yunlong, headed a taskforce in charge of “finding out everything about illegal Christians, bringing organisers of illegal activities and independent missionaries to justice, and shutting down venues used by the illegal Christians”.

The term “independent missionaries” apparently refers to evangelists who work independently from any churches. “(We) must strive to effectively halt the emergence of illegal activities by Protestants in our city,” the document said. Unlike previous government edicts, the latest one singled out Protestant groups as targets for control

and demanded police officers include the crackdown on “illegal Christians” as part of their daily work.[7]

73. House churches are broadly defined as small Protestant Christian communities or groups who meet informally in homes without government approval. Often described as evangelical, house church member services are simple and do not adhere to any particular Christian tradition or denomination.[8] No figures on the numbers of house churches in Hebei were found. Total Protestant numbers (official and unofficial) in the province were estimated to be approximately 400,000 in 2001.[9]

74. The UK Home Office *Country of Origin Information Report – China* reports[10]:

#### PROTESTANTS (INCLUDING ‘HOUSE CHURCHES’)

19.18 The USSD *International Religious Freedom Report 2009* stated:

“Officials from the Three-Self Patriotic Movement/China Christian Council (TSPM/CCC), the state-approved Protestant religious organization, estimated that at least 20 million citizens worship in official churches. Government officials stated there are more than 50,000 registered TSPM churches and 18 TSPM theological schools. The World Christian Database estimates there are more than 300 unofficial house church networks. The Pew Research Center estimates 50 million to 70 million Christians practice without state sanction. One Chinese scholar estimated in a public lecture at Renmin University that the number of Christians in China, including those in TSPM churches and unregistered churches, is near 90 million. By contrast, the Chinese Communist Party is estimated to have 60 million members, 10 million of whom are believed to participate regularly in religious services. Currents of Calvinism or Reformed theology gained influence among house churches and Christian intellectuals. Pentecostal Christianity was also popular among house churches.” [2a] (Section I. Religious Demography)

19.19 An article by *The Economist*, dated 2 October 2008, stated, “Because most Protestant house churches are non-denominational (that is, not affiliated with Lutherans, Methodists and so on), they have no fixed liturgy or tradition. Their services are like Bible-study classes.” [19a] As reported by the USSD *International Religious Freedom Report 2009*:

“The Government repressed Protestant house church networks and cross-congregational affiliations, which it perceived as presenting a potential challenge to the authority of the Government or the Party. For example, on November 28, 2008, the Ministry of Civil Affairs issued a decision abolishing the 250,000-member Chinese House Church Alliance (CHCA), which claims to have members in several provinces, stating that the CHCA was not registered and was engaging in activities in the name of a social organization without authorization... Local regulations, provincial work reports, and other government and party documents continued to exhort officials to enforce government policy regarding unregistered churches and illegal religious activities, although the extent to which officials interfered with the activities of unregistered churches varied and depended largely on local conditions. Urban house churches in some areas limited the size of their meetings to a few dozen individuals.



In nonurban areas, some house churches were able to hold meetings that hundreds of individuals attended with which local authorities did not interfere. Some unregistered religious groups had significant membership, properties, financial resources, and networks. House churches faced more risks when their memberships grew, they arranged for regular use of facilities for religious activities, or forged links with other unregistered groups or coreligionists overseas.” [2a] (Section II. Status of Religious Freedom, Restrictions on Religious Freedom)

19.20 The report stated further:

“In some areas, government authorities pressured house churches to affiliate with one of the PRAs and to register with religious affairs authorities by organizing registration campaigns and by detaining and interrogating leaders who refused to register. In other parts of the country unregistered groups grew rapidly and the authorities did not pressure them to register. Although SARA does not officially acknowledge the existence of house churches, its website states that family and friends holding meetings at home (as distinct from formal worship services in public venues) need not register with the Government (the ‘Family and Friend Worship Policy’). Police and officials of local RABs in some areas disrupted home worship meetings, claiming that participants disturbed neighbors or social order, or belonged to an ‘evil religion.’ Police sometimes detained for hours or days worshippers attending such services and prevented further worship activities. Police interrogated church leaders and lay persons about their worship activities at locations including meeting sites, hotel rooms, and detention centers. Non-governmental organizations (NGOs) reported that church leaders faced harsher treatment than members, including greater frequency and length of detention, formal arrest, and reeducation-through-labor or imprisonment. According to NGO and media reports, in some cases local officials also confiscated and destroyed the property of unregistered religious groups.” [2a] (Section II. Status of Religious Freedom, Restrictions on Religious Freedom)

19.21 The USCIRF *Annual Report 2010*, published on 29 April 2010, noted:

“The Chinese government continues to control the religious activities of Protestants affiliated with the government-approved religious organizations. It encourages registered Protestant leaders to emphasize ‘theological reconstruction,’ a doctrine that purges any elements of Christian faith and practice that the Communist Party regards as incompatible with its goals and policies... An estimated 10 million Chinese belong to the two approved Protestant organizations. However, even registered Protestant groups and leaders are not safe from harassment, detentions, and arrest due to the arbitrary nature of Chinese law and policy regarding religion...

“The government actively harasses, detains, fines, mistreats, and imprisons members and leaders of unregistered Protestant groups, whose membership may be between 40 and 60 million... Though the total number of arrests and imprisonments declined in the past year, government efforts to suppress the growth and activities of ‘house church’ Protestants continue to be systematic and intense. The State Department estimates that ‘thousands’ of house church members were detained for short periods in the past several years. Members of unregistered Protestant groups that the government deems ‘evil cults’ were the most vulnerable to detention... China Aid and other NGOs report a significant rise in incidents of harassment, property confiscation

and destruction, and intimidation of Protestants since the 2008 Olympic Games in Beijing.” [70a]

## FINDINGS AND REASONS

### Country of reference

75. The Tribunal finds that the Department’s file holds a certified true copy of a passport issued in the applicant’s name by the People’s Republic of China (PRC). That passport indicates that the applicant is a citizen of the PRC. There is no evidence before the Tribunal to suggest that this document is not genuine. The Tribunal accepts that the applicant is a citizen of the PRC.

76. The applicant declares that he does not have a right to enter or reside in, whether temporarily or permanently, any country(s) other than his country of nationality. He also declared that he does not hold any other citizenship and nor is he a national of any other country. The Tribunal accepts this evidence in the absence of any evidence that contrary, and finds that the applicant does not have a present right to enter or reside in any other country other than the People’s Republic of China.

### Credibility issues

77. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* [1992] FCA 470; (1992) 38 FCR 191, *Prasad v MIEA* [1985] FCA 47; (1985) 6 FCR 155 at 169-70.)

78. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the applicant’s claims. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

79. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant’s country of nationality (See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per

Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220).

80. The Tribunal found some aspects of the applicant's evidence was given in what appeared to be a somewhat evasive manner. Some aspects of his evidence also appeared to be vague and lacking in the level of detail which the Tribunal expected would be provided by a person in the applicant's claimed circumstances. For example, the Tribunal found the applicant appeared to be evasive about his work in Australia. In respect of the applicant's evidence as to his role and activities in the house church which he claims to belong to in China, the Tribunal found he was not able to provide evidence in the level of detail which the Tribunal expected he would know given his claim to be an organiser of house church services in his town. However, the Tribunal accepts the applicant is not highly formally educated and has made allowance for his apparent inability to express himself. Overall, the Tribunal found the applicant to be a credible witness. The Tribunal therefore makes its decision in light of these credibility findings.

#### **Assessment of protection claims**

81. The Tribunal accepts the country information cited above indicates that the government in China restricts the right of its citizens to practice religion outside of the registered churches endorsed by the government. The Tribunal finds by reference to the material about the Christian churches and the government of China that there is at least frequent, if sporadic, persecution of the unregistered house churches in China, both catholic and protestant. The Tribunal also accepts the country information indicates that house church leaders, and ordinary house church followers also, in China may be targeted by authorities for particular attention and may be detained for periods if caught practising or proselytising their religion. In this case, and based on the applicant's credible evidence about what happened at the house church gatherings he attended in China, while not accepting he is necessarily an leading organiser, the Tribunal is nonetheless satisfied that the applicant is a genuine practising Christian who has attended and participated in house churches for a substantial period of time in China.

82. The Tribunal accepts that the applicant may have experienced the past incidents where the authorities disrupted the house church services which he was attending, however, the Tribunal is not satisfied on the evidence provided by the applicant that what he experienced during the house raids amounts to 'serious harm' for the purposes of s.91R(1) of the Act. However, the Tribunal also accepts that in January 2008 the applicant was detained by local police who entered his home, and that what followed by virtue of his detention for two weeks, and the deprivation of liberty and mistreatment during that time, does amount to past 'serious harm' for the purposes of s.91R(1) of the Act. The Tribunal is satisfied that the applicant was detained for the essential and significant reason of his religious belief and for his affiliation with the house church. The Tribunal also accepts that there may have been a secondary

reason for his detention, namely for resisting the authorities, however, this does not detract from the essential and significant reason for the detention and mistreatment being his religion.

83. The Tribunal considered the applicant's travels to Hungary and Austria and finds the fact that the applicant did not apply for protection when in these countries is a relevant factor in considering his application for protection. The fact that he did not apply for protection in Hungary and Austria at first blush appears to weaken his claim that he has a genuine fear of serious harm for reasons of his religion should he return to China. The Tribunal notes that this travel to Austria and Hungary occurred after the applicant's claimed detention in 2008. The Tribunal considered the applicant's explanation of why he did not apply for protection in these countries. The Tribunal found the applicant's response to the Tribunal's questions on this particular matter to be direct and sincere. The Tribunal accepts his explanation that he travelled to these countries for a break and because of his love of music and that at the relevant time, he returned to China because he still held hope and optimism that after he returned to his home in China the police would not continue troubling him for reasons of his religion. However, the Tribunal accepts that the applicant returned to China and found that the circumstances had not improved as he had hoped. The Tribunal finds in the circumstances of this case the applicant's action not to seek protection in Hungary and Austria is not inconsistent with his claim that he holds a fear of persecution in China.

84. The Tribunal considered the applicant's circumstances that he was able to freely leave and re-enter China without being questioned or detained by the authorities at the exit and entry points in China. The Tribunal accepts that the applicant is not a person of interest as a leader of an underground or unregistered church group in China, however, by reference to the country information cited above the Tribunal is satisfied that there is still a real chance the applicant may face persecution as an ordinary member of such a church.

85. The Tribunal also considered the delay of almost three years between the applicant arriving in Australia in 2008 and making the protection visa application. In respect of this, the applicant said at the hearing that he does not recall lodging an earlier protection visa application and that he believes that the application which was received by the Department may have been submitted by a friend who was living in the same house as he was and to who he had shown his passport and to who had given his personal information. The Tribunal does not accept that this is a plausible explanation of the lodgement of the earlier protection visa application, however, the Tribunal does not consider that this is fatal to the applicant's claim for protection in this case. The Tribunal accepts that the applicant may have been speculating or trying to find a way to explain the first application, and the subsequent delay in the lodgement of the second application, in a positive or favourable way.

Ultimately, the Tribunal finds that while there has been a significant delay in the submission of the valid application for the protection visa in this case, and that the existence of delay is a relevant consideration, the existence of a delay is not determinative in this case as to whether the applicant faces a real chance of serious harm for a Convention ground should he return to China.

86. On the question of the applicant's participation and attendance at [Church 1] in Australia, the Tribunal accepts the evidence presented to it that he does attend this church when he does not have work commitments. The

Tribunal does not consider that this conduct is to be disregarded for the reasons specified in s.91R(3) of the Act as the Tribunal is satisfied that the applicant's conduct in respect of this church is otherwise than for the purpose of strengthening his claims to be a refugee.

87. In relation to the applicant's future conduct, the Tribunal accepts that the applicant's practice in an underground Christian house church on his return to China would continue, even though he may not continue to have a high profile as an organiser he would, in the Tribunal's view, continue following and practising his religious beliefs. The Tribunal finds that the country information set out above indicates that not only are organizers and leaders harassed, detained and mistreated, ordinary members may also be similarly mistreated. The Tribunal therefore accepts the applicant faces a real chance of being arrested, detained, mistreated in a manner which may amount to torture, fined, or otherwise mistreated amounting to 'serious harm' and persecution because of his religion if he returns to China.

88. The Tribunal finds, by reference to the country information cited above regarding the situation in China that the government and authorities of the country do not provide to those perceived as followers of the unregistered churches or religious bodies the level of protection which its citizens are entitled to expect according to international standards. (See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18; (2004) 222 CLR 1 at [27]- [29].*)

89. The Tribunal finds, by reference to the country information cited above about the situation in China, that the government and authorities of that country will not protect the applicant against the harm which he fears, because those same authorities will be the agents of that harm. Although there is some evidence that some individual officials of China have been disciplined for exceeding the limits of their authority in pursuing or punishing citizens, the Tribunal finds that the persecution of members of the unregistered churches and religious bodies, where and when that persecution occurs, is typically the implementing of the intended policies of the government, and will not be significantly curbed or changed by the authorities of China.

90. The Tribunal concludes that the applicant's unwillingness to rely on the protection from those authorities is therefore justified for the purposes of Article 1A(2) of the Convention.

91. The Tribunal considered the question of possible relocation within China with a view to determining whether the applicant could relocate to a region where objectively there is no appreciable risk of the occurrence of the feared persecution. The Tribunal finds that the applicant would continue to practise his religion, and that he is not expected to modify his conduct or suppress his religious beliefs. Based on the country information available to the Tribunal and cited above, the Tribunal finds that if the applicant were to relocate elsewhere within his province, his previous detention, and his role as a member of his unregistered church, may be known to the authorities and that there is at least a real chance that any future punishment of the applicant for involvement in the unregistered church would be heavier than before.

92. The Tribunal finds that if the applicant relocated to a town or city elsewhere in China and did not practise his faith in the unregistered church this would be because of fear of punishment and harm for the practice of his faith, and this would amount to suffering persecution in the form of

deprivation of religious freedom. The Tribunal finds, by reference to all the material before it, that if the applicant were to move to any other part of the China outside Hebei, he would want to continue to practise his faith in the unregistered church. The Tribunal finds that if he did so, there would be a real chance that he would again be detained, and that if he were detained he would suffer treatment amounting to persecution. In the alternate, if he did not practise his faith, the Tribunal is satisfied and finds that this would be because of fear of punishment, which would be a denial through fear of her religious liberty, and therefore persecution as discussed by the High Court in S395/2002(cited above)

93. The Tribunal therefore finds that in all the circumstances of the applicant, it would not be reasonable to expect the applicant to move and to resettle in another part of the PRC where objectively there might be no appreciable risk of the occurrence of the feared persecution for reasons of the applicant's religion.

94. For the reasons set out above, the Tribunal finds, by reference to the applicant's evidence and to the material concerning the situation in China, that if the applicant returns to China there is a real chance that he may suffer persecution in the foreseeable future, whether in his home area or wherever else in China he might attempt to resettle, and that this would be for the Convention grounds of religion.

95. Because of the Tribunal's findings above, the Tribunal concludes that the applicant has a well founded fear of persecution in China for reasons of his religion. The Tribunal therefore finds the applicant is a person in respect of whom Australia owes protection obligations within the meaning of section 36(2)(a) of the Act. It is therefore not necessary for the Tribunal to consider or determine whether he may also be a person to whom Australia owes protection obligations within the meaning of section 36(2)(aa) of the Act, and the Tribunal makes no finding on this question.

## CONCLUSIONS

96. 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).

## DECISION

97. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act

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[1] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, p.247; Kawn, D. 2003, 'Crackdown ordered on unofficial churches', *South China Morning Post*, 4 February; Johnstone, Patrick *et al* 2001, *Operation World: 21st Century Edition*, WEC International, p.172 .

[2] China Aid Association 2010, '30 Chinese House Church Alliance Leaders Detained, Facing Administrative Detention', 9 January [http://www.chinaaid.org/qry/page.taf?id=105&function=detail&sbtblct\\_uid1=1372&nc=109f3b061925cc9f78d9c01e7f6f88f8](http://www.chinaaid.org/qry/page.taf?id=105&function=detail&sbtblct_uid1=1372&nc=109f3b061925cc9f78d9c01e7f6f88f8) - Accessed 22 June 2010.

- [3] Yu, V. 2010, 'Christians' detention sparks concern', *South China Morning Post*, 11 January; 'Fate of Church Members Unknown' 2010, *Radio Free Europe Documents and Publications*, 11 January.
- [4] 'Authorities banish Pastor from Beijing prior to Games', 2008 Compass Direct, 5 August.
- [5] China Aid Association 2010, *Annual Report of Persecution by the Government on Christian House Churches within Mainland China January 2009—December 2009*, 31 January, p.17; China Aid Association 2009, *Annual Report of Persecution by Government on Christian House Churches within Mainland China: January 2008 – December 2008* (The Year of the Beijing Olympic Games, January, pp.7-8; China Aid Association 2008, *Annual Report of Persecution by the Government on Chinese House Churches within Mainland China: January 2007 to December 2007*, February, p.13
- [6] 'Missing since June, nine protestant leaders "re-appear" in labour camps' 2007, *Asia News IT*, 8 October –
- [7] Kawn, D. 2003, 'Crackdown ordered on unofficial churches', *South China Morning Post*, 4 February –.
- [8] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.55–59; DIMA Country Information and Protection Support Section 2006, *House Churches in China*, Issues Brief CHN290306, 29 March, pp.5-6..
- [9] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, p.247
- [10] UK Home Office 2010, Country of Origin Information Report – China, 15 November, pp.72-77, 88-89.  
<http://www.unhcr.org/refworld/publisher,UKHO,COUNTRYREP,CHN,4ce6a46e2,0.html>



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# Refugee Review Tribunal of Australia

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## ←1201599 →[2012] RRTA 1024 (9 November 2012)

Last Updated: 30 January 2013

←1201599 →[\[2012\] RRTA 1024](#) (9 November 2012)

### DECISION RECORD

**RRT CASE NUMBER:** ←1201599 →

**DIAC REFERENCE(S):** CLF2011/178934

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

**TRIBUNAL MEMBER:** Tony Caravella

**DATE:** 9 November 2012

**PLACE OF DECISION:** Perth

**DECISION:** The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of China (PRC), applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the



Migration Act 1958 as this information may identify the applicant ] October 2011.

3. The delegate refused to grant the visa [in] January 2012, and the applicant applied to the Tribunal for review of that decision.

## RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.

6. 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.

7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222clr1.html" class="autolink\_findacts">222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

8. 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.

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

10. 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.

11. 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.

12. 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.

13. 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 being persecuted 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.

14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. 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.

## Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## CLAIMS AND EVIDENCE

19. 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.

### Background and protection claims

20. The applicant has declared in his written application for a protection (Class XA) visa (Form 866C) that he was born in Hebei, China, in [year deleted: s.431(2)] and that he has lived in Hebei until October 2008. He claims his religion to be Christianity. He declares that he arrived in Australia [in] October 2008 and entered this country as the holder of a visitor visa. The applicant declares that he also travelled to Hungary and Austria [in early 2008]. He declares his occupation to be that of a small business owner.

21. In response to the question asked in the application form as to why the applicant left his country the applicant states:

I was born in a Christian family and believed Christianity since I was a child. Nearly all of my relatives are Christian, including my parents and my grandparents. I believed that God could give us peace and guide us to reach the final paradise of heaven.

