FEDERAL COURT OF AUSTRALIA

Pei Lan He v Minister for Immigration & Multicultural Affairs [2001] FCA 446

MIGRATION - protection visa - refugee - Refugee Review Tribunal - decision on review - judicial review on ground of failing to set out material findings of fact - whether "rolled up" finding of fact complies with s 430(1)(c) - effect of difficulty in asking "What if I am wrong?" in evaluating risk of persecution - rejection by Tribunal of particular piece of evidence - Tribunal not required to give reasons for - fear of persecution by reason of religion - whether religion connotes only organised body of beliefs and practices or extends to convictions personal to applicant - actual bias of Tribunal not revealed by relevant reference to circumstances of persons other than the applicant - whether no evidence to justify making of Tribunal's decision - not to be answered by asking whether there is evidence of matter not required to be affirmatively established or whether there is no evidence of non-existence of a particular fact.

Migration Act 1958 ss 430(1), 476

Hathaway, *The Law of Refugee Status* (1991)

Minister for Immigration and Multicultural Affairs v Singh (2000) 98 FCR 469

Re Minister for Immigration and Multicultural Affairs Ex parte Durairajasingham (2000) 74 ALJR 405

Minister for Immigration and Multicultural Affairs v Ming Xiong Zheng [2000] FCA 50 (unreported, 10 February 2000)

Ahmad v Secretary of State for the Home Department [1990] Imm AR 61

Omar v Minister for Immigration and Multicultural Affairs [2000] FCA 1430 (unreported, 16 October 2000)

Sun Zhan Qui v Minister for Immigration and Multicultural Affairs (1997) 81 FCR 71

PEI LAN HE v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

V 412 of 1999

RYAN J

MELBOURNE

23 APRIL 2001

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	V412 of 1999

BETWEEN:	PEI LAN HE Applicant
AND:	THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGE:	RYAN J

DATE OF ORDER:	23 APRIL 2001
WHERE MADE:	MELBOURNE

THE COURT ORDERS:

1. THAT the application be allowed.

2. THAT the decision of the Tribunal of 2 July 1999 be set aside and the application be remitted to the Tribunal, differently constituted, to be heard and determined according to law.

3. THAT the respondent pay the applicant's costs of and incidental to the application, such costs to be taxed in default of agreement.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

1 The applicant who is a citizen of the People's Republic of China ("the PRC") arrived in Australia on 2 May 1998 on a false Hong Kong passport. On 25 June 1998 she lodged an application for a protection visa, which was refused on 8 December 1998. On 11 December 1999 the applicant sought a review by the Refugee Review Tribunal ("the Tribunal") of that refusal. At the time of the Tribunal's decision, the applicant was 35 years old and came from Fu Qing City in Fujian Province.

2 The applicant and her husband have three children, the youngest of whom is a boy and she claimed to have had difficulty with the Chinese authorities in having those children, or at least one or more of them, registered. The Tribunal accepted that the applicant had been under strong social and family pressure to have a boy. The birth of the third child has, she claimed, occasioned financial difficulties and loss of employment for herself and her husband. On the applicant's account, her travel to Australia and the procuring of a false passport were financed by gifts from friends and by loans. The applicant also claimed to have a well-founded fear of persecution if she were to return to the PRC. The feared persecution was said to be by reason of her religion, she being a Christian who could not adhere to the State approved "Free Self Patriotic Church" because it did not allow persons under 18 years of age to attend services, was controlled by the government and required its members to sing patriotic songs and receive "instruction" (presumably political) from the State. The applicant also claimed that the Bible prohibited control of the Church by the State. As well, she claimed that about 100 people from her village had sought permission to set up a "home" church but had been refused because they were regarded as "counter-revolutionary". The rest of the evidence about this part of the applicant's claim has been summarised by the Tribunal in these terms;

"Country information was provided about the increase in churches and Christians in China, and the amount of information about churches in Fujian, and the increasing blurring of lines between registered and unregistered churches. The applicant was asked why she did not go to another area or province where she could participate in a church she wished to. She said she did not have the money. When asked how she had the money to come to Australia on false documentation, the applicant said this had been provided for her by church members and by taking out a loan.

The applicant said that they had tried to set up another house church in another small village, where her husband came from. In June 1997 they went on the streets

to petition and demonstrate. They had set up a secret printing shop and to spread the message. She and others helped print the messages and on 16 July 1997 when she was cutting stencils the police broke in and arrested her and three others, and charged her with being a counter revolutionary. She was held for two months by the authorities and then sent to a labour reform farm. She said she managed to get out only because her health deteriorated and her husband and brother took the advice of friends and used all his influence and money to bribe officials to let her out of the farm. She was supposed to report to the police every three months.

