

Department of Immigration and Multicultural Affairs

Office of the Secretary

Mr John Godfrey  
Acting Principal Member  
Refugee Review Tribunal  
Level 29\201 Elizabeth Street  
SYDNEY NSW 2000

Dear Mr Godfrey

I am writing to follow up my 23 October 2000 letter to your predecessor, Dr Nygh, in which I indicated my intention to make a submission to the Tribunal under s423(2) of the *Migration Act* on issues affecting Falun Gong and 'black children' claims.

The attached submission addresses a number of matters as they affect claims relating to those issues, having regard to up-to-date country information. It also provides advice to assist the Tribunal in addressing any future applications involving those matters, in the interests of maintaining consistency of interpretation in accordance with Australian law and policy.

I would greatly appreciate your assistance in circulating my submission on these matters to Members of the Tribunal.

Yours sincerely

WJ Farmer  
28 February 2001

# **SUBMISSION TO THE REFUGEE REVIEW TRIBUNAL ON APPLICATIONS FOR REVIEW OF DECISIONS INVOLVING MEMBERSHIP OF THE FALUN GONG MOVEMENT AND 'UNREGISTERED CHILDREN' ISSUES**

## *Background*

1. This submission provides written argument on the issues of membership of the Falun Gong movement ('Falun Gong') and of children not formally registered at birth for whatever reason ('unregistered children'), arising in relation to decisions under review by the Tribunal (see subsection 423(2) of the *Migration Act 1958*).

2. The submission addresses a number of matters as they affect claims relating to those issues, which have arisen in refugee protection applications lodged by PRC nationals. The submission provides advice to assist the Tribunal in addressing any future applications involving those issues, in the interests of maintaining consistency of interpretation in accordance with Australian law and policy, as is appropriate to the facts of each particular case, and has regard to relevant and up-to-date country information.

3. Advice and updates on these issues are obtained by the Department at regular intervals from the Department of Foreign Affairs and Trade (DFAT), with particular reference to consideration of the threshold questions of determining credibility and risk of persecution. The Department's Country Information Service (CIS) closely monitors Falun Gong and unregistered children-related developments reported in the international media.

- Current and comprehensive documents are regularly placed in the CIS electronic country information database, CISNET, through which they are readily available to RRT members. The CIS also holds information on these issues published by other governments, such as the US Department of State, the Canadian Immigration and Refugee Board and the UK Home Office.

## *Falun Gong*

4. Falun Gong is a system of 'cultivation' of body and mind, involving classical movement and breathing exercises; its stated purpose is to assist practitioners cultivate a higher level of being, as a way to enlightenment. The movement professes not to be a religion or a cult, nor have a formal hierarchy, nor be politically motivated.

- Since the formal banning of the movement by the Chinese authorities on 22 July 1999 (as anti-government and constituting a danger to Chinese society), there has been no evidence of any softening in official attitudes towards its followers. (see DFAT update CX43498 of 17 July 2000). The website of the Chinese Embassy in Australia (<http://www.chinaembassy.org.au/falun/1030-1-e.htm>.) includes a section devoted to "the evil cult", containing an official National Party Congress resolution condemning Falun Gong.

- Reports by the media and DFAT indicate that the continuing government campaign against Falun Gong members remains relatively contained and targeted with most reports of demonstrations and arrests occurring in the northern and north-eastern provinces of China.
- To date, the Chinese government has applied judicial or administrative penalties against only those adherents who have been involved in Falun Gong activities and/or protests within China. DFAT is not aware of any cases so far in which Falun Gong practitioners returning to China have been detained and/or penalised for their Falun Gong activities abroad.

### *Credibility*

5. As the Tribunal will be aware, assessing the credibility and well-foundedness of applicants' claims is an important component of the decision making process. Regarding PRC applicants with persecution claims based on membership of or involvement in Falun Gong, relevant issues are likely to concern an applicant's claims of association with Falun Gong, their political profile and the extent to which the Chinese authorities would view him or her as a political activist (DFAT update CX 43498, 17 July 2000).

- Though a liberal attitude may be required in evaluating proof of refugee status, that should not lead to an uncritical acceptance of all claims (*Sellamuthu v MIMA* [1999] FCA 247 and *Sivalingam v MIMA*, FCA, 5 March 1998, unreported).
  - For example, it is open to a decision maker to find that an applicant is so lacking in knowledge of Falun Gong practices or beliefs that his or her claims of association with Falun Gong may be rejected as a fabrication or affect his or her general credibility.
- Most Falun Gong protection visa applicants display a relatively low level of political activity of any kind.

### *Leadership*

6. Country information indicates that the Chinese government campaign against the movement has targeted the leaders and organisers of Falun Gong and those with some degree of influence or recognition (DFAT update CX 38557, 9 November 1999).

- Country information indicates that Chinese authorities are likely to take a particular interest in adherents who are members of the Communist Party, government employees or workers in state owned enterprises, and may require them to renounce Falun Gong or be subject to further government action.
- Country information further indicates that the Chinese authorities might seek to question high-profile advocates of Falun Gong. If they are seen as playing an organisational or leadership role, they could face prosecution resulting in criminal or administrative punishment.