But in China churches were often under the surveillance of the government. We always suffered oppression from government and our daily life was always interrupted. I was the organiser of our house church on Thursday evening, my family suffered much more harsh oppression than other villagers.

The police came to my house frequently since I began organising house church. Sometimes, they suddenly broke into my house when we were praying or studying the holy Bible. When that happened all church members were asked to show their ID card and were threatened not to take part in such activities. We would then suspend our practice for a period of time and then resumed when all felt safer. Sometimes we would argue with police and even fight with police, and then would be detained for a few hours.

In late 2007, the local government tightened their control on the family churches. In January 2008, the local police broke into my home again when we were praying to God. They searched every corner of my house. I was so angry and argued with them. Several members also followed me. The police arrested us and we were detained for about two weeks with the charge of illegal gathering. I was forced to sign a confession letter and was warned not to organise or attend to family churches. After release, I decided to go overseas. I could not survive in China where people even do not have free religious beliefs. I asked an agent in China to get a visitor visa for me. [In] October 2008 I left China and arrived in Australia [in] October 2008.

After arriving in Australia, I attended church activities regularly. I appreciate that I am safe and can have freedom in religious belief in Australia. I received baptism in the [Church 1] of Perth [in] February 2009, and I felt the peace and happiness deep in my heart. I hope that Australia government could protect me free from prosecutions of Chinese Government and enable me to live in Australia permanently.

### **The delegate's decision**

22. The delegate found that the applicant arrived in Australia [in] October 2008 on a subclass 676 tourist visa allowing him to stay for a period of three months. The delegate found that the Department's records showed the applicant lodged a protection visa application [in] January 2009 which was found to be invalid as the application had no claims. The delegate found the applicant lodged a valid application for a protection visa [in] October 2011.

23. The delegate accepted that the applicant is and has been a practising Christian. The delegate was also ready to accept that the applicant was detained for two weeks following a house break in as country information suggests that authorities do sometimes harass underground churches and detained church members.

24. The delegate found the applicant provided a vague account of the service and was unable to describe the service to an extent that the organiser of a house church would be expected to do. The delegate found the applicant did attend house churches but found it implausible to accept that the applicant was a house leader/house organiser because of his lack of knowledge of the church service and the length of his detention in January 2008 by the authorities.

25. The delegate also considered the applicant's travel to Austria and Hungary after his detention by the authorities in February 2008 and that he re-

entered the PRC without any apparent difficulties. The delegate considered that if the applicant feared being harassed and arrested by Chinese authorities, it would be illogical for the applicant to return to the PRC.

26. The delegate also found that the applicant is not a person of interest to the Chinese authorities and if he was he would have been detected by the PRC authorities at the airport when he exited the PRC to travel to Austria and Hungary and also when he left the PRC to come to Australia.

27. The delegate also found that the applicant waited seven months after he was released from detention to leave the PRC and that during this time the applicant was not detained by the authorities. The delegate put the delay in leaving the PRC to the applicant at the protection interview and the applicant replied that when the authorities came to harass him he would run from the back door and hide. The delegate was not satisfied with the applicant's explanation considering that if he was genuinely persecuted by the PRC authorities those authorities would have detained him in the seven-month period before the applicant left the PRC.

28. The delegate also considered that the applicant's passport expired [in] February 2011 and that the applicant obtained travel document from the Chinese authorities in Australia and that the applicant told the Chinese authorities he would return to the PRC. The delegate found that the claim that the Chinese authorities were willing to cooperate with the applicant contradicts the applicant's claim that he will be harassed and arrested by the PRC authorities upon return.

29. The delegate considered the three-year delay between the applicant arriving in Australia in October 2008 and the lodgement of a protection visa application. The delegate refers to the applicant lodging an invalid protection visa application in January 2009 which indicated that the applicant was aware of protection visas. The delegate writes that the applicant replied that he did not lodge any protection visa application in January 2009 nor received any letter from the Department. The delegate notes that the Department's records showed the applicant did lodge a protection visa application [in] January 2009 and the application was found to be invalid as it had no claims and that a notification letter was sent to the applicant [in] January 2009. The delegate concluded that the applicant could not provide a valid explanation as to why there was a delay in lodgement of a valid protection visa application and that this suggests the applicant's fear of persecution in his home country of the PRC is not genuine.

### **Application for review by this Tribunal**

30. [In] February 2012 the Tribunal received an application for the review of the delegate's decision.

### **Tribunal hearing**

31. The applicant appeared before the Tribunal [in] May 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

32. The applicant was represented in relation to the review by his registered migration agent. The representative did not attend the hearing. At

the hearing, the applicant told the Tribunal that his representative would be available to speak to the Tribunal via telephone. The Tribunal called the representative at the start of the hearing and asked him if he wanted to participate by telephone. The representative told the Tribunal that he was too busy because he had four other cases to submit by 4pm that day and added that he would like a copy of the hearing recording and that he would provide written comments within 2 weeks. After the hearing a copy of the hearing recording was despatched to the applicant's representative.

33. The Tribunal opened the hearing by asking the applicant why he feared returning to China. The applicant replied that he believes in God and that he was involved in forming a church group. He said that the police then began bothering him. He said that he would get locked up for one or two hours and once he was locked up for two weeks. He said the police would abuse him and not give him food for a whole day while he was in custody. He said that he has been beaten.

34. The Tribunal asked the applicant to provide more details. He said that in China he was the host for a home church service every Thursday night and that the police had visited them regularly. He said the police work for the government and when they visited they would ask everyone to show their ID. The applicant said that his wife and two sons are both born in [a certain year] making one son [age deleted: s.431(2)] years of age, and the other [age deleted: s.431(2)] years of age. He said they all live in the same house.

35. The Tribunal asked the applicant how he became involved in Christianity. He replied that it was because his parents and grandparents are Christian. The Tribunal asked what denomination of Christianity he follows. The applicant then looked through a copy of the Bible that he had with him but was unable to explain what denomination he followed. He then produced a card saying he is now attending the Baptist Church in Australia.

36. The applicant said that his grandfather believed in God and their whole family is involved in religion. He said his grandfather and his mother passed away due to health problems and that his father is very old and that because of this the applicant became the family Church host. The applicant told the Tribunal that he is the youngest of his siblings. He said his father used to be the Church host before and that it is usually the owner of the house who takes the role of the host. He said that his house is bigger than others and they could cope with up to 20 people or so.

37. The Tribunal asked the applicant whether he holds a formal leadership position within the church; he replied that he does not hold any formal position but he is only a host. He added that he is not a priest.

38. The Tribunal asked the applicant what happens when people come around to attend the meetings on Thursday nights. He replied that they gather together and everyone brings delicious food which they share and they also share evidence and play music and sing to their God. He said it is not like a Sunday service when they go to church. The Tribunal asked the applicant how the meeting on Thursday nights is different from church service on Sundays. The applicant told the Tribunal that at church they sing, drink grape juice and have little cookies. He said that they also make donations and share their experiences. He said the donations are to help run the church and that the pastor is in control of the donations received.

39. The applicant told the Tribunal that the police asked him to fill in a form to declare his religion but he refused to fill in the form.
40. The applicant told the Tribunal that he attends church in Tianjin city on Sundays and described this as being adjacent to Heibei province. He said that they secretly gather at the house church in [District 2] on Sundays because it is bigger than his house.
41. The applicant told the Tribunal that he has experienced the church in Australia and that compared to China the church there is not as well organised as the Australian church. He said that most of those who attend his church in China are farmers and are not educated very well.
42. The Tribunal asked the applicant whether he is a small business owner or a farmer. He replied that in China farmers are allowed to do some small trading. He said his wife once rented their land out and they therefore took to selling [goods] at the local market in rural areas which moves around from village to village according to the Chinese lunar calendar.
43. The Tribunal asked the applicant why he thinks that the authorities would want to harm him if he returns to his home in China. He replied that something happened in the past and that the authorities would search his house and rip up the Bibles. He said that the police only believe in the Communist Party and do not want people to believe otherwise. He said that he has an ongoing argument with the authorities and that he had been held by them for one or two hours but on one occasion he was detained for two weeks.
44. The Tribunal asked the applicant to provide more information on his detention. He said that on the occasion he was held for two weeks he was locked up at the police station which had responsibility for his village. He said that he and two other people were held on that occasion. The Tribunal asked whether he was charged with any offence, to which the applicant replied he had not been charged. The Tribunal asked the applicant why the police detained him; he replied that in January 2008 during the Olympic period, the authorities were very strict and were controlling the community. He said that the authorities came to his house used abusive language, searched the house and tore up their Bible. He said that he was beaten on the face and head and he was beaten because he was arguing with the authorities. He said he used his hand and arm to shield himself but then he was accused of fighting so he and two others were locked up. He provided the names of the two others who were locked up as [names deleted: s.431(2)].
45. The Tribunal asked the applicant what happened during the two weeks he claims he was locked up. He replied that during this time he was asked what his purpose was because the police thought that he wanted to do something harmful for society. He said he told the police they only believe in God and they had no political desires, but one of the police hit the applicant in the face and told him he was lying.
46. The applicant told the Tribunal that while he was in detention at the end of the day when the police locked the door where they were being detained, the police would tell them that as they believed in God then God should provide their meal and so they did not provide them with food. He told the Tribunal that in the room in which he was held there was no bed but only a small sofa so that they had to sleep on the sofa. He said that sometimes the police did not even provide water. He said that in the room there was a pot in which to pass urine.

47. The Tribunal asked the applicant what he was told when he was released from the two-week detention. He replied that firstly the authorities could not find any evidence that they were a threat to society or to the country. Then they were forced to sign a confession that he would not host future house church meetings in his home. He said that one of the police told them that the next time he is caught he will not be let out so easily and also the family would have to pay 10,000 RMB to bail him out. He said that he was not sure whether this was a genuine threat. He said that as he was scared he started to look at holding house church meetings at other places and they would then change from house to house and that when police came he would usually hear them because they arrived by car and he would leave the meeting before they entered.

48. The Tribunal asked the applicant whether he had made an earlier application for a protection visa in January 2009. He replied that he was asked the same question when he was interviewed by the Department. He said he could remember that he used to live in a rental house and there was a roommate who was not his friend and that the roommate asked him for a tax file number. The applicant said he did not know what a tax file number was at the time but he gave his personal information to the friend and also he showed him his passport. The particular friend then moved out of the house. He said that he now thinks that person might have applied for a tax file number and that it may be linked to an earlier protection visa submitted to the Department. The applicant said that he had not received any correspondence from the Department about this. The Tribunal asked the applicant whether he had a migration agent at the time and whether the agent might have submitted a protection visa on his behalf. He replied that he had no idea that he was able to migrate to Australia at that time and he was only planning to stay away from China for a while. He said he did not know he could apply to stay until someone introduced him to his representative and through him learned about protection visas.

49. The applicant told the Tribunal that when he came to Australia he had been to countries on tourist visas. He told the Tribunal that he entered Australia on a tourist visa and found Australia to be such a great country and found an immigration lawyer who could help him stay. The applicant told the Tribunal that he did not know Australia could provide protection and that he thought that protection may be only for rich people.

50. The Tribunal asked the applicant why he did not stay in Hungary or Austria as he had travelled there previously. He replied that the purpose in his going to Hungary and Austria was only to travel and relax. He said that he was not well emotionally at that time. He said that he had overheard that Austria was a place full of music and he loves music and so that is why he decided to go to Austria. The Tribunal asked the applicant if he was so worried about going back to China then why did he not remain in Austria or Hungary. He replied that the reason he went to Austria and Hungary was purely for a break and that he still had hope that after he returned to China that police would not continue troubling him. He said that he then came to Australia and found it to be a great country and then he started going to church in Australia and made many friends here.

51. The Tribunal referred to delegate's decision record where the delegate found the applicant did not appear to be an organiser in the church. The



applicant commented that he provided sufficient reason and evidence to the Department and if they did not believe him then it is their problem. He said that his house church was built up and there is no way that the government would approve that. The Tribunal asked whether the applicant had any evidence that he hosted and organised church meetings. He replied that all the evidence was taken by the police and also because it was illegal there is no evidence.

52. The Tribunal asked the applicant how those attending his house church knew the house. He replied that it started after he had done preaching on a door-to-door basis. He said he would tell people that the church meeting was held on Thursdays. He said that in China it is different because everyone knows each other in their villages and they had been there for several generations. He added that they are all farmers.

53. The Tribunal asked the applicant to comment on how he was able to leave, return, and leave China again without problem and suggested that this indicates that he is not a person of interest to the Chinese authorities. The Tribunal invited the applicant to comment on this. He replied that he is not the most wanted person in China and he is not registered in the authorities' computer. He told the Tribunal that he believes he was mistreated in the past and asked whether he needs to be made disabled or whether he needs to self-harm. He said that he was locked up for one or two hours and on one occasion for two weeks and that has severely affected his life and he could not freely practice his religion. He said that if he could not get out of his country he could not apply for a protection visa.

54. The applicant told the Tribunal that he has been told that the police visited his house and talked to his wife and asked when the applicant will be returning to China. The applicant added that he reads the newspapers in Australia that people in China who practice Falun Gong are mistreated. He added that he also has heart trouble and that he does not think he can go through the same experience again. At this point the applicant showed the Tribunal a bottle which appeared to be medicine. He said the medicine is called [name deleted: s.431(2)]. He said that this is for his [health] condition. He told the Tribunal that he thinks his life would be ended if he was detained by police again.

55. The Tribunal asked the applicant whether he believes he would be safe by relocating to another part of China. The applicant said that he does not believe that there is anywhere safe in China. He said that the police only beat people in his area and in other places could be worse because they might beat him with batons. He said that in Australia he has heard stories about Falun Gong followers and he has also heard where police force people from their houses because they want to redevelop the land. The applicant said that he is not Falun Gong practitioner although there are some Falun Gong practitioners in his area. He said that his case is not about redevelopment but he was just giving this to illustrate what the government does.

56. The Tribunal asked the applicant why he does not follow one of the religions which are accepted in China. The applicant said that the Christian Church there are government approved and are not genuine and he does not believe in them. He said that there is a saying that those in the registered churches over drink, over eat, gamble, and use prostitutes and use the church to cover up their wrongdoings.

57. The Tribunal asked the applicant whether he works in Australia. He replied that he works in Australia in construction and that he has some friends who have a construction contract and they asked him to assist them. He said he is paid weekly. [Details of work deleted: s.431(2)]. He said he does not know the deal between the contractor and house owner. He said that if he has something to eat, somewhere to stay, and is free, then that is all he wants.

58. The Tribunal asked the applicant who introduced him to [Church 1] which he claims to attend in Perth. He replied that a friend took him to a church near where he lives once and then another friend took him to [Church 1]. He told the Tribunal that he goes to [Church 1] even though it is spoken in English. He said he goes to this church because he feels comfortable there.

59. The Tribunal asked the applicant to describe what happened at his baptism. He said he was baptised in Australia and that his friend interpreted for him. He said that he believes God led him to this church. The Tribunal asked the applicant whether he had been baptised in China. He replied that in the Bible he could not see anywhere that said that a person cannot be baptised twice. He said that in China baptism was under Yue Han whereas in Australia it is under Jesus. He said that he wanted to be baptised in Australia and he wanted to show that he is a real Christian. He said he goes to church every week unless there is a phone call from his boss to advise him that there is an urgent job to be done, otherwise he is at the church every week even if he is sick. He said that he goes to church [every Sunday]. He said he goes with a friend called [name deleted: s.431(2)].

60. The Tribunal asked the applicant whether his wife is involved in the church. He replied she is involved but she is very quiet and nice and she would not talk when police entered the church house. He said that she stays in a corner and that she has been very lucky not to have been harmed. He told the Tribunal that he speaks to her once or twice a week after work during the evening or at night. He said that she is very busy during the day and that she works for [a certain] company and has a heavy workload and works in [District 2] in Tianjin. The Tribunal asked the applicant why his wife did not come to Australia with him. He replied that she did not come because in the past the police never bothered her. He repeated that he has a [health] condition. He said that last year his wife telephoned him and said she wanted to come to Australia as a tourist but then she got caught up with work. He said he misses her.

61. At the end of the hearing the applicant handed over two newsletters dated April 2012 and July 2012 from [Church 1] in [Western Australia].

### **Post hearing correspondence**

62. [In] May 2012, the Tribunal sent the applicant, through his representative a letter inviting the applicant to provide further information or submissions on any claims the applicant might wish to make on complementary protection. The letter states, in part:

....

The purpose of this letter is to invite you, pursuant to s.424 of the Migration Act 1958 (Cth), to provide any further information or submission in support of the applicant's

application for review. Furthermore, the Tribunal invites you to make any relevant submission in respect to the complementary protection provisions of the Migration Act 1958 (Cth) which came into force on 24 March 2012. These provisions provide, at section 36(2), that a protection visa is to be granted not only to non-citizens to whom Australia has protection obligations under the Refugees Convention, but also to non-citizens with respect to whom:

the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

Section 36(2A) provides that a non-citizen will suffer 'significant harm' if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

The terms 'torture', 'cruel or inhuman treatment or punishment', and 'degrading treatment or punishment' are defined in section 5(1) of the Migration Act.

Section 36(2B) provides that there is no 'real risk' of significant harm if:

- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
- (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

According to section 36(2C), an individual is ineligible for a visa on complementary protection criteria if:

- (a) the Minister has serious reasons for considering that:
  - (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
  - (ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

If you wish to make any written submission in respect to these provisions please do so in writing in accordance with the date set out below.

The information should be received at the Tribunal [by] June 2012. If the information is in a language other than English, it must be accompanied by an English translation from an accredited translator.

If you cannot provide the information [by] June 2012, you may ask the Tribunal for an extension of time in which to provide the information. If you make such a request, it must be received by the Tribunal [before] June 2012 and you must state the reason why the extension of time is required.

63. [In] June 2012, the Tribunal received a letter from the applicant's representative requesting an extension of time to provide supporting documents from the applicant from China. The letter states that some of the documents are in Chinese and the representative required extra time to have them translated. The letter states that the representative expected the documents would be provided by [mid] June 2012.

64. [In] June 2012, the Tribunal received a further submission and attachments from the applicant's representative, the attachments comprise:

- A translated person statement (summarised in the following paragraph);
- A letter [dated] May 2012 from [a Pastor] of [Church 1] Perth, which states that the pastor has known the applicant since he joined the church when he was baptised [in] February 2009. It also states that the applicant attends church every week on Sundays, except on a few weekends when he is working. It also states that "He seems sincere in his desire to follow the Christian faith.";
- A newsletter for [Church 1] Perth, [dated] 2010, and a copy of a [magazine] both of which include photographs of church congregations which also depict the applicant in the congregation.

The Tribunal summarises the submission referred to above in the following paragraphs.

65. In respect of the applicant's second baptism, in Australia, the applicant claims that he thought he would wash off his sins. He states he was unlawful at the time without a visa, and thought that might also be a sin. He writes that

with the second baptism he thought he could be more absorbed into the Australian church. He claims that he spoke to some church members about the second baptism who told him that a second baptism is not necessary but if he is baptised a second time it is not a big issue.

66. The applicant also writes that he has been unable to provide evidence to prove his church experiences and the experience of being detained by the Chinese government. He refers to the Department's decision where the delegate indicated he believed what the applicant had experienced. He claims he wanted to contact his wife to see if she could provide some further evidence but is worried about her well-being and does not want his wife and his family to be affected.