She said some church people came to her home a few days later and told her someone had found a way to buy her way into Australia."

3 In the "Findings and Reasons" section of its decision, the Tribunal referred to "country information" detailing the implementation of policies in the PRC to contain the birth rate. The Tribunal continued;

"Initially the applicant claimed only her last child was denied registration. It was only at hearing that the applicant claimed all of her children were denied registration, and that she had to pay for all of their education. She claimed, again only at hearing, that this was because her husband had city registration, even though he was from the rural area, and she was therefore in a unique situation. She claimed also that they both lost their jobs in 1989 after the birth of one of their children because of that birth. She also claimed at hearing that she had not been able to register her children because she was Christian.

Country information indicates that losing a job may have resulted from the birth of a second child, and I accept that this might have happened. However, country information also indicates that if the applicant and her husband had breached local Chinese policy, they would have been counselled for one of them to be sterilised. The applicant did not claim this happened. Indeed, she went on to have a third child. She did not claim that there was ever any pressure on her to have an abortion. I have considered the applicant's explanation that the adviser had written her story incorrectly. However, her initial claims appear entirely consistent with country information cited above about discretion being available, and I therefore accept the applicant's original claim, ie that she was unable to register her third child, and had to pay a heavy fine. The family planning law of China is a law of general applicability, even if there are some cases where exceptions are made to it. I do not accept that the applicant and her family were treated differentially on the basis of her Christianity. She made this claim only at hearing. I have examined a number of human rights reports about China, including Human Rights Watch, Amnesty International and the US State Department Reports, and I can find no indication that there is such differential treatment of Christians. I accept that the fine on the applicant and her husband may have caused great hardship, given that they appeared to have only average schooling and few work skills which would make them competitive in obtaining jobs. However, the severity of the effects of a generally applicable law is not a matter which is Convention related."

4 On the question of the applicant's religious adherence, the Tribunal concluded, from a review of further "country information" that there had been a change in the PRC from a policy, in the 1980's, of repression of all religious

activities to one, in the 1990's, of containment rather than repression of religious belief and practice. Part of the that "country information" included this extract from the United States Department of State, *1997 Country Reports on Human Rights Practices* (published in 1998);

"The Government, however, seeks to restrict religious practice to government-controlled and -sanctioned religious organizations and registered places of worship.

The State Council is responsible for monitoring religious activity. During the year, the Government continued a national campaign to enforce 1994 State Council regulations that require all religious groups to register with government religious affairs bureaus and come under the supervision of official "patriotic" religious organizations. Some religious groups were subjected to increased restrictions, although the degree of restrictions varied significantly from region to region and the number of religious adherents, in both unregistered and registered churches, continued to grow rapidly.

In certain regions, government supervision appears to have loosened, but local implementing regulations, such as those for Shanghai, Chongqing, and Guangxi, call for strict government oversight. In some parts of the country registered and unregistered churches are treated similarly by authorities and congregants worship in both types of churches. In other areas, particularly in regions where considerable unofficial and unregistered religious activity has taken place, authorities closely monitor places of worship and the relationship between unregistered and registered churches is tense.

At the end of 1996, the Government reported that more than 70,000 places of worship had registered. During 1997 authorities continued the campaign to register all religious groups. Some groups registered voluntarily, some registered under pressure, while authorities refused to register others. Unofficial groups claim that authorities often refuse them registration without explanation...

.....

There was evidence that authorities in some areas, guided by national policy, made strong efforts to crack down on the activities of the unapproved Catholic and Protestant churches. The Government officially permits only those Christian churches affiliated with either the Catholic Patriotic Association or the (Protestant) Three Self Patriotic Movement to operate openly. The Government established both organizations in the 1950's to eliminate perceived foreign domination of local Christian groups...

.....

According to foreign experts, perhaps 30 million persons worship privately in house churches that are independent of government control. One informed Chinese source has put the number at 50 to 60 million."

5 After noting that the Cultural Revolution had ended in December 1978 and that suffering under it would not of itself be relevant in the 1990's, the Tribunal concluded;

"As the Chinese comments quoted earlier on religion in China today indicated, however, people are not now repressed or victimised for their religion as they were then. I do not accept that the applicant faces persecution for reason of these events and policies which were repudiated over twenty years ago."