- However, there is no suggestion in the country information that key members of Falun Gong are either prosecuted under an unjustifiable special law directed at them or selectively under a law of general application. (DFAT updates CX 38557, 9 November 1999 and CX 43498, 17 July 2000).

7. According to a Chinese government announcement of 23 July 1999, ordinary Falun Gong practitioners would be treated differently to organisers and key members of Falun Gong (RRT decision N00\31852 at 13).

- “Ordinary” practitioners would reasonably be expected to include rank and file followers who perform Falun Gong practices in the belief that it will improve their health. It would also embrace low-level political activists who have not held leadership positions, have not been involved in organising protest activities in support of the movement and have not engaged in activities which would place them at risk of detention or other forms of serious harm – notwithstanding that they may have participated in some form of public protest.
- Rank and file followers who do come to the attention of the Chinese authorities through their participation in public demonstrations or by being named by others are likely to be lectured on the error of their ways and the social damage caused by Falun Gong, and urged to repent their actions and renounce their beliefs. Penalties inflicted depend on the adherent’s degree of co-operation with the authorities: compliance would lead to quick release; refusal to cooperate would most likely lead to a period of detention, usually non-judicial (re-education through labour) (DFAT update CX 38557, 9 November 1999).

*Being discreet*

8. It is up to the Tribunal to determine, as a factual finding in each case, what a Falun Gong adherent is likely to say and do, if returned to China, and then to assess what consequences are likely to flow from that and why.

- The Full Federal Court has indicated that it may be possible for a decision maker to assume, in the absence of evidence to the contrary, that a person will, on return, act in a particular way so as to avoid persecution in the future (*Omar v MIMA* (2000) FCA 1430).
  - In general it would thus appear open to adherents to limit their activities in order to comply with Chinese laws or social mores. A choice to refrain from public display and being discreet in their practice of Falun Gong would, in all likelihood, not compromise basic human rights such as freedom of expression or worship.
  - As public exercise is not an essential or fundamental part of Falun Gong activities, there would be no conflict with established principle that a person is entitled to religious freedom in terms of a right to a belief of choice, without interference from the State. Even if unable to perform Falun Gong exercises in public places, it appears unlikely that there would be any serious affront to their essential beliefs.

- DFAT assesses that ordinary adherents of Falun Gong who practice privately are unlikely to be the subject of particular attention by the authorities (DFAT update CX 38557, 9 November 1999).
- Only when there are indications that an applicant may refuse to comply with Chinese social mores or laws of general application regarding control of public gatherings would an alleged fear of persecution be likely to be well-founded.

#### *Limitations on behaviour*

9. The mere fact that an applicant's freedom of expression or religion may be restricted does not of itself amount to persecution in a Convention sense. For example, it would not necessarily be persecution for Falun Gong followers in the PRC to be subject to limitations on their activities, provided those limitations fall short of requiring them to effectively suppress or deny Falun Gong.

- While freedom of expression is an important human right, there are limits on what can be reasonably expressed in any society (for example, in Australia there are limits imposed by laws on sedition, defamation, secrecy, racial vilification and privacy).
- Further, it is appropriate that the Tribunal consider whether the mere threat of enforcement of laws of general application relating to public gatherings (for applicants who would comply with those laws), or the actual enforcement of those laws (for applicants who would not comply with them) would in either case sufficiently interfere with an applicant's freedom of expression or religion so as to amount to persecution.
  - Such consideration would enable the Tribunal to properly focus on whether the consequences of what it finds will occur on return amount to persecution in a Convention sense, rather than on whether the applicant would be able to exercise his or her right to worship, or to freedom of expression.
- If the laws under which a person's activities are limited could be characterised as laws of general application (*Wang v MIMA* [2000] FCA 1599) and are enforced in a non-discriminatory manner, then action against the applicant would not be for a Convention reason (*MIMA v Guo Ping Gui* [1999] FCA 1496, on sexuality and the need to be discreet). The fact that Falun Gong practice does not require any public displays or gatherings would be relevant in this regard.

#### *Other issues*

10. The Tribunal ought to scrutinise closely the claims of Falun Gong applicants who take steps in Australia deliberately designed to bring himself or herself within the protection of the Convention. Such steps may be relevant to an applicant's general credibility, to whether the applicant has any subjective fear of persecution for a Convention reason, to how the applicant is likely to behave if returned to China, and to whether any fear of persecution for a Convention reason the applicant may have is well founded.

### *Unregistered children*

11. Findings on particular social group, persecution and Convention grounds are findings of fact for the Tribunal to make, having regard to the applicant's particular circumstances, the claims he or she makes and all relevant evidence, including country information, as at the time of the Tribunal's decision.

12. In *Chen Shi Hai v MIMA* [2000] 170 ALR 553 the High Court majority held that children born in contravention of China's one-child policy *can* constitute a 'particular social group' for Convention purposes; however, the Court made no express finding that they necessarily *will* constitute such a group.

- Important factors for the Tribunal to take into account in making a finding on this point are whether such children are recognised as a distinct social group within Chinese society and whether the one-child policy targets such children or is one of general application in relation to children. The Tribunal will need to pay particular attention to changes in the available evidence since *Chen's* case.