67. In response to the question about whether he will be persecuted if he returns to China, the applicant states that he cannot say this will happen for sure, but adds that it has happened to him before. He writes that the Chinese government still does not recognise the legitimacy of house churches and the media reports of house churches being persecuted in various areas in China. He states that the Chinese media reports on good things, but they cannot cover up the truth. He refers to the recent media coverage about a blind lawyer Chen Guangcheng being rescued by the US embassy and also the case involving a high ranked official Bo Xilai whose wife murdered a British businessperson.

68. The applicant writes that in Australia he can enjoy democracy and freedom. He writes that he used to be unlawful but he applied for a protection visa and was given work entitlements and Medicare. He refers to how members of the church gave him a lot of help and that if the Chinese government protection of human rights could reach half the Australian level he would return to China without hesitation as his family is in China. He concludes by stating that for now he could only stay in Australia and he wishes his protection visa could be approved so he can bring his family here.

### **Independent country information**

69. Some house church members in Hebei province currently experience ill-treatment from government officials in the form of administrative detention, arrest, and re-education in labour camps. Missionary activity by independent church members was the target of police action in one location in Hebei (Baoding City) in 2003. While it is unknown whether similar forms of treatment against house church members are common across Hebei, in general, officials in this province are reported to strictly enforce the Communist government's religious policy that the practice of Christianity be limited to officially registered church associations.<sup>[1]</sup> No specific information was found on the treatment of house church members in the applicant's home town/village.

70. In January 2010, 30 house church leaders in Handan city in southern Hebei (approximately 200 kilometres south of Gaocheng City) were detained during a Bible study meeting. The members were accused of participating in an illegal meeting. Three were sentenced to administrative detention for periods of between 10 and 15 days. The remaining leaders were either released or their treatment by officials is unknown.<sup>[2]</sup> The detentions were reported by Reverend Zhang Mingxuan, pastor and president of the Chinese Home Church

Alliance (CHCA),<sup>[3]</sup> a body established to defend the specific rights of house church Christians.<sup>[4]</sup>

71. The China Aid Association reported on the arrest of 43 house church members between January 2007 and December 2009 in three cities (Hengshui, Baoding, Zhouzhou) in Hebei. These individuals were involved in house church meetings, and Bible and marriage classes.<sup>[5]</sup> Treatment of these individuals after arrest is not known. Nine Protestant leaders from the province were also detained in July 2007 after conducting a Sunday worship service together at a home. Administrative courts in Enshizhou, in Hebei, found the Christians guilty of “engaging in organizing and making use of [an] evil cult organization to undermine the enforcement of State laws” Those sentenced were later placed in forced labour camps.<sup>[6]</sup>

72. In addition to targeting house church members, authorities in Hebei also target those undertaking missionary activities. In 2003, an internal document reportedly issued by the Public Security Bureau in Baoding city ordered that police take action to stop illegal Protestant groups in the area, including those working as “independent missionaries” who attempt to evangelise. No reports were found on the results of this police action in Baoding. An article from the *South China Morning Post* reported on these events as follows:

Activists say that police in Hebei were ordered to spy on worshippers and to isolate rogue Christian groups. Police were ordered to isolate unofficial Christian groups in Baoding city, Hebei province, and spy on people worshipping at their churches, a group of religious activists has claimed.

Quoting a classified document issued by the Public Security Bureau in Baoding city in August, the New York-based Committee for Investigation on Persecution of Religion in China said police had been instructed to separate activities by the officially-sanctioned Protestant Church and other groups....

The document – entitled “Work Plan on Terminating Illegal Christian Activities” – recommended all officers in Baoding city to heighten their vigilance against “illegal Christians” between August and October last year.

The crackdown coincided with the lead-up to the 16th Communist Party Congress, a key event in the political calendar. However, in addition to a specific action plan for the three-month period, the document also laid down general guidelines that could signal a hardening of the government’s position towards Protestant groups deemed a threat to the authorities.

During the crackdown, the city’s police chief, Li Yunlong, headed a taskforce in charge of “finding out everything about illegal Christians, bringing organisers of illegal activities and independent missionaries to justice, and shutting down venues used by the illegal Christians”.

The term “independent missionaries” apparently refers to evangelists who work independently from any churches. “(We) must strive to effectively halt the emergence of illegal activities by Protestants in our city,” the document said. Unlike previous government edicts, the latest one singled out Protestant groups as targets for control

and demanded police officers include the crackdown on “illegal Christians” as part of their daily work.[7]

73. House churches are broadly defined as small Protestant Christian communities or groups who meet informally in homes without government approval. Often described as evangelical, house church member services are simple and do not adhere to any particular Christian tradition or denomination.[8] No figures on the numbers of house churches in Hebei were found. Total Protestant numbers (official and unofficial) in the province were estimated to be approximately 400,000 in 2001.[9]

74. The UK Home Office *Country of Origin Information Report – China* reports[10]:

#### PROTESTANTS (INCLUDING ‘HOUSE CHURCHES’)

19.18 The USSD *International Religious Freedom Report 2009* stated:

“Officials from the Three-Self Patriotic Movement/China Christian Council (TSPM/CCC), the state-approved Protestant religious organization, estimated that at least 20 million citizens worship in official churches. Government officials stated there are more than 50,000 registered TSPM churches and 18 TSPM theological schools. The World Christian Database estimates there are more than 300 unofficial house church networks. The Pew Research Center estimates 50 million to 70 million Christians practice without state sanction. One Chinese scholar estimated in a public lecture at Renmin University that the number of Christians in China, including those in TSPM churches and unregistered churches, is near 90 million. By contrast, the Chinese Communist Party is estimated to have 60 million members, 10 million of whom are believed to participate regularly in religious services. Currents of Calvinism or Reformed theology gained influence among house churches and Christian intellectuals. Pentecostal Christianity was also popular among house churches.” [2a] (Section I. Religious Demography)

19.19 An article by *The Economist*, dated 2 October 2008, stated, “Because most Protestant house churches are non-denominational (that is, not affiliated with Lutherans, Methodists and so on), they have no fixed liturgy or tradition. Their services are like Bible-study classes.” [19a] As reported by the USSD *International Religious Freedom Report 2009*:

“The Government repressed Protestant house church networks and cross-congregational affiliations, which it perceived as presenting a potential challenge to the authority of the Government or the Party. For example, on November 28, 2008, the Ministry of Civil Affairs issued a decision abolishing the 250,000-member Chinese House Church Alliance (CHCA), which claims to have members in several provinces, stating that the CHCA was not registered and was engaging in activities in the name of a social organization without authorization... Local regulations, provincial work reports, and other government and party documents continued to exhort officials to enforce government policy regarding unregistered churches and illegal religious activities, although the extent to which officials interfered with the activities of unregistered churches varied and depended largely on local conditions. Urban house churches in some areas limited the size of their meetings to a few dozen individuals.

In nonurban areas, some house churches were able to hold meetings that hundreds of individuals attended with which local authorities did not interfere. Some unregistered religious groups had significant membership, properties, financial resources, and networks. House churches faced more risks when their memberships grew, they arranged for regular use of facilities for religious activities, or forged links with other unregistered groups or coreligionists overseas.” [2a] (Section II. Status of Religious Freedom, Restrictions on Religious Freedom)

19.20 The report stated further:

“In some areas, government authorities pressured house churches to affiliate with one of the PRAs and to register with religious affairs authorities by organizing registration campaigns and by detaining and interrogating leaders who refused to register. In other parts of the country unregistered groups grew rapidly and the authorities did not pressure them to register. Although SARA does not officially acknowledge the existence of house churches, its website states that family and friends holding meetings at home (as distinct from formal worship services in public venues) need not register with the Government (the ‘Family and Friend Worship Policy’). Police and officials of local RABs in some areas disrupted home worship meetings, claiming that participants disturbed neighbors or social order, or belonged to an ‘evil religion.’ Police sometimes detained for hours or days worshippers attending such services and prevented further worship activities. Police interrogated church leaders and lay persons about their worship activities at locations including meeting sites, hotel rooms, and detention centers. Non-governmental organizations (NGOs) reported that church leaders faced harsher treatment than members, including greater frequency and length of detention, formal arrest, and reeducation-through-labor or imprisonment. According to NGO and media reports, in some cases local officials also confiscated and destroyed the property of unregistered religious groups.” [2a] (Section II. Status of Religious Freedom, Restrictions on Religious Freedom)

19.21 The USCIRF *Annual Report 2010*, published on 29 April 2010, noted:

“The Chinese government continues to control the religious activities of Protestants affiliated with the government-approved religious organizations. It encourages registered Protestant leaders to emphasize ‘theological reconstruction,’ a doctrine that purges any elements of Christian faith and practice that the Communist Party regards as incompatible with its goals and policies... An estimated 10 million Chinese belong to the two approved Protestant organizations. However, even registered Protestant groups and leaders are not safe from harassment, detentions, and arrest due to the arbitrary nature of Chinese law and policy regarding religion...

“The government actively harasses, detains, fines, mistreats, and imprisons members and leaders of unregistered Protestant groups, whose membership may be between 40 and 60 million... Though the total number of arrests and imprisonments declined in the past year, government efforts to suppress the growth and activities of ‘house church’ Protestants continue to be systematic and intense. The State Department estimates that ‘thousands’ of house church members were detained for short periods in the past several years. Members of unregistered Protestant groups that the government deems ‘evil cults’ were the most vulnerable to detention... China Aid and other NGOs report a significant rise in incidents of harassment, property confiscation



and destruction, and intimidation of Protestants since the 2008 Olympic Games in Beijing.” [70a]

## FINDINGS AND REASONS

### Country of reference

75. The Tribunal finds that the Department’s file holds a certified true copy of a passport issued in the applicant’s name by the People’s Republic of China (PRC). That passport indicates that the applicant is a citizen of the PRC. There is no evidence before the Tribunal to suggest that this document is not genuine. The Tribunal accepts that the applicant is a citizen of the PRC.

76. The applicant declares that he does not have a right to enter or reside in, whether temporarily or permanently, any country(s) other than his country of nationality. He also declared that he does not hold any other citizenship and nor is he a national of any other country. The Tribunal accepts this evidence in the absence of any evidence that contrary, and finds that the applicant does not have a present right to enter or reside in any other country other than the People’s Republic of China.

### Credibility issues

77. The Tribunal accepts that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well-founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the Tribunal to establish the relevant facts. A decision-maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* [1992] FCA 470; (1992) 38 FCR 191, *Prasad v MIEA* [1985] FCA 47; (1985) 6 FCR 155 at 169-70.)

78. In determining whether an applicant is entitled to protection in Australia, the Tribunal must first make findings of fact on the applicant’s claims. This may involve an assessment of the applicant’s credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

79. The Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant’s country of nationality (See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per

Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220).

80. The Tribunal found some aspects of the applicant's evidence was given in what appeared to be a somewhat evasive manner. Some aspects of his evidence also appeared to be vague and lacking in the level of detail which the Tribunal expected would be provided by a person in the applicant's claimed circumstances. For example, the Tribunal found the applicant appeared to be evasive about his work in Australia. In respect of the applicant's evidence as to his role and activities in the house church which he claims to belong to in China, the Tribunal found he was not able to provide evidence in the level of detail which the Tribunal expected he would know given his claim to be an organiser of house church services in his town. However, the Tribunal accepts the applicant is not highly formally educated and has made allowance for his apparent inability to express himself. Overall, the Tribunal found the applicant to be a credible witness. The Tribunal therefore makes its decision in light of these credibility findings.

#### **Assessment of protection claims**

81. The Tribunal accepts the country information cited above indicates that the government in China restricts the right of its citizens to practice religion outside of the registered churches endorsed by the government. The Tribunal finds by reference to the material about the Christian churches and the government of China that there is at least frequent, if sporadic, persecution of the unregistered house churches in China, both catholic and protestant. The Tribunal also accepts the country information indicates that house church leaders, and ordinary house church followers also, in China may be targeted by authorities for particular attention and may be detained for periods if caught practising or proselytising their religion. In this case, and based on the applicant's credible evidence about what happened at the house church gatherings he attended in China, while not accepting he is necessarily an leading organiser, the Tribunal is nonetheless satisfied that the applicant is a genuine practising Christian who has attended and participated in house churches for a substantial period of time in China.

82. The Tribunal accepts that the applicant may have experienced the past incidents where the authorities disrupted the house church services which he was attending, however, the Tribunal is not satisfied on the evidence provided by the applicant that what he experienced during the house raids amounts to 'serious harm' for the purposes of s.91R(1) of the Act. However, the Tribunal also accepts that in January 2008 the applicant was detained by local police who entered his home, and that what followed by virtue of his detention for two weeks, and the deprivation of liberty and mistreatment during that time, does amount to past 'serious harm' for the purposes of s.91R(1) of the Act. The Tribunal is satisfied that the applicant was detained for the essential and significant reason of his religious belief and for his affiliation with the house church. The Tribunal also accepts that there may have been a secondary

reason for his detention, namely for resisting the authorities, however, this does not detract from the essential and significant reason for the detention and mistreatment being his religion.

83. The Tribunal considered the applicant's travels to Hungary and Austria and finds the fact that the applicant did not apply for protection when in these countries is a relevant factor in considering his application for protection. The fact that he did not apply for protection in Hungary and Austria at first blush appears to weaken his claim that he has a genuine fear of serious harm for reasons of his religion should he return to China. The Tribunal notes that this travel to Austria and Hungary occurred after the applicant's claimed detention in 2008. The Tribunal considered the applicant's explanation of why he did not apply for protection in these countries. The Tribunal found the applicant's response to the Tribunal's questions on this particular matter to be direct and sincere. The Tribunal accepts his explanation that he travelled to these countries for a break and because of his love of music and that at the relevant time, he returned to China because he still held hope and optimism that after he returned to his home in China the police would not continue troubling him for reasons of his religion. However, the Tribunal accepts that the applicant returned to China and found that the circumstances had not improved as he had hoped. The Tribunal finds in the circumstances of this case the applicant's action not to seek protection in Hungary and Austria is not inconsistent with his claim that he holds a fear of persecution in China.

84. The Tribunal considered the applicant's circumstances that he was able to freely leave and re-enter China without being questioned or detained by the authorities at the exit and entry points in China. The Tribunal accepts that the applicant is not a person of interest as a leader of an underground or unregistered church group in China, however, by reference to the country information cited above the Tribunal is satisfied that there is still a real chance the applicant may face persecution as an ordinary member of such a church.

85. The Tribunal also considered the delay of almost three years between the applicant arriving in Australia in 2008 and making the protection visa application. In respect of this, the applicant said at the hearing that he does not recall lodging an earlier protection visa application and that he believes that the application which was received by the Department may have been submitted by a friend who was living in the same house as he was and to who he had shown his passport and to who had given his personal information. The Tribunal does not accept that this is a plausible explanation of the lodgement of the earlier protection visa application, however, the Tribunal does not consider that this is fatal to the applicant's claim for protection in this case. The Tribunal accepts that the applicant may have been speculating or trying to find a way to explain the first application, and the subsequent delay in the lodgement of the second application, in a positive or favourable way.

Ultimately, the Tribunal finds that while there has been a significant delay in the submission of the valid application for the protection visa in this case, and that the existence of delay is a relevant consideration, the existence of a delay is not determinative in this case as to whether the applicant faces a real chance of serious harm for a Convention ground should he return to China.

86. On the question of the applicant's participation and attendance at [Church 1] in Australia, the Tribunal accepts the evidence presented to it that he does attend this church when he does not have work commitments. The

Tribunal does not consider that this conduct is to be disregarded for the reasons specified in s.91R(3) of the Act as the Tribunal is satisfied that the applicant's conduct in respect of this church is otherwise than for the purpose of strengthening his claims to be a refugee.

87. In relation to the applicant's future conduct, the Tribunal accepts that the applicant's practice in an underground Christian house church on his return to China would continue, even though he may not continue to have a high profile as an organiser he would, in the Tribunal's view, continue following and practising his religious beliefs. The Tribunal finds that the country information set out above indicates that not only are organizers and leaders harassed, detained and mistreated, ordinary members may also be similarly mistreated. The Tribunal therefore accepts the applicant faces a real chance of being arrested, detained, mistreated in a manner which may amount to torture, fined, or otherwise mistreated amounting to 'serious harm' and persecution because of his religion if he returns to China.

88. The Tribunal finds, by reference to the country information cited above regarding the situation in China that the government and authorities of the country do not provide to those perceived as followers of the unregistered churches or religious bodies the level of protection which its citizens are entitled to expect according to international standards. (See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18; (2004) 222 CLR 1 at [27]- [29].*)

89. The Tribunal finds, by reference to the country information cited above about the situation in China, that the government and authorities of that country will not protect the applicant against the harm which he fears, because those same authorities will be the agents of that harm. Although there is some evidence that some individual officials of China have been disciplined for exceeding the limits of their authority in pursuing or punishing citizens, the Tribunal finds that the persecution of members of the unregistered churches and religious bodies, where and when that persecution occurs, is typically the implementing of the intended policies of the government, and will not be significantly curbed or changed by the authorities of China.

90. The Tribunal concludes that the applicant's unwillingness to rely on the protection from those authorities is therefore justified for the purposes of Article 1A(2) of the Convention.

91. The Tribunal considered the question of possible relocation within China with a view to determining whether the applicant could relocate to a region where objectively there is no appreciable risk of the occurrence of the feared persecution. The Tribunal finds that the applicant would continue to practise his religion, and that he is not expected to modify his conduct or suppress his religious beliefs. Based on the country information available to the Tribunal and cited above, the Tribunal finds that if the applicant were to relocate elsewhere within his province, his previous detention, and his role as a member of his unregistered church, may be known to the authorities and that there is at least a real chance that any future punishment of the applicant for involvement in the unregistered church would be heavier than before.

92. The Tribunal finds that if the applicant relocated to a town or city elsewhere in China and did not practise his faith in the unregistered church this would be because of fear of punishment and harm for the practice of his faith, and this would amount to suffering persecution in the form of

deprivation of religious freedom. The Tribunal finds, by reference to all the material before it, that if the applicant were to move to any other part of the China outside Hebei, he would want to continue to practise his faith in the unregistered church. The Tribunal finds that if he did so, there would be a real chance that he would again be detained, and that if he were detained he would suffer treatment amounting to persecution. In the alternate, if he did not practise his faith, the Tribunal is satisfied and finds that this would be because of fear of punishment, which would be a denial through fear of her religious liberty, and therefore persecution as discussed by the High Court in S395/2002(cited above)

93. The Tribunal therefore finds that in all the circumstances of the applicant, it would not be reasonable to expect the applicant to move and to resettle in another part of the PRC where objectively there might be no appreciable risk of the occurrence of the feared persecution for reasons of the applicant's religion.

94. For the reasons set out above, the Tribunal finds, by reference to the applicant's evidence and to the material concerning the situation in China, that if the applicant returns to China there is a real chance that he may suffer persecution in the foreseeable future, whether in his home area or wherever else in China he might attempt to resettle, and that this would be for the Convention grounds of religion.

95. Because of the Tribunal's findings above, the Tribunal concludes that the applicant has a well founded fear of persecution in China for reasons of his religion. The Tribunal therefore finds the applicant is a person in respect of whom Australia owes protection obligations within the meaning of section 36(2)(a) of the Act. It is therefore not necessary for the Tribunal to consider or determine whether he may also be a person to whom Australia owes protection obligations within the meaning of section 36(2)(aa) of the Act, and the Tribunal makes no finding on this question.

## CONCLUSIONS

96. 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).

## DECISION

97. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act

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- [7] Kawn, D. 2003, 'Crackdown ordered on unofficial churches', *South China Morning Post*, 4 February –.
- [8] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, pp.55–59; DIMA Country Information and Protection Support Section 2006, *House Churches in China*, Issues Brief CHN290306, 29 March, pp.5-6..
- [9] Lambert, T. 2006, *China's Christian Millions*, Monarch Books, Oxford, p.247
- [10] UK Home Office 2010, Country of Origin Information Report – China, 15 November, pp.72-77, 88-89.  
<http://www.unhcr.org/refworld/publisher,UKHO,COUNTRYREP,CHN,4ce6a46e2,0.html>



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# Refugee Review Tribunal of Australia

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◀1203936 ➡ **[2012] RRTA 1070 (14 December 2012)**

Last Updated: 12 February 2013

◀1203936 ➡ **[2012] RRTA 1070 (14 December 2012)**

## DECISION RECORD

**RRT CASE NUMBER:** ◀1203936 ➡

**DIAC REFERENCE(S):** CLF2012/5538

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

**TRIBUNAL MEMBER:** Charlie Powles

**DATE:** 14 December 2012

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa (the visa) under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of the People's Republic of China (China), applied to the Department of Immigration and Citizenship (the

department) for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2012.

3. The delegate refused to grant the visa [in] February 2012, and the applicant applied to the Refugee Review Tribunal (the tribunal) for review of that decision.

## RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.

6. 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.

7. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

8. 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.



9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
15. 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.

### Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### Credibility

19. The tribunal accepts the difficulties of proof faced by applicants for refugee status and complementary protection. In particular there may be statements that are not susceptible of proof. It is rarely appropriate to speak in terms of onus of proof in relation to administrative decision making: see *Nagalingam v MILGEA & Anor* [1992] FCA 470; (1992) 38 FCR 191 and *McDonald v Director-General of Social Security* [1984] FCA 57; (1984) 1 FCR 354 at 357; [1984] FCA 57; 6 ALD 6 at 10. The United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1992, at paragraph 196-197 and 203-204 recognises the particular problems of proof faced by an applicant for refugee status and states that applicants who are otherwise credible and plausible should, unless there are good reasons otherwise, be given the benefit of the doubt. Given the particular problems of proof faced by applicants a liberal attitude on the part of the decision maker is called for in assessing refugee status and complementary protection obligations.

20. However, the tribunal is not required to accept uncritically any or all allegations made by an applicant. Moreover, the tribunal is not required to have rebutting evidence available to it before it can find that a particular

factual assertion by an applicant has not been made out. In addition, the tribunal is not obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. See *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* [1994] FCA 1105; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547.

## CLAIMS AND EVIDENCE

21. The tribunal has before it the department 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.

### Visa application

22. The applicant provided the following evidence in support of his claims to be owed protection with the visa application forms lodged with the department [in] January 2012.

23. The applicant is a [age deleted: s.431(2)] man, born in Sichuan, China, on [date deleted: s.431(2)]. He speaks, reads and writes Mandarin. He currently holds a Chinese passport, issued [in] May 2010, expiring [in] May 2020.

24. The applicant's parents continue to reside in China. He has one married brother who is currently residing in the United States of America (the USA).

25. The applicant completed primary and secondary school in Qionglai City, China. He worked as a truck driver in Qionglai City between 1995 and 2001 and then ran a small [store] in the same city between 2002 and February 2011. The applicant married in 1997. He has one son, born on [date deleted: s.431(2)].7. His wife and son continue to reside in China. The applicant was granted a Subclass 676 visitor visa [in] January 2011 and arrived in Australia as the holder of that visa [in] February 2011. That visa expired [in] May 2011.

26. The applicant previously travelled outside of China to Korea [in] 2010 when he was "looking for protection". He has not departed Australia since his arrival here in February 2011.

27. The applicant provided a statement typed in English and dated [in] January 2012 setting out his claims for protection in Australia. That statement can be relevantly summarised as follows:

- a. The applicant came to Australia because he has been persecuted in China.
- b. He was born and raised in Qionglai, Sichuan province.
- c. The pollution in Qionglai is very bad. He suffered [problems with his lungs].
- d. In March 2000, a friend of his father came to visit and told him if he began to practice Falun Gong it would help cure his illness. His father's friend taught him Falun Gong. He knew it was forbidden but his father's friend said he should practise at home to make sure he would not be caught by the police.

- e. After six months of practising Falun Gong, the applicant stopped [experiencing the health problems] and felt better and strong.
  - f. In February 2001, his father's friend visited again and gave the applicant the book "Zhuan Falun" (the book). He taught the applicant how to speak "Truth". The applicant's father also began to believe in Falun Gong.
  - g. The applicant felt much stronger and more broadminded. He continued to practice Falun Gong. He was willing to help others and always talked kindly. He had many friends and told them about Falun Gong.
  - h. In April 2004 he met another more senior Falun Gong practitioner, [Mr A]. He joined a small Falun Gong group of four practitioners. He did not keep the book at home. The group were caught by the police. The applicant thinks a neighbour reported to the police that he saw people coming in and out of the applicant's house. This happened [in] September 2006. [Mr A], a [Mr B] and the applicant were taken by the police to the local police station. The applicant was interrogated and beaten. [Mr A] had been caught by the police before so the police believed they were all Falun Gong practitioners. [Mr A] was sent to a detention centre and the applicant and [Mr B] was sent to a mental hospital.
  - i. At the mental hospital the applicant was given injections against his will and forced to take medicine. He was held in the mental hospital for a month.
  - j. The police went to search the applicant's father's home. He quarrelled with the police and was detained for three days. He had to pay 5000 RMB. The applicant's brother also became involved and was worried about being caught by the police. The applicant's brother escaped to the USA. The applicant's wife took their son to live with her parents.
  - k. The applicant will never give up Falun Gong. He has heard of people being put in jail and beaten so badly that they are permanently disabled. He could only practice Falun Gong at home after he was released.
  - l. [Mr A] was later released but the applicant dared not visit or contact him.
  - m. In 2010 he decided to try to travel overseas. An agent got a visa for him to travel to South Korea. He went there [in] 2010 but could not escape from the tour group because the guide was watching them all the time. In South Korea he saw Falun Gong practitioners practising freely and knew that if he wanted to do the same he would have to leave China.
  - n. A friend helped him to get a visa to Australia and he now wants to start a new life here where he can practice Falun Gong freely. The Chinese government persecuted Falun Gong practitioners and he wants the protection of Australia.
28. The applicant provided a certified copy of the identity and visa evidence pages of his current Chinese passport with the visa application forms.
29. The applicant appointed [name deleted: s.431(2)] (the representative), a registered migration agent, as his migration agent and authorised recipient in relation to the visa application.

30. The delegate interviewed the applicant [in] February 2012 with the assistance of an accredited Mandarin interpreter. The tribunal has read a transcript of that interview.

### **Delegate's decision**

31. The delegate refused the application [in] February 2012.

32. The delegate had concerns about the credibility of the applicant's claims as a result of significant inconsistencies between information provided in the applicant's application for a visitor visa and the information provided in the visa application. The delegate also found that the applicant did not display a level of practical knowledge of Falun Gong that would be expected from a person who, as the applicant claimed, had studied and practised Falun Gong for the previous 12 years, which led to the delegate to not be satisfied that the applicant was a genuine Falun Gong practitioner.

33. The delegate also did not accept that the applicant would have been able to obtain a passport in 2010 if he had been of sufficient interest to the Chinese authorities that he was detained for his Falun Gong practice in 2006. Further, the delegate found that the length of time between the applicant's arrival in Australia and his lodging the visa application raised serious doubts about the genuineness of his fears of harm in China.

### **Application for review**

34. The applicant lodged a valid application for review of the delegate's decision with the tribunal [in] March 2012. The applicant appointed the representative as his representative and authorised recipient in relation to the application for review.

35. The application for review was constituted to the presiding member [in] May 2012.

36. [In] May 2012, the tribunal sent a letter to the applicant advising him that it had considered the material before it but was unable to make a favourable decision on that information alone and inviting him to appear before the tribunal to give evidence and present arguments relating to the issues arising in his case [in] July 2012.

37. [In] May 2012, the tribunal received a completed Response to Hearing Invitation stating that the applicant would attend the hearing scheduled [in] July 2012.

38. [In] July 2012, for reasons beyond the applicant's control, the tribunal was unable to conduct the hearing scheduled for that day.

39. [In] July 2012, the tribunal sent a letter to the applicant inviting the applicant to attend a rescheduled hearing [in] September 2012.

40. [In] July 2012, the tribunal received a completed Response to Hearing Invitation form stating that the applicant would attend at the rescheduled hearing [in] September 2012.

### ***Tribunal hearing***

41. The applicant appeared before the Tribunal [in] September 2012 to give evidence and present arguments. The Tribunal hearing was conducted

with the assistance of an interpreter in the Mandarin and English languages. The representative did not attend the hearing.

42. Before the hearing began, the applicant provided the tribunal with a copy of a document appearing to be a marriage certificate for the applicant and seven photographs of the applicant purporting to participate in Falun Gong activities in Australia. During the hearing, the applicant also provided the tribunal with a full copy of his current Chinese passport.

43. The applicant provided the following evidence in support of his protection claims at the hearing.

44. The applicant confirmed his full name, date and place of birth and that his parents continue to live in his home city of Qianglai. He stated that he has one brother living in the USA. He stated that his brother went to the USA [in 2007]. He stated that his brother obtained a working visa through an agent.

45. The applicant confirmed that he was married to [name deleted: s.431(2)] and that they have one son who is [age deleted: s.431(2)]. His son is at boarding school in Chengdu. His wife has been working in [another location] for over one year selling clothes. The applicant is in contact with his wife and his parents and speaks to his son once a week.

46. The applicant completed [primary and secondary school]. [In] 1992 he served in the Chinese [military] for three years in the communications area. He left the [military] in 1995 because his term of service ended. He then ran a business as a truck driver until 2000 when he opened a [shop] at his home. He ran that [shop] until 2008 when he opened a restaurant. After a serious earthquake in 2008, damage to the restaurant and lack of customers meant the applicant had to close the restaurant. He had continued running the [shop] during that time and his parents took over running the [shop]. He then began [driving trucks again].

47. The applicant lived with his parents until approximately 2001. He married in 1997 and his wife came to live with him and his parents at that time. The applicant moved to another residence in 2001 and he began the [shop] from that residence, where he and his family also lived. His parents own both properties.

48. The tribunal asked the applicant whether he had held a previous Chinese passport. He stated that the passport he had provided to the tribunal at the hearing was his second passport. He stated that he obtained his previous passport in 2007 but lost it in 2008. The tribunal asked the applicant why he obtained a passport in 2007. He stated it was so that he could travel to Singapore, Malaysia and Thailand. He stated that at the end of 2007 he went on holidays with friends for about 11 days to those countries. The tribunal asked the applicant how long his previous passport had been valid for. He stated it had been valid for 10 years. The tribunal asked the applicant whether he had travelled anywhere else outside China before he obtained his current passport. He stated the trip to Singapore, Malaysia and Thailand was the only time he did so.

49. The tribunal asked the applicant whether he had applied for visas to any other countries than Singapore, Malaysia and Thailand before he obtained his current passport. The applicant referred to his trip to Korea in [2010]. The tribunal noted that the applicant travelled on his current passport to Korea at that time. The applicant stated that as he understood it a group of visas had been obtained for a [touring party] to travel to Korea at that time. He stated

that he had wanted to leave the tour group and stay in Korea but that he had been unable to do so.

50. The tribunal asked the applicant again whether, before he held his current passport, he had ever applied for a visa to another country than Singapore, Malaysia and Thailand. He stated that he had not. The tribunal asked the applicant whether he had ever planned to travel anywhere else between the time he returned from his trip to Singapore, Malaysia and Thailand and when he intended to travel to Korea. The applicant stated he had been planning to leave China. He stated that he had obtained the visa through an agent and had gone to Korea but had failed to be able to stay there and so felt very lucky to be able to get a visa to Australia.

51. The tribunal asked the applicant a third time whether he had ever applied to any other country for a visa after his trip to Singapore, Malaysia and Thailand and before his trip to Korea. The applicant stated that he had an agent help with his visa application. The tribunal asked the applicant whether he had arranged for his agent to get a visa to Korea. The applicant confirmed this. The tribunal asked the applicant whether he had ever asked as agents to obtain a visa to any other country before that. The applicant stated that he had: to Canada. The tribunal asked the applicant whether he had asked the agent to get him a visa for any other country in Canada. The applicant stated that his agent had told him there were four countries he could go to: New Zealand, Australia, Canada or the USA. He stated that the agent asked to choose but that he told the agent to apply for him.

52. The tribunal asked the applicant when the agent had lodged an application for him to go to Canada. He stated it was in 2010. The tribunal asked the applicant if he knew what had happened with that application. The applicant stated he was not sure of the details. He stated he had provided property documents and evidence of his savings in the bank but that the agent had told his application was not approved. The tribunal asked the applicant whether he had used his current passport for that application. He stated that he had.

53. The tribunal asked the applicant why he had obtained a new passport in 2010. The applicant stated there was a serious earthquake in his home area [in] May 2008 which had meant he and his family had had to pack their belongings quickly and flee the area. He stated that at that time he lost his passport and so had to apply for a new passport. The tribunal asked the applicant if this meant he did not have a passport for the rest of 2008 and during 2009. The applicant confirmed this. The tribunal asked the applicant about the documents he had provided to the agent in support of his application for a visa to Australia. The applicant stated he had provided his marriage certificate, a property certificate and a financial certificate. He stated the property certificate was for a commercial property he owned in Shanghai. He stated it was a shop. He stated he did not own any other property.

54. The tribunal asked the applicant if the marriage certificate he had given to the agent was the one that he had provided to the tribunal at the hearing. The applicant confirmed this. The tribunal advised the applicant that because the document he had provided to the tribunal was in Mandarin with he would need to provide a certified translation of the document if he wanted the tribunal to consider the contents of that document in relation to his protection claims.

55. The tribunal asked the applicant whether he had been contacted by the Australian government in relation to his visitor visa application. He stated that he had not. The tribunal asked the applicant what telephone number he used when he was living in China. The applicant gave the telephone number.

56. The applicant confirmed that he was granted his visitor visa to Australia [in] January 2011 and that he arrived here [in] February 2011. The tribunal asked the applicant whether he travelled to Australia alone or with some announced. The applicant stated he had travelled to Australia with a woman called [Ms C]. He stated that his agent had introduced her at the airport and had told them that when they travel to Australia they needed to say they were a couple.

57. The tribunal asked the applicant to confirm his current address in Australia. The applicant provided the same address that he had provided to the department in support of his visa application and to the tribunal in relation to the application for review. The tribunal asked the applicant whether he had gone to live at this address immediately after his arrival in Australia. The applicant stated that the first night he was in Australia he stayed at a hotel and then he found his current accommodation on a rental list. He stated that at this accommodation there are a number of rooms which are rented out by a couple. He stated that currently living at that address were he and an international student.

58. The tribunal asked the applicant if he had been working in Australia. He confirmed he had been working as a [occupation deleted: s.431(2)].

59. The tribunal asked the applicant whether he had seen [Ms C] since he arrived in Australia. He stated that they had stayed at the hotel together and then moved to the applicant's current residence together. He stated that she had moved out of that residence approximately one month ago. The tribunal asked the applicant why he had arranged accommodation with [Ms C]. He stated they had travelled to Australia together and because the landlord at the applicant's current residence had a number of vacant rooms she rented one of the rooms as well. He stated that [Ms C] now has a boyfriend and had moved in with him.

60. The applicant confirmed that he knew his visa had expired [in] May 2011. He stated that he had not applied for another visa to remain in Australia before that visa expired because after he arrived in Australia he had no friends or people who could help them and so he did not know about the visa application process until he was introduced to the representative.

61. The applicant confirmed he had lodged the visa application [in] January 2012. He stated that he had first met with the representative at the end of 2011. He explained that he and the representative had communicated using [a Chinese social media platform]. He stated that he had written down in Mandarin his reasons for seeking protection in Australia and sent them to the representative. She had then translated them into English and sent the statement back to him. He stated that he had signed the statement and the visa application forms. The tribunal asked the applicant whether he had arranged for anyone to check whether what was in the statement in English was correct. He stated that he did not because he trusted his representative.

62. The tribunal asked the applicant whether, to the best of his knowledge, everything that he had told the agent to put in the statement was true and correct. The applicant confirmed this. The applicant also confirmed that he



remembered the interview with the delegate. The tribunal asked the applicant whether there was anything he wanted to change about what he had told the delegate during the interview. The applicant stated that during the interview he had been afraid that information about him might be given to the Chinese government so he had not told the delegate that he had served in the Chinese [military]. He stated that he feared that if the Chinese government found out he had sought protection in Australia, he would be punished because they would suspect that he had provided confidential information that he had obtained when working in the communications area for the [military].

63. The tribunal asked the applicant what he feared would happen to him if he went back to China. The applicant stated that because he had practised Falun Gong in China he feared he would be punished because the Chinese government persecuted Falun Gong practitioners. He stated that because he had served in the [military], he did not know what would happen to him. He feared that he would be treated the same way as the head of the Chengdu police force, Wang Lijun, who had sought protection from the US embassy and was now under a suspended death sentence. He stated that he did not think he would be as treated as badly as Wang Lijun but that he thought he might still be persecuted in the same way for seeking protection in Australia because he had been in the [military].

64. The tribunal asked the applicant why he thought he would be persecuted because he was a Falun Gong practitioner. The applicant stated he had been arrested by the police in the past for practising Falun Gong. He described being questioned and imprisoned and then sent to a mental health hospital where he was forced to take medication and given injections.

65. The tribunal asked the applicant whether he feared being harmed because he had been in the [military]. The applicant stated he had also been a member of the Communist Party but had withdrawn his membership. The tribunal asked the applicant why he thought he would suffer harm in China because he had been in the [military]. He stated that if he was an ordinary person and found to practice Falun Gong he would just be put in detention but because he had been in the [military] he would be treated worse. He stated that he thought the Chinese government would think he would release confidential information overseas and so would want to keep him under control.

66. The tribunal asked the applicant why, if the Chinese government wanted him to stop revealing secrets overseas, it would have allowed him to leave China on at least three occasions after he had stopped serving in the [military]. The applicant stated that the Chinese economy was strong in so many people were going overseas on tours and he would have been allowed to do that.

67. Tribunal asked the applicant when he first became involved in Falun Gong. He stated it was in 2000 when a friend of his father came to visit his family. The applicant stated he had suffered lung [problems] for a decade before then and the friend of his father told him that Falun Gong practice would cure him. He stated that he began secretly practising at home and after six months he was cured. The tribunal asked the applicant how he knew what to do when practising at home. He stated that the friend of his father had taught him the basics. The tribunal asked the applicant how much time the friend of the applicant's father spent teaching him. He stated he had only spent about 30 minutes with the friend of his father, while he came to visit. The

tribunal asked the applicant whether he received any lessons about Falun Gong from anyone else at that time. He stated that he did not.