### *Particular social group*

13. Since *Chen*, DFAT have advised that, broadly speaking, 'unregistered (or black) children' covers children not formally registered at birth either because the birth was in contravention of China's one-child policy, or for any other reason (DFAT update CX 46100, 7 November 2000).

14. Whether such children may fall within a particular social group will depend to a large extent on the particular facts of each individual case. According to DFAT, under PRC legislation unregistered children are not a formally recognised category. Nor does there appear to be any widely accepted understanding of the concept of 'black children' within Chinese society. (DFAT update CX 46100, 7 November 2000).

- Further, while a child may be unregistered because it was born in contravention of the one-child policy, other plausible reasons exist, for example, the parents may be part of China's large 'floating population' and are either themselves unregistered, or have purposefully not sought to register the child to avoid the possibility of arousing interest in their residential status.

### *Discrimination*

15. It is open to the Tribunal to make a finding that, regardless of the formal one-child policy, there is no significant discrimination in practice at present between those children who are registered and those who are not, whether because they were born outside the family planning policy or for other reasons.

- As far as DFAT is aware, individuals who are unregistered are unlikely to suffer social ostracism or ill-treatment as a direct consequence of that situation (DFAT update CX 46855, 29 November 2000).

16. Families with more than one child (for whatever reason) are now common in China and a large number of children continue to be born each year outside the formal family planning regulations, possibly numbering in the millions (DFAT update CX 46100, 7 November 2000).

17. Implementation of the one child policy is clearly not uniformly applied and, increasingly, penalties can be avoided. Any document or administrative approval can be obtained, or penalty avoided, through personal connections or payment of "incentives" to officials (DFAT updates CX 46615, 24 November 2000 and CX 46100, 7 November 2000).

- While an unregistered child may not formally 'exist' in terms of Chinese officialdom (which in theory should affect access to education, health care and possibly public sector employment), reforms over recent years have now introduced payment - across the country - for both health care and education. The latter, though nominally free, in practice is not - including for those children who are registered.
  - Where those services are available, there is unlikely to be a barrier to accessing them for an individual able to pay for them - whether the person is registered or not. Whatever problems of access to education and other social services are faced by unregistered children are also shared by other groups in the population.
  - In addition, where the unregistered child's parents have sufficient financial means to limit the discriminatory effect of being unregistered (and would use those means to do so), then it would be open to the Tribunal to find as a matter of practical reality and fact that the child, notwithstanding his or her status, would not be subject to harm amounting to persecution.
- Even if a distinction on the basis of registration does exist, DFAT assesses that it would be very unlikely to affect employment in the non-government sector or in rural areas (DFAT update CX 46100, 7 November 2000).
- DFAT also assesses that Chinese returning from overseas with more than one child do not experience difficulties with government authorities on the unregistered child issue (DFAT update CX 46100, 7 November 2000).

#### *Policy developments*

18. Evidence of particular relevance, which suggests a degree of shift in government policy settings on the issue of child registration, is Chinese government statements on unregistered children relating to the fifth national census (November 2000), covering their unconditional registration - in the interests of obtaining more accurate data.

- To avoid an inaccurate census count or have people deliberately excluded from it out of fear, State Council leadership groups supervising the census, which includes the State Family Planning Commission, the State Statistics Bureau and the Ministry of Public Security, jointly issued a *Directive concerning thoroughly*

*carrying out Population Census Registration Work and preventing Incomplete Returns and Deceptive Returns during the 2000 Fifth National Population Census.*

- The directive states that children who were not registered in the past because of exceeding family planning rules, can be registered in the census and acquire permanent residential registration in accordance with state law and relevant regulations (DFAT update CX 46619, 21 November 2000).
- To encourage families with such children to truthfully report them, the directive also stipulates that children born outside the family planning policy will be registered “unconditionally” and that “data for the census shall not be taken as a basis for charging any families with children born outside the family planning policy”. Public Security officials have stated that “this is a matter of human rights” (China Youth Daily, 30 August 2000) and that “these babies rights and interests should be protected” (China Economic Times, 16 October 2000).

20. This evidence of a changing PRC policy situation, that the Tribunal will need to take into account, is a further factor supporting a view that such children do not face a real chance of persecution in China and that there is no longer a distinction in a Convention sense between those children who are registered and those who are not, whether because they were born outside the family planning policy or for other reasons.

*Concluding comments*

21. Though the objective of all Chinese policies and regulations on family planning and population matters is to deter a high birthrate (to the extent possible), recent country information supports a view that pragmatism prevails once such births have occurred (DFAT update CX 46100, 7 November 2000).

- The right of unregistered children to exist now appears to have gained a measure of official recognition from the Chinese state, and their presence is by and large accepted by the Chinese community generally.
- On the basis of the above evidence, black children are extremely unlikely to experience significantly differential, or substantively adverse, treatment in China. Thus it is open to the Tribunal to conclude either that they are no longer a particular social group, or alternatively, that they do not face a risk of persecution for reasons of membership of that group.