68. The applicant explained that in 2001 the friend of his father came to visit again and brought him a copy of the Falun Gong book, the Zhuan Falun. He stated that he began reading the book and learnt about the Falun Gong principles of truthfulness, compassion and forbearance. He began to feel much better as a person and began to tell his friends to do good things and be tolerant. He stated that he kept the copy of the Zhuan Falun but hid it in the garden of the house. The applicant then described meeting another Falun Gong practitioner in 2004, a man called [Mr A], and beginning to practice Falun Gong with him and sometimes two other men, [Mr D] and [Mr E]. The tribunal asked the applicant whether he had read the Zhuan Falun himself between the time when he was given it in 2001 and when he met the other Falun Gong practitioners in 2004. He stated that he had. The tribunal asked the applicant whether any other members of his family were Falun Gong practitioners. The applicant stated he had not dared to tell his family about Falun Gong because it was considered a cult. He stated that his parents did not practice Falun Gong but admired it.

69. The tribunal asked the applicant what he would do when he met with the other Falun Gong practitioners. He stated they would read from the Zhuan Falun together and practice Falun Gong exercises. The tribunal asked the applicant whether their group met at the applicant's house. He stated that they took turns as to where they would meet. The tribunal asked the applicant if this meant that they did not always meet at his house. The applicant confirmed this. The tribunal asked the applicant whether the other practitioners had their own copies of the Zhuan Falun. He stated that they did. The tribunal asked the applicant whether they used anything else for guidance other than the Zhuan Falun. He stated they only used the books. He stated they did not dare use any DVDs or audio CDs because they feared that if the neighbours heard them they would be reported to the police.

70. The tribunal asked the applicant to explain more about what happened when he was arrested by the police. The applicant stated that [in] September 2006, he, [Mr D] and [Mr A] were practising together when they were found by undercover police and taken to the police station. He stated that at the police station they were questioned and beaten with sticks. He stated that [Mr A] had previously been arrested for practising Falun Gong and so he was sent to detention. He stated that he and [Mr D] were sent to a mental health hospital where they were held for one month and given injections and tablets. He stated they were released after one month.

71. The tribunal asked the applicant whether he continued to practice Falun Gong after that. He stated that after his release he did not dare contact [Mr A] again but continued to practice at home. The tribunal asked the applicant whether he had had any contact with the police or security services after his release. He stated he had not. The tribunal asked the applicant whether the police and security services had ever come to his house after that. The applicant stated that while he was held in the mental health hospital, police had gone to his parents' home to search it. He stated that his father had become angry with them, got into a fight and was detained for three days. He stated his father had had to pay 5000 RMB fine to be released. He stated the

police had also gone to search the house of his brother. He stated that his brother's ex-wife did not want to get involved [with] him.

72. The tribunal asked the applicant again whether after his release from a mental health hospital he had had any further contact with the police. The applicant stated that people from the local Community Committee and police kept watching him to see if he was contacting other Falun Gong practitioners.

73. The tribunal asked the applicant why, if he had continued to be monitored by the police, he was able to obtain a passport in 2007. The applicant stated he had no difficulties in obtaining a passport at that time and that he thought the Chinese government should issue passports even to Falun Gong practitioners. The tribunal asked the applicant why, if he continued to be monitored by the police, he was allowed to travel overseas at the end of 2007. The applicant stated that because he was travelling with a tour group the government would accept that he was just going on holiday. The tribunal asked the applicant whether, when he was on that trip, he intended to leave the group and not return to China because he feared being harmed there. The applicant stated he had not thought about that at the time because his child was still very young. He stated that he had not wanted to leave his family and his son because he was willing to forego freely practising Falun Gong while he continued to support his child.

74. The tribunal asked the applicant whether he had been practising Falun Gong in Australia. He stated that he sometimes practised in the backyard of his house and sometimes in a park. He stated he would see other practitioners in the park and join them. He stated that sometimes he would go to [Melbourne] and try to persuade people to leave the Communist Party and Communist youth groups.

75. The tribunal asked the applicant about the photographs he had provided at the hearing. The applicant stated they prove that he is really a Falun Gong practitioner. The tribunal asked the applicant about the four photographs that appeared to show him practising Falun Gong in a park. The tribunal asked the applicant who the people in the photograph with him were. He stated they were other Falun Gong practitioners. The tribunal asked the applicant whether he could name them. He stated that he did not know them well and called them by an honorific. He stated they would chat sometimes. The tribunal asked the applicant who had taken these photos. He stated it was another Falun Gong practitioner. The tribunal put to the applicant that the photographs all appeared to have been taken on one occasion. The applicant agreed with this. The tribunal asked the applicant when it was the photographs were taken. He stated it was two months ago.

76. The tribunal asked the applicant about the three photographs showing him standing in front of what appeared to be Falun Gong information boards and speaking to a person in Chinatown. The applicant stated the boards were erected to give visitors information about Falun Gong. The tribunal asked the applicant who arranged for those boards to be placed there. The applicant stated it had been done by the Falun Gong organisation. The tribunal asked the applicant what the Falun Gong organisation was. He stated it was the leaders who ran the Epoch Times. The tribunal asked the applicant if there was a Falun Gong organisation in Melbourne. The applicant stated there was and it was referred to in the newspapers.

77. The tribunal asked the applicant whether he had attended any meetings of Falun Gong organisations in Australia. He stated that he had not. The tribunal asked why he had not. He stated it was because he was working during the week and only had time on the weekends. The tribunal asked the applicant whether he had been to any Falun Gong classes. He stated that he did not need to because practitioners would correct each other's movements. The tribunal asked the applicant whether he read the Epoch Times. The applicant stated that he did. The tribunal asked the applicant whether he read about Falun Gong activities in Melbourne. The applicant stated that there were activities in Melbourne and Sydney and that if he had time he attended them. The tribunal asked the applicant which activities he had attended. The applicant stated he had gone to practice Falun Gong in the park and spoken to people at Chinatown, as he had shown in the photographs.

78. The tribunal asked the applicant why Falun Gong was important to him. He stated that he wanted to have freedom of religion. He stated that Falun Gong had cured him of the [health problems] he had suffered for a decade. He stated it was a really good thing and not a cult. He stated that it was good for the body and guided him to be honest.

79. The tribunal asked the applicant how many parts that were in the Zhuan Falun. He stated there were five sets of exercises. The tribunal asked the applicant how many chapters there were in the Zhuan Falun. The applicant stated he could not remember clearly. He stated that before 2010 he had read the book secretly and understood the principles and theories of Falun Gong.

80. The tribunal asked the applicant about the five exercises. The applicant demonstrated the five exercises and referred to the name of the Buddha in relation to those exercises. The tribunal asked the applicant whether it was Falun Gong practice to refer to Buddha. The applicant stated that Falun Gong was similar to Qi Gong and was taken from Buddhism and Taoism.

81. The tribunal asked the applicant why he had not applied for a protection visa before his visitor visa expired. The applicant stated that he had known he could find an agent from the newspaper but that he did not have friends or familiar people to help him after he came. He stated that his landlord had told him not to trust the agents the newspaper. He stated that later a friend introduced him to the representative.

82. The tribunal asked the applicant whether he had practised Falun Gong with anyone he had shared a house within Australia. He stated that he had practised Falun Gong in the backyard with [Ms C]. The tribunal asked the applicant whether [Ms C] had applied for protection. The applicant stated that she had. The tribunal asked the applicant whether he knew what had happened to her application. He stated that [Ms C] told him that she withdrew it. The tribunal asked the applicant whether he knew why she had withdrawn the application. He stated that [Ms C] had a boyfriend and made her own arrangements.

83. The tribunal asked the applicant whether he feared being harmed in China for any reason other than because he had practised Falun Gong there in the past and would want to continue his Falun Gong practice there in the future. The applicant stated that because he had worked in the [military] in the telecommunications area, he feared he would be mistreated like Wang Lijun because he, the applicant, had sought protection in Australia.

84. The tribunal put to the applicant that the country information before it indicated that individuals who are identified as having unsuccessfully sought asylum overseas did not appear to be subjected to harm on their return to China, even if they had been in the [military]. The tribunal also put to the applicant that the circumstances of the arrest and sentencing of Wang Lijun, where there had been corruption allegations and disputes at senior levels of the Communist Party about the running of Chongqing province, appeared to be very different from those of the applicant. The applicant stated that because he is a Falun Gong practitioner he would never give up. He stated that he had read about what had happened to Wang Lijun and understood that he had been sentenced to death because he had sought protection from the US Embassy. He stated that when he was in the [military] he took an oath to serve his country and not reveal confidential information. He stated that in China the Communist Party was in charge. He stated that his father had been sentenced to 7 years hard labour because he had made complaints about pollution from the mines.

85. The tribunal asked the applicant whether he had ever had any problems in China because of what his father had done. The applicant stated that he was saying this to show that no one can tell what the government may do. He stated that he had not worked in the mines himself. He stated that he had suffered lung [problems] because of contamination from the mines, that his father had mentioned this to his boss, had been accused of being anti-revolutionary and then sentenced to 7 years hard labour.

86. The tribunal asked the applicant whether he feared that the Chinese authorities might know about his Falun Gong activities in Australia. The applicant stated he did not think that the Chinese authorities would know about what he had done in Australia but that he feared that if he went back to China and continued to practice Falun Gong he would be in trouble.

87. The tribunal advised the applicant about the relevance of s91R(3) of the Act and asked the applicant what he would say in response to the proposition that he had engaged in Falun Gong activities in Australia solely for the purpose of strengthening his refugee claim. The applicant stated that he had not done that for this reason. He stated that Falun Gong is his faith and teaches him to be honest and do good things. He stated that Falun Gong makes him stronger and healthy. He stated that in a Western country Falun Gong is a normal exercise, that in China it is a cult but that it is his faith.

88. The tribunal put to the applicant a number of matters that it considered would be a reason all part of the reason for affirming the decision under review, following s 424AA of the Act. The tribunal explained the information and the relevance of the information. In each case, the applicant stated that he understood the information and its relevance. The tribunal asked the applicant whether he wished to respond to the information immediately, after an adjournment or in writing. In each case the applicant stated he wished to respond to the information immediately. The information put to the applicant by the tribunal under s424AA of the Act is set out below.

*[Information before the Tribunal]*

89. The tribunal put to the applicant that it had information before it [showing that the applicant had made] an application for a visa to the USA [in]

March 2009 and [in] April 2009. The information indicated the applicant did not travel to the USA which suggested his applications were either refused or that he was granted a visa but did not travel on it.

90. The tribunal advised the applicant this information was relevant because it may lead the tribunal to believe the applicant did apply for one or more visas to the USA in March and April 2009, which may lead the tribunal to also believe that the applicant held a Chinese passport at that time. The tribunal explained to the applicant that this appeared to be inconsistent with the statements made by the applicant at the hearing that he had lost his passport in an earthquake in May 2008 and that he had not applied for a visa to any other country between when he went to Malaysia, Singapore and Thailand and when he applied for a visa to Canada in 2010. The tribunal also put to the applicant that it may lead the tribunal to believe that a record may have been placed in the applicant's previous passport indicating that his application or applications for visas to the USA had been refused and that this was the reason the applicant had decided to obtain a new passport for his visa applications to Korea and Australia. The tribunal explained to the applicant that this information may therefore lead the tribunal to doubt the credibility of the applicant's claims about when he had a passport and to which countries he applied for visas, which may lead the tribunal to doubt the credibility of other claims made by the applicant, which would be a reason or part of a reason for affirming the decision under review.

91. The applicant stated that he had applied for a visa to the USA in March and April 2009. He stated that he had lost his passport. He stated that he did not get a stamp in his passport that show he had been refused a visa to the USA. He stated that he had not told the tribunal about this during the hearing because his agent had told him not to say anything about anything that would complicate his application. The agent told him that if there was no visa in his current passport he should not mention it. The applicant stated that before he had gone to Korea he had been unable to find his passport and thought he must have packed it when his family fled the earthquake in 2008.

92. The tribunal asked the applicant whether he had the passport with him when he applied to the USA for a visa in March or April 2009. The applicant stated that his agent may have had his passport but that he did not get it back. He stated that when he planned to go overseas, he had engaged in agent who asked him to provide documents of something needed to be done.

*Inconsistencies between information provided in the applicant's statement to the department, at the interview with the delegate and at the hearing*

93. The tribunal put to the applicant that in his statement the applicant stated that the two men with whom he was arrested in September 2006 were named [Mr A] and [Mr B]. During the interview with the delegate and at the hearing the applicant stated that the two men's names were [Mr A] and [Mr F]. The tribunal also put to the applicant that during the interview with the delegate, the applicant stated that the meetings of the group of Falun Gong practitioners between 2004 and 2006 only took place at his residence whereas during the hearing the applicant had stated that the members of the group had taken turns as to where the meetings of the group were held.

94. The tribunal explained to the applicant that this information was relevant to the application for review because it may lead the tribunal to doubt the credibility of what the applicant claimed about the men with whom he was arrested in 2006 or where the meetings of the group took place, which may lead the tribunal to doubt the credibility of other claims made by the applicant, which would be a reason or part of a reason for affirming the decision under review.

95. The applicant stated that the names he had given during the interview and at the hearing were correct and the difference in the name of one of the men in the statement must have been as a result of a mistake made by the representative. The tribunal asked the applicant whether there would still be electronic records of what the applicant had sent to the representative based on which the representative prepared the applicant's statement to the department. The applicant stated he would look into that. The tribunal stated that if he wanted to say that he had provided to the representative the names that he told the delegate and the tribunal then he would need to provide evidence of this including, if necessary, certified translations and if the evidence was based on electronic records, the tribunal would wish to see that material in its electronic form.

96. The applicant stated that the group of Falun Gong practitioners did meet at his home. He stated that his son was at boarding school during the week but would come home on weekends so, because he did not want to disturb his son, he would meet with other members of the group at their homes on the weekends. The tribunal read to the applicant the relevant portions of the interview with the delegate as follows:

**Q: Okay. How often did you continue to meet and practise?**

*I: At least twice every week.*

**Q: Is that all together in a group?**

*I: Yes, always in group, but sometimes just a group of two. But the most is four.*

**Q: And where did you meet?**

*I: Well, it was always at my home because I had my own apartment, so it was only me and my wife and child, so it was separate from my parents.*

**Q: Why didn't you meet in the homes of any of the other group members?**

*I: Well, I don't know. Probably because I was a businessman, I was willing to invite people to my home. I was, generally speaking, very generous and would just welcome anyone, any friend, to come and visit me. So probably that's why we met all the time in my home.*

97. The tribunal asked the applicant why he had made these statements if, in fact, he had met with other members of the group at their homes. The applicant stated it was because he had not been asked where the members of the group practised.

98. The tribunal advised the applicant it had concerns about his protection claims given the number of times he had travelled outside China after the time he claimed to have been detained because of his Falun Gong practice and because of the significant length of time between when the applicant arrived in Australia, his visitor visa expired and he lodged the visa application. The applicant stated that he had not planned to stay in Singapore, Thailand or Malaysia but just went there for a holiday. He stated that he wanted to stay in Korea but the tour guide of the group he was part of was very strict so he had been unable to leave. He stated in relation to his applications for a visa to the USA, his agent had told him that if there was no record of his passport he should not mention it. He stated that he was very sorry that he had not told the tribunal the truth about this. He stated that he had lost his previous passport and that he was sure there was no stamp on it showing that he had been refused a visa to the USA.

99. The tribunal asked the applicant again whether he acknowledged that he had his previous passport when he made his application or applications for visas to the USA in early 2009. The applicant stated that the passport may have been with his previous agent who was different from his current agent.

100. The tribunal asked the applicant whether there was anything else he wished to say in relation to the application for review. The applicant stated that he believed he would be persecuted if he went back to China because Falun Gong is regarded as a cult. He stated that he has been in Australia for two years and misses his wife, son and parents. He stated he will keep the faith and never give up practising Falun Gong.

### **Relevant country information**

101. RRT Research Response No. CHN40767 states the following in relation to the treatment of failed asylum seekers in China:

Information located indicates that Chinese authorities may not view the act of seeking asylum in Australia to necessarily indicate disloyalty to the state; it is a common action by Chinese citizens travelling to foreign countries and DFAT has reported that passport application procedures may take this into account.

In June 2012 DFAT indicated that that they were aware that some failed asylum seekers had only had short interviews with Chinese authorities on their return, primarily to discuss the reason that they travelled back on an entry permit rather than on a normal passport:

[R4]. [...] Post (DIAC) is aware, however, that some Chinese nationals who were failed Protection visa applicants in Australia, and who were returned to China, have only had a short interview ... with authorities upon return. The primary reason for this interview seems to have been to question why applicants had been returned on an entry permit rather than a normal, ordinary passport. (Australia: Department of Foreign Affairs and Trade (DFAT), 2012, *CIS Request No. CHN 13470; Attitude of Chinese government to Falun Gong claimants arriving in Australia by boat*, 25 June, Country Information Report 12/40, CISNET China CX289690)



Information provided by the post in May 2012 indicates that Chinese authorities are aware that some people who travel to foreign countries may not return to China, and as a result people from some areas, including for instance Xinjiang and Hebei, are required to provide more documentation when applying for a passport than people from some other regions:

(R1) A. The Xinjiang Public Security Department (PSD) lists, on their official website (6G(b) in reftel IC40227L refers), the requirements for all persons who wish to obtain a private (ordinary) passport for overseas travel. These requirements apply equally to all Chinese nationals, including Han, Uyghur and other ethnic minorities, with their household registration in Xinjiang. Xinjiang PSD has not published requirements for any ethnic minorities to provide any additional documentation as part of the passport application process. Post (DIAC) is not aware of any additional requirements imposed on ethnic minorities to provide additional documentation in a passport application. The Beijing Public Security Bureau (PSB), however, requires less documentation than Xinjiang PSD and Post (DIAC) is aware most other municipalities and provinces have a similar standard of documentation requirements as Beijing. Post (DIAC, is aware that in certain locations in other provinces (e.g. particular cities and counties in Hebei province) there is a higher standard of documentation required by passport applicants as a result of the higher risk that persons from these locations may not return to China after their overseas travel. (Australia: Department of Foreign Affairs and Trade (DFAT), 2012, *CIS Request No. CHN 12966; Financial guarantees and exit documents for Uighurs*, 1 May, Country Information Report 12/28, CISNET China CX286221)

In March 2007 DFAT advised that seeking asylum in Australia is no longer seen as an unusual step or an indication of political disloyalty by the authorities in China:

R.3. Media publicity of the mere fact that the person had [a]ppplied for asylum would not necessarily lead to harsher [t]reatment for the person on return. Our impression is that these days Chinese authorities view seeking to remain in Australia through a protection application as more commonplace behaviour rather than a sign of political disloyalty. Authorities could, however, treat the person more severely if he or she was quoted publicly as criticising China's regime or senior leadership in the media. (Australia: Department of Foreign Affairs and Trade (DFAT), 2007, *CIS Request CHN8980: China: Publication of client details*, 20 March, CISNET China CX174138)

102. The arrest and prosecution of the Chongqing police chief Wang Lijun has been widely reported. For example, on 24 September 2012, The Australian reported as follows:

**THE jailing of Wang Lijun for 15 years was the final tightly scripted act in the downfall of a police chief who always had a flair for theatre.**

Once China's most revered crime fighter, Wang's exploits were the basis of a TV series called Iron Blooded Police Spirits. But reality turned out to be more dramatic than the works of any playwright.

Until his spectacular flight to a US consulate, triggering a scandal that has seen one of China's most high-profile politicians sacked and his wife convicted of murdering a British businessman, Wang, 52, had commanded fear, even hatred, for his aggressive ways.

An ethnic Mongolian and martial arts expert, his steely, unsmiling gaze and thin glasses gave him the face of an incorruptible "supercop", and his body carried 20 scars from bullet and other wounds.

He learned his trade in the industrial northeastern province of Liaoning, starting as a patrolman in the 1980s and climbing up the hierarchy.

Zhou Lijun, the screenwriter behind Iron Blooded Police Spirits, wrote on his blog that Wang, dressed in a black coat, would fire a single gunshot into the air when confronting criminals.

He equipped his police car with rows of powerful lights so "even on a cold pitch-black night, people far away would know: chief officer Wang is here!" Zhou wrote.

Wang would pay solo visits to death row prisoners the night before they were executed, according to Zhou.

It was in Liaoning that he met Bo Xilai, a Communist "princeling" with powerful connections who went on to become the top party official in the megacity of Chongqing, and made Wang head of its police force.

Bo rose to national prominence courtesy of a Maoist revival and sky-high economic growth rates driven by state-funded investment, while Wang led a crackdown on organised crime.

His quota-driven crusade, which peaked in 2009, clocked up thousands of arrests but was marred by accusations of torture sessions and human rights violations.

Chinese newspapers were plastered with courtroom images from the anti-mafia trials, including one in which Wen Qiang, Chongqing's top judicial official, was sentenced to death and swiftly executed.

Wang was on hand at Chongqing airport - along with a photographer to record the scene - to witness Wen's arrest, and repeated the stunt with Li Zhuang, a Beijing lawyer who had defended an alleged Chongqing mafia boss.

Wang confronted Li at the airport, in front of dozens of police cars, their lights flashing, greeting him with the words "Li Zhuang, we meet again!" before taking him into custody, the lawyer said.

That case provoked uproar amongst China's legal community, and critics also noted Wang's penchant for luxury watches and suits.

But his policeman's methods served him well when suspicions about Heywood's death began to mount.

Trained in forensics and able to carry out autopsies himself, Wang secretly recorded Bo's wife Gu Kailai when she confessed to poisoning Heywood, and took a sample of the victim's blood, according to official accounts.

Exactly what led Wang to confront Bo over Gu's actions - a move that reportedly led the politician to strike the policeman in the face - remains unclear.

But the sensitivity of the scandal - which has exposed murder and double-crossing at the top levels of Chinese politics - meant that Wang's trial last week was closely managed by the authorities.

China's communist party, keen to limit the potential fallout from the case, has settled on an official version of events which has played up a personal conflict between Wang and Gu, while omitting any direct mention of Bo.

An account of Wang's trial by the official news agency Xinhua said he initially agreed to cover up the murder, but changed his mind after Gu "turned hostile" towards him.

Others speculate that Wang's escape to the consulate was aimed not so much at gaining asylum, but at ensuring he would be dealt with by China's central government, protecting himself from the Chongqing machine controlled by Bo.

But President Hu Jintao himself branded Wang a traitor at a meeting of senior Communist party officials, according to Chinese media reports.

Whatever happened, the "iron blooded police chief" long ago anticipated his career would be cut short at the whim of the politicians he served, according to Zhou, the screenwriter who interviewed him several times in the late 1990s.

"Its clear to me that I'm just a piece of chewing gum in the mouths of government officials," Zhou quoted Wang as saying.

"Once they've chewed me until I've lost my taste, I'll be spat onto the ground, and who knows whose shoe I'll end up sticking to."

## **FINDINGS AND REASONS**

### **Country of nationality**

103. The applicant claims to be a citizen of China. He arrived in Australia on an apparently valid passport, issued to him in China by the Chinese government, and stating that he is a national of that country. The tribunal finds on this basis that the applicant is a national of China, and has assessed his claims against that country.

### **Assessment of Protection claims**

104. The applicant fears harm at the hands of the Chinese government and security forces because he claims he has practised Falun Gong in China and Australia and would do so if he were to return to China and because he will be

identified as having unsuccessfully sought asylum in Australia if he returns to China. He fears that the Chinese government will regard him as a traitor because he unsuccessfully sought asylum in Australia and, because he undertook military service in an area relating to communications, he will be suspected of knowing secret information about the Chinese military which he may have disclosed in Australia.

105. As put to the applicant at the hearing, the tribunal has significant concerns about the credibility of the applicant's claims. The tribunal put these inconsistencies to the applicant at the hearing and found his explanation for them largely unconvincing. In relation to the inconsistency in the names of the men with whom the applicant claims to have practised Falun Gong in China, the tribunal is willing to give the applicant the benefit of the doubt that there may have been some translation or mistranscription of those men's names. However, the tribunal finds the inconsistency in the applicant's claims to the department and the tribunal about where they met to be more serious. The tribunal finds the applicant's willingness to say that they had only met at his house to the department but to say to the tribunal that they met at the houses of other members of the group as well raises serious doubts about the applicant's credibility generally.

106. The tribunal also places significant weight on the inconsistencies between the statements made by the applicant at the hearing about his past travel outside China, his reasons for travelling and when he held a Chinese passport and the evidence before the tribunal in relation to the [applicant's application for a US visa] and the information provided by the applicant to the department. The tribunal finds that the applicant has travelled outside China on a number of occasions before coming to Australia and has been willing to return to China after those travels. The tribunal finds this to be inconsistent with the applicant's claims to have been persecuted before then because he is a Falun Gong practitioner. Further, the tribunal finds the applicant has been unwilling to honestly disclose his immigration history to the tribunal, a finding which contributes to the tribunal's serious concerns about the applicant's overall credibility.

107. The tribunal also has significant doubts about the applicant's claims to have been and be a Falun Gong practitioner given the length of time between when he arrived in Australia, when his visa expired and when he lodged the visa application. The tribunal does not accept as plausible the applicant's explanation for that significant delay and finds that if the applicant did genuinely fear harm in China he would have at the very least sought immigration assistance in relation to, if not actually lodge, a protection visa application at some point before his visa expired. The tribunal also found that the applicant's explanation for why he had not attended any meetings of Falun Gong associations in Australia to be implausible. The tribunal finds that if the applicant had been and was a genuine Falun Gong practitioner, who had decided to make a genuine commitment to Falun Gong as he claimed, he would have contacted Falun Gong associations in Australia and participated in meetings and practice with members of those associations.

108. In light of the above, the tribunal does not accept the applicant as a witness of truth in relation to his protection claims. Accordingly, the tribunal does not accept that:

- a. the applicant's father was imprisoned in China because he complained about pollution or for any other reason;
- b. that the applicant suffered lung [problems] as a result of pollution;
- c. the applicant was ever a member of the Chinese [military] either working in the communications area or in any other area;
- d. the applicant was a member of the Communist Party;
- e. that the applicant ever engaged in Falun Gong practice or met with any Falun Gong practitioners in China;
- f. that the applicant was ever taught Falun Gong by a friend of his father or by anyone else;
- g. that the applicant ever owned or read the book before arriving in Australia;
- h. that the applicant had met with other Falun Gong practitioners in 2004 or at any other time;
- i. that the applicant was arrested, detained or beaten in 2006 or at any other time because he was practising Falun Gong;
- j. that the applicant was held at a mental hospital and given injections against his will;
- k. that the applicant has or is being monitored by the Chinese government or security forces as a result of him being a Falun Gong practitioner or for any other reason;
- l. that the applicant's brother was ever visited by the police because of the applicant's Falun Gong practice;
- m. that his brother fled to the USA because of problems arising from the applicant' as Falun Gong practice; or that
- n. that the applicant's father has quarrelled with the police, been detained and required to pay a bribe to be released.

109. The tribunal has considered the photographs provided by the applicant which he claims to be evidence of his Falun Gong practice in Australia. As put to the applicant at the hearing, the tribunal considers these photos as evidence that the applicant has engaged in Falun Gong practice on one occasion with practitioners in a park and has stood in front of and holding Falun Gong materials at two places in Melbourne on one occasion. The tribunal does not accept these photographs are evidence of the applicant engaging in regular Falun Gong practice in Australia or as evidence of the applicant engaging in advocacy about Falun Gong in Australia. In light of its serious concerns about his credibility, the tribunal does not accept that the applicant has engaged in Falun Gong practice at any other time after his arrival in Australia. Nor does it accept that he has engaged in any form of Falun Gong advocacy or expressed any views either publicly or privately about the circumstances of Falun Gong practitioners in China.

110. Accordingly, the tribunal does not accept that the applicant is a genuine Falun Gong practitioner or that he has any genuine beliefs about the treatment of Falun Gong practitioners in China. Based on his evidence provided at the hearing, the tribunal accepts that the applicant has some knowledge of Falun Gong practice and beliefs but finds that he has obtained this knowledge solely for the purpose of strengthening his refugee claim. The tribunal also finds that the applicant engaged in Falun Gong practice on the occasion on which he was photographed and stood in front of and holding

Falun Gong material solely for the purposes of strengthening his refugee claim and not because he is a genuine Falun Gong practitioner or has any genuine beliefs about the circumstances of Falun Gong practitioners in China.

111. The tribunal also does not accept that the applicant will be identified as a failed asylum seeker if he is to return to China in the reasonably foreseeable future. The tribunal finds the applicant will be returning to China on a Chinese passport that is valid until 2020. The tribunal accepts the applicant will be returning on a passport that shows he remained in Australia for a significant period of time after his visitor visa expired. However, the tribunal does not accept that the fact of the expiry of his visitor visa and the length of time he has remained in Australia since that time, will result in the Chinese authorities assuming he is a failed asylum seeker on his return. Under Australian immigration law, there are a number of visas the applicant may have applied for, the time taken for the consideration of the applications for which could explain the length of time the applicant has remained in Australia since his visitor visa expired.

### **Well-founded fear of persecution for a Convention reason**

112. The applicant has made claims against China based on the Convention grounds of religion (as Falun Gong involves commitment to certain transcendent values, and is perceived and denounced by the Chinese government as a heretical sect); political opinion (as Falun Gong is persecuted as a political threat and/or because failed asylum seekers are perceived to be opposed to the Chinese government) and membership of the particular social groups "Falun Gong practitioners" (as Falun Gong is a movement with certain distinct set of values and behaviours) and "failed asylum seekers".

### *Risk of Serious Harm Capable of Amounting to Persecution*

113. In light of its findings set out above in relation to the credibility of the applicant's claims, the tribunal does not accept that the applicant faces a risk of harm either because he has engaged in Falun Gong practice in China or in Australia or because he will be identified as a failed asylum seeker on his return to China.

114. In relation to the applicant's claim to face a risk of harm because he is identified as a failed asylum seeker on his return to China, the tribunal, in the alternative, finds that the country information set out above does not show that individuals identified as failed asylum seekers on their return are targeted for harm and, accordingly, finds that even if the applicant were identified as a failed asylum seeker on his return to China he would not suffer a risk of harm as a result.

115. Further, the tribunal finds that the applicant has engaged in the Falun Gong activity in Australia evidenced in the photographs provided by him to the tribunal solely for the purpose of strengthening his refugee claim and is not satisfied that the applicant has engaged in that conduct for any other reason. Accordingly, under s 91R(3) of the Act, the tribunal disregards this conduct by the applicant in Australia in assessing his protection claims under the Refugees Convention.

116. Accordingly, the tribunal finds that there is not a real chance the applicant may suffer serious harm at the hands of the Chinese authorities or security forces if he were to return to China now or in the reasonably foreseeable future.

### *Conclusion on Persecution*

117. In light of the above, the tribunal considers that, taking all the information together, there is not a real chance that the applicant will face arrest, detention, beating or death or any other form of serious harm at the hands of the Chinese government or security forces if he were to return to China. The tribunal finds there is not a real chance the applicant will encounter serious harm capable of amounting to persecution for reasons of his religion, actual or imputed political opinion or membership of the particular social group set out above, considered both individually and cumulatively, in the reasonably foreseeable future should he return to China.

118. As the tribunal has found the applicant does not face a real chance of serious harm for a Convention reason on his return to China, it is unnecessary for the tribunal to consider whether effective state protection or safe relocation will be available to the applicant within China.

119. Accordingly, the tribunal is not satisfied the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention.

### **Complementary protection**

120. The tribunal has considered whether, in light of its findings in relation to the applicant's claims set out above, there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm.

121. In light of its adverse findings about credibility of the applicant's claims set out above, the tribunal does not accept that the applicant faces a real risk that he will be arbitrarily deprived of his life, have the death penalty carried out on him or be subjected to torture, cruel or inhuman or degrading treatment or punishment if he returns to China because he is a Falun Gong practitioner, because he has engaged in Falun Gong practice in China, because he would engage in Falun Gong practice after he returned to China, because he is identified as a failed asylum seeker or for any other reason.

122. The tribunal has considered whether the applicant faces a real risk of significant harm on his return because he has posed in photographs engaging in Falun Gong practice on one occasion in Australia and distributing Falun Gong materials on one occasion in two locations in Australia and because he has some knowledge of Falun Gong practice. The tribunal notes the applicant conceded at the hearing that he had not attended any meetings of Falun Gong associations in Australia or otherwise publicly expressed views about Falun Gong practice in Australia. The tribunal finds that the risk of the applicant having engaged in Falun Gong practice on one occasion and distributed Falun Gong materials in two locations on one occasion in Australia, as evidenced by the photographs provided by him to the tribunal, coming to the attention of the

Chinese government or security forces in China to be extremely low to the point of being non-existent.

123. Accordingly, the tribunal does not accept that the applicant faces a real risk of being arbitrarily deprived of his life, having the death penalty carried out on him, being tortured or suffering cruel, inhuman or degrading treatment or punishment because the Chinese government or security forces discover that he engaged in Falun Gong practice on one occasion and distributed Falun Gong materials in two locations on one occasion in Australia, particularly given that, as the tribunal finds, he only did so for the purposes of strengthening refugee claim and not because he is a genuine Falun Gong practitioner or genuinely holds any beliefs about the treatment of Falun Gong practitioners in China or elsewhere.

124. As a result, the tribunal is not satisfied that there is a real risk that the applicant will suffer significant harm in the form of being arbitrarily deprived of his life, having the death penalty carried out on him or suffering torture, cruel or inhuman or degrading treatment or punishment as a result of his return to China from Australia. The tribunal is therefore not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm.

## CONCLUSIONS

125. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

126. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(aa).

127. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

## DECISION

128. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.





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# Refugee Review Tribunal of Australia

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## ←1106507 →[2013] RRTA 30 (29 January 2013)

Last Updated: 22 March 2013

←1106507 →[\[2013\] RRTA 30 \(29 January 2013\)](#)

### DECISION RECORD

**RRT CASE NUMBER:** ←1106507 →

**DIAC REFERENCE(S):** CLF2011/31353

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

**TRIBUNAL MEMBER:** Margret Holmes

**DATE:** 29 January 2013

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

### STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. 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).
2. The applicant, who is a citizen of China (PRC), arrived in Australia on [date deleted under [s.431\(2\)](#) of the *Migration Act 1958* as this information may identify the applicant] February 2008 and applied to the Department of

Immigration and Citizenship for the visa [in] March 2011. The delegate decided to refuse to grant the visa [in] June 2011 and notified the applicant of the decision.

3. 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.

4. The applicant applied to the Tribunal [in] June 2011 for review of the delegate's decision.

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

## RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### Refugee criterion

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

8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.

9. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1, *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387, *Appellant*

*S395/2002 v MIMA* [2003] HCA 71; (2003) 216 CLR 473, *SZATV v MIAC* [2007] HCA 40; (2007) 233 CLR 18 and *SZFDV v MIAC* [2007] HCA 41; (2007) 233 CLR 51.

10. 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.

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

12. 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.

13. 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.

14. 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.

15. 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 being persecuted 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.

16. 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.

17. It is generally accepted that a person can acquire refugee status *sur place* where he or she has a well-founded fear of persecution as a consequence

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

18. Whether an applicant is a person in respect of 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.

#### Complementary protection criterion

19. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

20. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

21. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

## CLAIMS AND EVIDENCE

### Material before the delegate

22. The applicant is [age deleted: s.431(2)]. She came to Australia when she was [age deleted: s.431(2)] with a student visa. She travelled with a passport issued [in] 2007. She lived in Fuqing in Fujian Province where her parents live; her [sibling] is married and is in [another country].

23. In the statement submitted as part of her protection visa application, the applicant states that her whole family practised Falun Gong and were persecuted in China. They encouraged her to do likewise and to practise it

secretly at home. The applicant states that Falun Gong advocates 'truth, compassion and forbearance'; they cannot lie and are instructed to be kind.

24. She states that the persecution of Falun Gong practitioners by the Chinese authorities began in 1999 and the local authorities harassed practitioners in her area frequently. She states that her father was arrested by a policeman because someone informed against him. Many strangers broke into her family's home and were very rude, beating and smashing 'here and there' and confiscating the family's belongings. Her mother took the applicant and her sister to hide at the home of relatives over the school holidays but then the applicant had to return to school. There, she was forbidden to enter the class by the teacher and the school demanded that her parents come to the school. They did so and were told that because they practised Falun Gong, the applicant should transfer to another school. Her mother paid so the school would stop demanding that the applicant move to another school.

25. However, the applicant was then 'allocated to the bottom class' and experienced discrimination from teachers and classmates who also bullied her. 'One day, when (she) was gladly riding a small bicycle for funs, a group of children threw small stones on (her) and abused (her) as a child of evil cult' The applicant fell off her bicycle and they threw her bicycle into a ditch. When she stood up she was hit on the face and her nose was broken; she claims to have a deep scar on her nose. All of this made her nervous and scared of people and no matter how good her results, she was always 'allocated to the schools with the lowest quality and to the worst classes' She sometimes felt discouraged and inferior.

26. So as to protect the applicant from unfair treatment in China and so the applicant would not have to live a cautious life there, her mother raised the funds for the applicant to come to Australia where she can practise Falun Gong freely without fear of being bullied, insulted or scorned. Her sister has been sent to [another country] also to avoid such treatment. The applicant states that financial pressures meant that she stopped going to school here in Australia but wants to remain here because she fears she would face 'oppression and discrimination' if she were to return to China.

27. The delegate's decision records that at the interview [in] May 2011 the applicant was not able to answer general questions about Falun Gong. The delegate records that the applicant did not know the origins of Falun Gong, why it is banned in China and how Falun Gong practitioners cultivate their character. The delegate was not satisfied that the applicant was in fact a Falun Gong practitioner. The delegate records that the applicant said she reads Falun Gong books, attends events and is a good person as evidence of her involvement.

28. The delegate stated that there was no evidence to support the applicant's claim to have practised Falun Gong here in Australia. She said that a friend had suggested she contact [Bookshop 1] and people there helped her with her protection visa application. The delegate concluded that the applicant's involvement with Falun Gong here was for the sole purpose of strengthening her claims for a protection visa. The applicant said that she had not applied before she did because she did not know about protection visas.

29. The delegate records that the applicant showed at the interview letters which she said were from her father in prison. She told the delegate that she

stopped going to school here in Australia because her father was detained and her mother was unable to support her.

### **Additional material before the Tribunal**

30. The Tribunal has before it the Department's file relating to the applicant's protection visa application. 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.

31. The applicant appeared before the Tribunal [in] September 2011, [in] December 2012 and [in] January 2013 to give evidence and present arguments. The Tribunal records its regret having is taken so long to consider the applicant's claims. It notes that the hearing [in] December 2012 was adjourned soon after it began because the applicant said she had not yet received a recording of the hearing [in] September 2011 which she had requested and which had been sent to her. The Tribunal did not consider that it should proceed with the second hearing without the applicant having an opportunity to listen to and remind herself of what went on at the first hearing. A copy of the recording was provided to her that day and the Tribunal wrote to her [in] December 2012 to advise that the hearing would resume [in] January 2013. The Tribunal hearings were conducted with the assistance of an interpreter in the Mandarin and English languages.

### *The first Tribunal hearing*

32. At the time of the hearing the applicant submitted a statutory declaration from [Ms A] of [Bookshop 1] and dated [in] August, apparently 2011. It states that [Ms A] is a Falun Dafa practitioner and is a supervisor at the bookshop where she regularly 'conduct studies, watch videotapes of the lectures and exercises on Falun Dafa'. She confirms that the applicant 'attended our activities [for a number of days in March 2011]' and that the applicant impressed her as an honest, sincere and diligent person. [Ms A] testifies that the applicant 'is a genuine Falun Gong practitioner, as she had been truly practising Falun Gong's principles of Truth-Compassion-Forebearance and doing what Falun Gong practitioner should do'.

33. The applicant confirmed at the hearing that the reason she feared persecution in China was because she is a Falun Gong practitioner. The applicant said that Falun Gong was a combination of mind and body and she told of its three important principles, truth, and benevolence and tolerance. She said that Master Li started it in 1992.

34. The applicant told the Tribunal at the hearing that her father had worked as a driver and that her mother had sometimes worked in a variety of casual positions. She said that she has some contact with her parents and referred to two letters her father had sent and occasional telephone calls to her mother. The applicant said that she had studied for only about four months after coming to Australia in February 2008 because there were pressures at home in China and she wanted to lessen the financial burden on her family and that since then had stayed at home because she was afraid, it appeared for reasons including her migration status; she also said she had gone to Melbourne and that she had had suicidal thoughts. She explained that her

student visa had been cancelled and that was why she was scared. The applicant said that abandoning her studies here had been impulsive on her part and something she regretted.

35. The applicant said that her Falun Gong practice involves stillness and movement. She said that she practises four times a day, at 7.55 in the morning and in the evening, and at 1.55 in the morning and in the afternoon, explaining that Master Li does not think that it is important when one practises and that it can be done anywhere at any time but she had established her own pattern. The Tribunal asked her about what she did at 1.55 in the morning and she explained that she woke up with an alarm to practise. The Tribunal said that it found it hard to believe that the applicant would wake every morning at 1.55 am and she said she would not say every day but most days and that some days she did not hear the alarm.

36. The applicant said that in the morning she sometimes practised in [Suburb 2] or in the city or near the train station in [Suburb 3] to which she travelled with one of her mentors about four or five times a week; later she said that she met her friend in [Suburb 3] and travelled there by herself by train, a journey which took about an hour and which required her to get up around 5.00 am. The Tribunal asked how many people would be at the [Suburb 3] gathering each morning and she said about 4 to 6, sometimes up to 10. The Tribunal asked why she would go all the way to [Suburb 3] and not practice in [Suburb 2] and she said that there was a group in [Suburb 2] but she had followed her mentor and wanted to go where there were people she knew. She said she was scared to get in touch with strangers. Later the applicant said that she had been going to [Suburb 3] since May 2011 and that she had done self-learning before that; that her mentor had moved to [Suburb 3]; and that she had attended big Falun Gong events before going to the regular gatherings. She confirmed that it was not until May 2011 (she said it was before the interview with the delegate which the Tribunal advised her had been [in] May 2011) that she started to do exercises at the gatherings and said that before that she was doing them at home by herself.

37. The Tribunal indicated that it found the applicant's practice four times a day at the times she described and her getting up at 5.00am a few days a week to go to [Suburb 3] a scenario which was difficult to accept as credible. The applicant said that there was not very much else in her life and she could go to bed early at night.

38. The applicant confirmed that she had been to events organised by [Ms A] [in] March 2011. She was one of the applicant's mentors and had introduced the applicant to Falun Gong. The applicant said that there is a nine-day class every month and that she usually attended each month. The Tribunal pointed out that the statutory declaration she had provided from [Ms A], apparently written not long before the hearing, specified that the applicant had attended [in] March 2011 and did not say anything about attending at other times. The applicant said that she had been attending since March 2011 and that the statement from [Ms A] proved that she had been practising since March 2011. She said that the document had been translated into English just two days ago and she had not read it very carefully. The Tribunal said that the statutory declaration was not a translation; the applicant said that if the original evidence had been written in Chinese and it had been translated and put into a statutory declaration form. The Tribunal pointed out that [Ms A] had

signed it and there was no evidence that it had ever been written in Chinese. The applicant said that [Ms A] meant that she had started going to classes in March 2011.

39. The applicant was able to describe the Falun Gong movements. The Tribunal said to the applicant that by March 2011 she been in Australia for a long time and asked if it was so that she had not started to practise Falun Gong before then. She said that she had not done so before and it was not until after she moved to Melbourne that she learned about Falun Gong through newspapers. She said that her father had gone to prison when she was little and she had no access to anything about Falun Gong when she was in China. The Tribunal said that it seemed that the applicant's evidence was that she had learned Falun Gong exercises for the first time in 2011 and the applicant said that in the middle of 2010, when she was living in Melbourne, there were Falun Gong events that she went to and obtained pamphlets and books but that her serious practice had begun in 2011.

40. The applicant also said that she said that she came to know of the existence of the exercises when she was small because her father was a practitioner but that she did not practise in China. The applicant said that her mother is involved in Falun Gong and does the exercises but not so intensively as her father. When the Tribunal referred to her evidence that she had not learned the exercises until 2011, the applicant said that she had learned at home in China but had not practised in public.

41. The applicant said that the Chinese Communist Party is evil and believes that Falun Gong affects people's mental state and that it is an evil cult. She referred to information about the mistreatment of Falun Gong practitioners which she had submitted.

42. The Tribunal asked the applicant about whether any bad things happened to her in China (other than the arrest of her father). She said that she was constantly discriminated against and that she tried to study hard but people laughed at her even if she came top of the class. It had been hard for her mother to manage without her father and she (her mother) had to work really hard including on construction sites where she was assaulted and abused. The applicant told of the scar on her nose and having had a stitch near her eye when she was pushed and of being laughed at and called a child of an evil cult. She said that nobody would play with her and that the parents of other children thought she would be a bad influence on their children. The Tribunal pointed out that these things said to have happened when the applicant was a child did not seem to be of a kind to constitute persecution.

43. The Tribunal asked the applicant when her father was arrested. She said it was in 1999 when she was about [age deleted: s.431(2)]. She said she recalled the arrest and said that he had been in prison since then. The Tribunal asked the applicant how long her father's sentence was and she said she had been told that he had been sentenced to death and she understood her uncles had paid bribes to suspend the death sentence and make it indefinite imprisonment. The Tribunal said that it was not aware that the death penalty was imposed on Falun Gong practitioners and the applicant said that it (the Tribunal) may not have realised how evil the Chinese Communist Party's treatment of Falun Gong people is and that her father had been tortured and abused. The Tribunal said that it could obtain the applicant's student visa application and asked the applicant what that would show about her parents.



She said that she was not someone who handles applications she did not know what it said. She had found she was coming to Australia not long before her departure.

44. The Tribunal asked the applicant what she thought would happen to her if she were to return to China. She said that Falun Gong prioritises truth, benevolence and tolerance and these principles were important to her. She said she wanted to gain further knowledge of Falun Gong practice and become a better person. She said that she had left youth organisations associated with the Chinese Communist Party of which she claimed to have been a member and said she had organised to withdraw from them when she joined Falun Gong. The Tribunal asked when that was and the applicant said it was last year, she said in July 2010 when she was in Melbourne. The applicant said that because she has practised Falun Gong in public and joined Falun Gong, she knows that people from her area have been talking about her activities back home. The Tribunal asked how these people would know about this and she said that the village committee has people everywhere and that the committee had notified her mother that she (the applicant) had been practising Falun Gong and asked her mother to stop the applicant from doing so. The applicant had been told that upon her return to China she would face the same treatment as her father. The applicant said that people had visited her mother in January 2011 to tell her.

45. The applicant provided documents at the time of the hearing. The applicant said that they had been brought by people who came from China and that such documents could not be posted overseas from China, and that she had sought the documents after the delegate refused the application. Her mother had arranged the documents. One is from [a prison in Fujian Province] and purports to be a Visiting Certificate. The translation shows that it was issued to a person in the name of the applicant and the month and year of her birth correlate with that in her protection visa application. It states that she is the daughter of the prisoner and his name is given as [name deleted: s.431(2)], the name of the applicant's father provided in the protection visa application. The translation shows that the Certificate includes a square for a photo but there is no photo in the document provided to the Tribunal. The Certificate shows that the applicant had visited once on the morning [in] October, apparently in 2007, the date it was issued. The applicant said she had visited her father once. The Tribunal pointed out the missing pieces on the Visiting Certificate.

46. The applicant told the Tribunal at the hearing that one of her family's household registration documents showed that her father was not listed and this proved that he had been arrested and removed from the household registration.

47. The Tribunal explained to the applicant the requirement that it disregard of things she has done in Australia unless the Tribunal is satisfied that she engaged in the conduct otherwise than for the purpose of strengthening her claim. The applicant said that she would definitely like to return to China if Falun Gong was allowed by the Chinese government. She said her family was important to her and she did not want to leave her mother alone.

48. The Tribunal indicated that it had some credibility concerns about aspects of the applicant's claims.

49. [In] October 2012 the Tribunal wrote to the applicant to explain that [in] March 2012, after the date of the hearing, new alternative criteria for the grant of a protection visa had been introduced. The letter explained that an applicant for a protection visa who is found not to be a refugee may nevertheless be a person to whom Australia has protection obligations on 'complementary protection' grounds. The letter explained that the new legislation may apply where there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm. The letter explained what significant harm means and invited the applicant to provide information, in addition to the information she had already given, as to whether she met the alternative complementary protection criterion. The applicant was invited to do so at a further hearing about her case.

### *The second Tribunal hearing*

50. [In] December 2012 the Tribunal received a submission from the applicant. It drew attention to the mistreatment of Falun Gong practitioners, and members of their families, by the Chinese authorities. It states that if she were to return to China she would definitely suffer inhuman treatment. She refers to the imprisonment of her father because of his Falun Gong practice and states that her mother had spent a lot of money to save his life and that otherwise 'he would have been tortured to death in police custody' She states that her family was harassed and threatened by the police after her father was detained which caused her to 'flee to Australia' The applicant states that her mother is still being harassed by the local authorities. She states that she (the applicant) is an active Falun Gong practitioner and it is unimaginable for her to renounce it. She states that therefore she would be detained and her life would be in danger. She states that she trembles at the thought of being subjected to sexual torture in a Chinese police station.

51. The applicant confirmed that she had had the opportunity to listen to the recording of the hearing [in] September 2011. The applicant confirmed that her fear of coming to harm on account of her practice of Falun Gong was the only reason for her fear of returning to China. She drew attention to the documents she had submitted showing the cruel and inhuman treatment and persecution of Falun Gong practitioners in China.

52. The Tribunal went over the applicant's claims about the bad things which she said had happened to her in China. She said that having her father arrested and the family being broken up were bad things which had happened to her. She spoke about being isolated and ostracised at school on account of her parents' involvement with Falun Gong. She said that she had to change primary schools although had not needed to change high schools and named the two she had attended. The Tribunal observed that the applicant appeared to have done well at school and she said that she worked very hard to demonstrate that she was not dangerous and could do well. The Tribunal said that it did not seem that the things which she claimed had happened to her personally were of a kind to constitute persecution and she said that to her they were very serious and she had been but a child at the time.

53. The applicant also mentioned that after her father was arrested the authorities came to her home and ransacked it and stole practically everything.

54. The Tribunal asked the applicant whether she saw the police again at her house after her father was arrested in 1999. She said she had done so twice but was unable to remember just when. She explained that one day she had been at a neighbour's house and saw people come to her place and she later learned they were police. She said that her mother told her police had come another time to search the house and to check that the family were telling the applicant's father to give up Falun Gong.

55. The applicant confirmed that her mother no longer practised Falun Gong in public after her husband's arrest but that she did so at home. The applicant had seen her doing so.

56. The Tribunal asked the applicant how long her father had been in prison before she went to visit him and she said she could not remember because it was long ago but that she had been to visit him with her mother and relatives. The Tribunal asked how many times she had visited her father in prison and the applicant said two or three times. The Tribunal pointed out that at the hearing in September 2011 the applicant said that she had only visited her father once and she said it was two or three times. She said it was hard to recollect painful things and to remember how many times something happened. She said that she had seen him once after he was arrested, perhaps one or two years later, but she could not quite remember. The Tribunal asked if she could remember how old she was when she last saw her father and the applicant said [age deleted: s.431(2)]. The Tribunal said that at the hearing in September 2011 she provided a visiting certificate indicating that she had visited her father in prison in October 2007 so not long before she came to Australia. The applicant said that that showed then that she had visited him three times.

57. The Tribunal asked the applicant about her practice of Falun Gong in China, before she came to Australia in 2008. The applicant said that she had learned the exercises from her mother at home. The Tribunal said to the applicant that at the hearing in September 2011 she had said that she learned the exercises in 2010 and 2011 here in Australia. The applicant repeated her claim to have learnt the exercises in China.

58. The applicant said that here in Australia she first started to practise Falun Gong in public in May 2011. She said that she sometimes does the exercises at home, that she goes to the [bookshop] and mixes with others, and that she goes to gatherings in [Suburb 3], as she explained she did at the hearing in September 2011. The applicant said that she is working so goes there around three times a week, from 6.00 to 7.00 am. She said that she often gets a lift with the father of one of her friends but otherwise has to catch a bus and train. She has to get up at 5.00 or 5.30 am and can be late for the gathering. The applicant said she kept going to [Suburb 3] because the person she had followed from the beginning went there.

59. The Tribunal asked the applicant about her contact with her family. The applicant said that she had no contact with her father since the letters she had referred to at the first hearing and that she speaks with her mother by phone. She and her mother did not really talk directly about Falun Gong in their conversations, the applicant said because one could not tell if anyone would be listening in

60. The applicant said that after the arrest of her father the police kept watching and disturbing her family; she said they were being watched. The Tribunal asked the applicant how she knew they were being watched and she said the authorities would have understood why her parents sent their children abroad. She said that after what happened to her father everyone knows that the authorities would continue to watch her family. The Tribunal asked the applicant about her claim that the authorities in the area know about her Falun Gong practice here in Australia and she explained that rumours have spread in her home area about her being from the same evil cult as her father. The applicant said that her mother had told her about the rumour and that everybody knew about it.

61. The Tribunal asked the applicant about leaving China. She said that her mother was helped by friends and relatives to get the necessary documents.

62. The Tribunal said to the applicant that a critical issue for it was whether the applicant was in fact a genuine Falun Gong practitioner. The applicant said that if she was not genuine why would she have escaped from China to come to Australia and left her mother alone there. She said that if she could practise Falun Gong freely in China she would return.

63. Using the procedure provided under s.424AA of the Act, the Tribunal advised the applicant of the particulars of information which, subject to her comment or response, would be the reason or part of the reason for affirming the decision under review. The information was from the applicant's student visa application file. That application was lodged in 2007. The Tribunal told the applicant that there was a page of the student visa application form which listed her father at the address also given as that of her and her mother. The applicant was informed that there was also a letter signed by both her parents about the money they had available to fund her studies in Australia along with a certificate from the applicant's father's employer apparently issued [in] September 2007 about his income. The Tribunal explained that the information was relevant to the review because it cast doubt over her claim that her father had been arrested in 1999 and had remained in custody ever since. The Tribunal said that, subject to her comment or response, the information may lead it to reject her claim that her father had been arrested and detained as she had claimed, and it may affect the Tribunal's assessment of the credibility of other parts of her evidence. The Tribunal said that if it relied on this information it would be the reason or part of the reason for affirming the decision under review. Copies of the relevant pages from the applicant's student visa application file were provided to her after the Tribunal had put the information to her.

64. The applicant was invited to comment on or respond to the information. The Tribunal advised the applicant that she could choose to do so then or that the Tribunal could adjourn the review for her to respond later, after a short adjournment that day or in writing by a time to be agreed. The applicant said that she would comment then. She said that an agent had been engaged to prepare the documents for the student visa application and she had never before seen the documents the Tribunal had referred to. She did not know anything about their content. She pointed out that the elements of her mother's name had been put in the wrong order. She said that her father was imprisoned and so could not have earned any money as the document showed. She said that she had never heard of the company where her father was shown

to have worked and reminded the Tribunal that she had said that her father had been a driver.

### **Relevant independent information about Falun Gong and the treatment of practitioners in China**

65. The United Kingdom's Border Agency produces Country of Origin Information Reports which draw on a wide range of sources. A report on China (referred to as the UK Report in this decision record) was published in August 2011 and includes the following about Falun Gong:

21.18 The United States Department of State (USSD) *International Religious Freedom Report 2010* noted 'Falun Gong is a self-described spiritual discipline that combines qigong (a traditional Chinese exercise discipline) with the teachings of founder Li Hongzhi. Prior to the Government's 1999 ban of Falun Gong, it estimated that there were 70 million adherents.

21.19 The report also stated:

It was difficult to confirm some aspects of reported abuses of Falun Gong adherents because they were often prevented from meeting with foreign reporters and officials. There were credible reports from NGOs [non-governmental organisations] and international media that detentions of Falun Gong practitioners increased around sensitive dates. In certain areas neighbourhood groups were reportedly instructed to report on Falun Gong members; monetary rewards have been offered to citizens who informed on Falun Gong practitioners.

Falun Gong sources estimated that since 1999 at least 6,000 Falun Gong practitioners have been sentenced to prison. Falun Gong adherents have also been subjected to administrative sentences of up to three years in RTL [re-education through labour] camps. Falun Gong estimated more than 100,000 adherents in the country have been sentenced to RTL.

Family members reported the harsh treatment of Falun Gong practitioners, including the use of torture. Falun Gong practitioners were also subjected to detention in psychiatric hospitals on the orders of public security officials. There was no mechanism for appealing such psychiatric commitments. Falun Gong practitioners detained in psychiatric hospitals were reportedly administered medicine against their will and subjected to electric shock treatment...

21.20 In its *Annual Report 2011* (events of 2010), published on 13 May 2011, Amnesty International noted:

The authorities renewed the campaign to 'transform' Falun Gong practitioners, which required prison and detention centres to force Falun Gong inmates to renounce their beliefs. Those considered 'stubborn', that is, those who refuse to sign a statement to this effect, are typically tortured until they co-operate; many die in detention or shortly after release. Falun Gong members continued to be targeted in security sweeps carried out prior to major national events. Falun Gong sources documented 124 practitioners detained in Shanghai prior to the World Expo, with dozens reported to have been sentenced to terms of Re-education through Labour or prison. Human rights lawyers were particularly susceptible to punishment by the authorities for taking on Falun Gong cases, including losing their licences, harassment and criminal prosecution.

21.21 The United States Commission on International Religious Freedom (USCIRF) stated in its *Annual Report 2011*, published in May 2011:

The Chinese government continues to maintain a severe campaign against adherents

of the Falun Gong spiritual movement, which it considers an 'evil cult' and banned in 1999, including maintaining an extrajudicial security apparatus, the 6-10 office, designed to identify and stamp out Falun Gong activities. Over the past decade, the government has carried out an unprecedented campaign against the Falun Gong, imprisoning large numbers of practitioners and abusing them in detention. Practitioners who do not renounce their beliefs in detention are subject to torture, including credible reports of deaths in custody and the use of psychiatric experiments. 'Transforming' Falun Gong adherents continues to be a high priority for Chinese government security officials.

Falun Gong adherents report, and official Chinese government statements confirm, long-term and arbitrary arrests, forced renunciations of faith, and torture in detention. Officials use Article 300 of the Criminal Procedure Code, which deals with individuals accused of crimes associated with 'evil cults,' and its associated legislation, the Decision of the Standing Committee of the National People's Congress on Banning Heretical Cult Organizations, Preventing and Punishing Cult Activities. It is difficult to determine how many Falun Gong practitioners were in detention because they are most often incarcerated in re-education through labour camps (RTL) and mental health institutions...

In the year before the Olympic Games, police waged a concerted campaign to harass and detain known Falun Gong practitioners and brutally suppressed their activities. Between 2007 and August 2008, an estimated 10,000 people were detained. Of that number at least 700 were sentenced to prison term or RTL. At least five Falun Gong practitioners are known to have died in police custody in 2008. One Falun Gong-affiliated research NGO, using public sources from within China, confirmed that 2,513 individuals were detained in the past year, many in Hebei and Shandong provinces and also in Shanghai. Security officials reportedly offered rewards to anyone who would identify Falun Gong adherents, in order to 'protect' the Shanghai World Expo. Almost all of those detained were sentenced to prison or RTL.

Numerous allegations of government-sanctioned organ harvesting from incarcerated practitioners have surfaced within the last several years as well. Independent investigation into the practices of a hospital in Sujiatun, Shenyang proved inconclusive. However, based on a report from two prominent Canadian human rights activists, international human rights organizations and the Special Rapporteur on Torture have called for an independent investigation and for continued international attention to allegations of organ harvesting from prisoners, torture in custody, and psychiatric experiments conducted on adherents. The UN Special Rapporteur on Torture reported that Falun Gong practitioners allegedly make up two-thirds of the alleged victims of torture presented to him in China ...

### Origins and support

21.26 As reported by *The Guardian* on 18 July 2009 (China's Falun Gong crackdown: The persecution is almost underground):

Without any real formal leadership structure and no role of membership as such, adherents of the religion, founded by Li Hongzhi in 1992, follow so-called traditional qigong practices for both spiritual and physical development as detailed in Falun Gong's literature. Without formal rituals of worship, its central tenets are truthfulness, forbearance and compassion. Falun Gong, which emerged in large part out of ideas prevalent in some aspects of alternative Chinese medicine, came to be regarded as a threat to the Chinese state after 10,000 of its practitioners staged a silent protest at the

Communist party's headquarters in April 1999 to complain about attacks on its members, a move that led to its banning two months later. Accused of being an unregistered religion, spreading superstition and defrauding people, official organisations – crucially – attempted to suggest it was a politically motivated organisation, suggesting the real motive for the crackdown: the perceived threat it posed to the Communist party by its massive appeal.

21.27 As documented by Maria Hsia Chang in her book *The End of Days: Falun Gong* (2004), Falun Gong/Falun Dafa was founded in 1992 by Li Hongzhi. In the early 1990s Li took advantage of a relaxation in the rules governing the regulation and formation of social groups to formulate his own distinctive brand of the ancient Chinese art of qigong (qi gong) or energy cultivation. He fused this with elements of other religions to create a quasi-religious movement, which encompassed a loose hierarchical structure (technically there are no members, only enthusiastic volunteers) and emphasised high moral standards and good health amongst its followers. Pre-ban (July 1999) followers would gather in public parks and squares to practise the five exercises/movements (see below) which are central to the teachings of Li Hongzhi, also known to his followers as Master Li.

21.28 The same source also noted 'Reportedly, the middle-aged and those from the middle class comprised the sect's main following, although its ranks also included students and the elderly, as well as peasants. They came from all walks of life: teachers, physicians, soldiers, CCP [Chinese Communist Party] cadres, diplomats posted in foreign countries, and other government officials.'

### Guiding principles

21.29 As reported in *Compassion: A Journal of Falun Dafa Around the World* (Issue 5 of 2004):

Falun Gong – which is also referred to as Falun Dafa – is an ancient advanced form of the qigong. Falun Gong consists of gentle exercises combined with a meditation component. Aside from its popularity... what is usually said to distinguish Falun Gong is its emphasis on the practice of refining one's moral character in accordance with three principles – Truthfulness, Compassion, and Tolerance. These three principles form the backbone of Falun Gong's philosophy and practitioners of the discipline aspire to live by them in their daily lives, striving to achieve, over time, a state of kindness, selflessness and inner balance.

21.30 The source continued:

The principles of Falun Gong are captured in the two main books written by Mr. Li Hongzhi: *Falun Gong (Law Wheel Qigong)* and *Zhuan Falun (Turning the Law Wheel)*. *Falun Gong* [the book] is a systematic, introductory book that discusses qigong, introduces the principles of the practice, and provides illustrations and explanation of the exercises... Organized in the form of nine lectures, *Zhuan Falun* is the most comprehensive and essential work of Falun Gong... Both books and instructional videos are available free on the Internet. There is no membership, and no fees collected.

### Exercises and movements

21.31 As noted in *Healthy Body, Peaceful Heart: Falun Gong – A Path to Your Original, True Self*, a leaflet sent to the Country of Origin Information (COI) Service on 16 August 2005 by the Falun Gong Association (UK), 'Falun Dafa, also known as

Falun Gong, is a traditional Chinese self-cultivation practice that improves mental and physical wellness through a series of easy to learn exercises, meditation and develops one's 'Heart/Mind Nature (Xingxing)'.

21.32 The five exercises listed on this leaflet are as follows:

Movement Exercises:

1. Buddha Showing A Thousand Hands.
2. Falun Standing Stance.
3. Penetrating the Two Cosmic Extremes.
4. Falun Heavenly Circulation.

Sitting Exercise/Meditating Exercise/Tranquil Exercise:

5. Way of Strengthening Divine Powers ...

66. The Department of Foreign Affairs and Trade has advised that Falun Gong practitioners who have been active in Falun Gong organisations overseas can be of interest to the authorities upon return to China if the authorities believed the person to be a Falun Gong member. Such people could, for example, be interviewed repeatedly, subject to surveillance or, if the person remains active in Falun Gong or is believed to remain in contact with overseas groups, detained (*Country information Report No 06/53* 14 September 2006, confirmed by the Department as still current in advice of March 2007, February 2008, April 2009 and April 2011).

## FINDINGS AND REASONS

67. The Tribunal accepts that the applicant is from Fuqing in Fujian Province, that she came to Australia to study but this did not work out as planned, and that her [sibling] is in [another country].

68. Central to the applicant's claims for a protection visa is her claim that she is a Falun Gong practitioner. The elements of her claims concern her parents being Falun Gong practitioners and her father being arrested and imprisoned in 1999 where she claims he remains. There is also her claim of her own association with and practice of Falun Gong while she was in China, and her claims to practise here. The applicant has said that there is no other reason for her fear of returning to China other than her practice of Falun Gong and the authorities' knowledge that she has done so.

69. Whether the applicant was being truthful in aspects of what she has claimed was a question which arose in the Tribunal's mind during the hearings about the applicant's case. The Tribunal had in mind its *Guidance on the Assessment of Credibility* and has taken into account the difficulties which may be faced by asylum seekers, and whether there are any particular circumstances of this applicant which may have affected her capacity to put forward her claims. The Tribunal notes in particular that she came to Australia in 2008 when she was [age deleted: s.431(2)] and has not been home to China since. It notes too that her study plans here were not realised and that she studied for a short time only. While the benefit of the doubt should be given to applicants who are generally credible but unable to substantiate all of their claims, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is the Tribunal required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out: *Randhawa v MILGEA* [1994] FCA 1253; (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor*



[1994] FCA 1105; (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* [1998] FCA 1126; (1998) 86 FCR 547.

70. The Tribunal has considered carefully the applicant's evidence about her parents being Falun Gong practitioners and her father being arrested and detained in 1999 and that he remains in prison.

71. There is evidence before the Tribunal which casts serious doubt on the veracity of her account about the fate of her father. She has claimed that her father was sentenced to death and that after bribes were paid, his sentence was changed to indefinite imprisonment. Leaving aside the question of whether the death penalty was in fact imposed on Falun Gong practitioners, there are two aspects of the applicant's evidence that have led the Tribunal to find that her claim about the arrest of her father on account of his Falun Gong practice is not true. First, the applicant said that the first hearing that she had visited her father once in prison and she provided what purported to be a Visiting Certificate which was dated October 2007 (when she would have been [age deleted: s.431(2)]) and which she said was issued on the day of her visit. Yet at the second hearing the applicant said she had visited her father two or three times and that she had been [three years younger] when she last saw him. The Tribunal does not expect people to recall precise dates and notes that the applicant was only [young] when she claims her father was arrested. However, once when she was [a certain age] and two or three times, the last when she was [three years younger], are so different that the Tribunal has come to the view that what she has said about visiting her father in prison is not true. Second, information submitted in support of the application lodged in 2007 for the applicant to come to Australia as a student gives her father's address as the same as that of her and her mother and provides information about his employment and income. Given the high chance that such information can be subject to verification, the Tribunal considers that the information provided about her father in that student visa application was most probably correct and it shows that the applicant's father was not in prison. The Tribunal understands that the applicant may herself have had little if anything to do with the compilation of documents submitted in support of the student visa application but the evidence remains that what was submitted does not support her account about what happened to her father.

72. Against this background, the letters apparently sent to the applicant by her father in prison have little weight. Also of little weight are the household registration documents, one including the applicant's father and the other not. These are greatly outweighed by the evidence which indicates that her father was not in fact arrested and detained. The Tribunal considers that the Visiting Certificate is not a genuine document, not only because it purports to show that the applicant visited her father in prison in October 2007 which the Tribunal finds she did not, but also because so many parts of the certificate were incomplete.

73. The Tribunal does not accept that the applicant's father was arrested in 1999 on account of his Falun Gong practice nor that he has been in prison since then and it follows that the Tribunal does not accept that her family was harassed and threatened afterwards and that this ongoing treatment motivated her coming to Australia. The Tribunal does not accept that her family's house was broken into and belongings confiscated nor that her family had to hide with relatives. The Tribunal does not accept that the police harassed her family

after her father's arrest because of her parents' involvement with Falun Gong, nor that the police kept watch on the family.

74. It follows from the finding that the applicant's father was not arrested for being a Falun Gong practitioner that Tribunal does not accept that the applicant suffered the isolation or discrimination or mistreatment while at school on account of her parents' alleged involvement with Falun Gong which she claims became known after the arrest of her father.

75. The evidence indicating that the applicant's father was not arrested for reasons associated with Falun Gong also casts a shadow over the credibility of the applicant's account of her and her family practising Falun Gong while she was in China, before she came to Australia.

76. The applicant said in the statement submitted as part of her protection visa application that her whole family practised Falun Gong and that they encouraged her to do likewise and to practise it secretly at home. The Tribunal found this difficult to reconcile with the somewhat confused evidence provided at the hearing about the applicant having learned about Falun Gong in Melbourne in 2010 and that she did not practise until 2011 although the Tribunal notes that the applicant also said she had learned of the exercises in China. She stated that funds were raised for her to come to Australia so she could practise Falun Gong freely without fear of being bullied, insulted or scorned. On the evidence before it, the Tribunal does not accept that the applicant was ever bullied insulted or scorned when she lived in China on account of Falun Gong.

77. In considering whether the applicant in fact ever learned about or practised Falun Gong in China, the Tribunal has noted that she arrived in February 2008 yet did not become aware of anything involving Falun Gong here in Australia until mid-2010 and did not begin practising in public until May 2011. The Tribunal understands that a [age deleted: s.431(2)] moving to a new country may be glad to leave behind the beliefs and practices of their parents but it is nevertheless relevant that the applicant's own evidence indicated that she had nothing at all to do with Falun Gong for more than two years.

78. The applicant has drawn the Tribunal's attention to reports of the serious mistreatment of Falun Gong practitioners by the Chinese authorities (the United States Commission on International Religious Freedom describes it as a 'severe campaign' against them) and the Tribunal has read considerable material to indicate that Falun Gong adherents have been sentenced to prison or reform through labour as well as many being detained in psychiatric facilities. On the evidence before the Tribunal, a critical element of the applicant's claims – the arrest of her father and what followed for the applicant and her family - has been found not credible and there is therefore nothing which has been done to the applicant's parents, nor to the applicant or her sister, by the Chinese authorities and in particular no evidence that they came to serious harm.

79. Considering the evidence as a whole and having regard to the lack of credibility of a critical element of her claims, the Tribunal has come to the view that the applicant's parents were not Falun Gong practitioners and that the applicant had no involvement with Falun Gong when she was in China.

80. The Tribunal has considered carefully the applicant's claims to practise Falun Gong here in Australia, something she says the authorities know of, and

people are talking about, back home in in China. The Tribunal notes that the applicant knew the names of the five exercises and was able to name the Falun Gong guiding principles. While the Tribunal accepts that genuine practitioners will know these things, there is evidence which weighs against the credibility of the applicant's claim to be such a practitioner:

- the applicant provided a statutory declaration from [Ms A] dated [in] August, apparently 2011. It states that the applicant attended the activities at [Bookshop 1 in] March 2011. Yet the applicant's evidence was that she had attended such classes not just once but every month since March 2011 and said that the document from [Ms A] had been translated from Chinese into English just a couple of days before the first Tribunal hearing, and that she had not had the opportunity to look at it closely. There was however nothing about the statutory declaration from [Ms A] which indicated to the Tribunal that it had been a translation of something in Chinese and the Tribunal does not accept the applicant's assertion that what [Ms A] meant to say was that the applicant had been going to classes since March 2011;
- the applicant said that she began to go to regular practice in [Suburb 3] in May 2011 and that she had done self-learning at home before then and only attended big Falun Gong events. By May, or March, 2011 the applicant had been in Australia for more than three years yet had not started to practise Falun Gong until then. The coincidence with the timing of her protection visa application which was lodged in March 2011 and the interview with the delegate which took place in May 2011 is notable; and
- the Tribunal found the applicant's account of practising Falun Gong four times a day, at 7.55 in the morning and in the evening and at 1.55 in the morning and in the afternoon very unconvincing, particularly having regard to her evidence that Master Li does not think it is important when one practises and that can be done anywhere at any time. The Tribunal does not accept that a woman in her early [age deleted: s.431(2)] would set 1:55am as such a time, in particular having regard to the claim that on four or five days a week, later on three days, she would also get up around 5.00am and go to [Suburb 3] for Falun Gong practice.

81. The Tribunal has come to the view that the applicant's account of being a genuine Falun Gong practitioner and 'truly practising' Falun Gong's principles as attested by [Ms A] is outweighed by evidence which indicates that she is not such a practitioner. The Tribunal considers that the statutory declaration from [Ms A] and the evidence the applicant gave about her attendance at nine day classes to be inconsistent giving rise to doubt that she went to any such program. The Tribunal found her account of waking at 1.55 am and several times a week rising very early to go to [Suburb 3] unconvincing. The Tribunal does not accept that the applicant is a regular Falun Gong practitioner. Considering all of the evidence about the applicant's involvement with Falun Gong, the Tribunal does not accept that the authorities visited her mother in 2011 for any reason associated with the applicant's involvement with Falun Gong here in Australia; there is far too much evidence weighing against important elements of the applicant's claims to give this assertion any weight, nor does the Tribunal accept that the authorities would

be listening to the phone used by her mother for any reason the applicant has told of in her claims for a protection visa. The Tribunal does not accept that the applicant left youth organisations associated with the Chinese Communist Party in 2010 on account of her involvement with Falun Gong; the Tribunal does not accept that the applicant had any significant involvement with any such organisations in China and notes that she made no claims in that regard.

82. The Tribunal does, however, accept that the applicant has been to [Bookshop 1] and has been assisted by people there; that she may have attended some Falun Gong events; and that she knows how to do the Falun Gong exercises and knows its guiding principles. The Tribunal has therefore considered whether the applicant's association with Falun Gong here is conduct which gives rise to a real chance that the applicant could come to serious harm on account of a Convention reason in the event that she were to return to China.

83. The Tribunal has considered whether these aspects of the applicant's conduct are of a kind to bring them within the scope of s.91R(3) of the Act. The Tribunal has had regard to the applicant's evidence about the timing of her involvement, coming as it did around the time her protection visa application was lodged, and her lack of involvement for more than two years after her arrival despite claiming that she left China so she could practise Falun Gong freely. The Tribunal considers that the weight of evidence indicates that going to [Bookshop 1] and being assisted by people there; attending some Falun Gong events; and learning Falun Gong exercises and its guiding principles was conduct which was engaged in for the sole purpose of strengthening her claims to be a refugee. It must therefore be disregarded in the assessment of the applicant's claim to have a well-founded fear of persecution in China.

84. The Tribunal has found that the applicant's father has not been arrested and that she and her family were not involved in Falun Gong in China. The Tribunal has also found that the applicant's association with Falun Gong here in Australia was solely to advance her protection claims. In light of these findings, the Tribunal does not consider that the applicant will practise Falun Gong upon return to China. Nothing has happened to her or her family on this account in the past and the Tribunal does not consider that there is a real chance that anything of a kind which could constitute persecution will happen to her upon return.

85. The Tribunal does not accept that the applicant has a well-founded fear of persecution for a reason in the Refugees Convention in the event that she returns to China in the reasonably foreseeable future. She does not meet the refugee criterion for the grant of a protection visa.

### **Complementary protection**

86. As the Tribunal has found that the applicant is not owed protection obligations on the basis of meeting the definition of a refugee, it must consider whether she meets the complementary protection criterion: whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that she will suffer significant harm in accordance with s 36(2)(aa) of the Act.

87. To recap, a person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. Conduct of the kind which comes with s.91R(3) in relation to the assessment of the applicant's claims against the refugee criterion for the grant of a protection visa is not disregarded in the assessment of the applicant's claims under the complementary protection criterion.

88. The Tribunal does not accept that going to [Bookshop 1], attending some Falun Gong events and knowing the Falun Gong exercises and guiding principles would lead the applicant to come to the adverse interest of the authorities upon return. The Tribunal does not consider that the authorities in China will believe the applicant to be a Falun Gong member because the evidence indicates that she is not such a member and the Tribunal does not consider it all likely that she will be perceived otherwise. It follows that she will not be subjected to the kind of treatment which can occur when a person is believed to be an active Falun Gong member such as being interviewed repeatedly, subject to surveillance or, if the person remains active in Falun Gong or is believed to remain in contact with overseas groups, detained.

89. The Tribunal accepts that some Falun Gong practitioners are, and continue to be, subjected to treatment which could constitute significant harm but after its consideration of all of the applicant's evidence, much of which has been found to be not credible for reasons set out above, its assessment is that there is not a real risk of the applicant facing such harm.

90. The Tribunal finds that there are not substantial grounds for believing that, as a necessary or foreseeable consequence of the applicant being removed to Australia to a receiving country (in her case her country of nationality which is China), there is a real risk that she will suffer significant harm.

91. The applicant does not meet the complementary protection criterion for the grant of a protection visa.

## CONCLUSIONS

92. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

93. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

94. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

## DECISION

95. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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