6 The Tribunal then made these observations about the impact on the applicant in particular, of its general findings as to the nature of religious activity and the extent to which it is tolerated in the PRC;

"I have concerns about the applicant's claims that she continued to suffer harassment from the authorities because of her religion until she left China. The applicant has said that she had attended a Three Self Patriotic church but did not like the teachings there, as it was about Chinese propaganda and not about God. However, it is clear from the US State Department Report that there is a wide variety of practices in different provinces, in both registered and unregistered churches, and that while some things may be permitted in some provinces of China, they may not in other provinces. This is also borne out by the article by Antionette Wire in the Christian Century of July 1998, which discusses her experience of visiting both types of churches in both rural and city areas of China, specifically to record China's Christian oral tradition.

There is nothing which the applicant has described in her evidence about her religion, and things which she believed in, which are central tenets of her religion and could not be undertaken in a registered church."

7 The Tribunal then rejected the applicant's contention that she had been denied registration of her children because she was a Christian and opined that it was more likely that difficulties encountered on the birth of her third child were attributable to her breach of family planning regulations. Then follow these further observations about the applicant's religious activity;

"I have considered the applicant's claims that she was detained because she was helping print material for a particular home church after a demonstration to enable the church to be registered. However, I have concern about this aspect of her story. Country information indicates that Fujian is one of those provinces which is relatively tolerant in relation to religion.

Further, I have examined a variety of Amnesty International and Human Rights Watch Reports of 1997 and 1998, and I can find no record of any arrests or disturbances in Fujian province for any religious activity. The China Study Journal indicated in December 1996 (CX23388) a number of new churches in Fujian, including in Liancheng county, Minhou country, and made reference to a multi-storey building with a total area of 720 square metres in Fuqing city, (the city from which the applicant indicates she comes) built with help from an Indonesian overseas Chinese. An Internet download sourced from Amity News Service on the Church in

China (CX26050) of 9 October 1997 indicated a range of Christian buildings and activities, including Lutheran activities in China. It included a reference to the fact that

> "Believers from Xiwei village, Weitian township in Songxi country, Fujian province recently received government permission to buy a 30m2 broadcasting station in the village to use as a church. After refurbishing, the church was opened in September last year, with 400 believers attending the dedication."

While the applicant said she went to an approved church in the city close to her village, she has not indicated that she and her family sought to move anywhere else in China to accommodate her beliefs, given that she did not find the local approved church suitable. When queried about this, she indicated that she did not have the money, however, I do not find this answer convincing when I note that she claims that her family was able to raise the money to obtain her release from a work reform farm and for her to travel overseas. She was able to arrange the money to leave the country on false documentation and to travel to Australia. Further, country information cited above indicates that there are over 70,000 places of worship registered, the number of adherents to the Christian faith continues to grow quickly, and, while the government may monitor religious activity, its degree of monitoring varies significantly in different parts of the country. Even if the applicant were to return and wished to continue practising her faith as she described it in unregistered churches, country information cited earlier suggests that in some areas of China such churches are rapidly expanding and, further, co-operation between registered and unregistered churches is increasing so that the line between the two is no longer clearly identifiable. I do not consider it unreasonable for her to relocate elsewhere if she found church practices in her own area not to her liking."

> 8 On the basis of the information recounted in those passages, the Tribunal expressed itself "not satisfied that the applicant was ever detained for reason of her religious beliefs or participation in printing materials for an unregistered church" or "that she was denied the right to practise essential tenets of her beliefs". Accordingly, the Tribunal concluded that there was not a real chance of persecution of the applicant if she were to return to the PRC now or in the foreseeable future, and she therefore does not have a well-founded fear of persecution for a Convention reason. The Tribunal considered, but rejected, as supporting such a well-founded fear, either alone or in conjunction with other matters, the fact that the applicant had left the PRC on a false passport.

Did the Tribunal comply with s 430?

9 Sub-section (1) of s 430 of the Act provides;

"Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based."

10 The first element of the case raised by the applicant before the Tribunal was that, as a result of her printing a petition and leaflet for an unregistered "home" church, she had been sentenced, in about September 1997, to three years detention in a "Reform Through Labour Farm". She claimed that, after some weeks' detention, her health had deteriorated to a point where her husband was forced, in October 1997, to bribe some officials to procure her release. Thereafter, her husband, after paying "a huge amount of money" arranged her departure from the PRC on 31 January 1998. Accordingly, the applicant claimed to have a well-founded fear of further persecution for the same reason should she return to the PRC.

11 A second, independent, manifestation of persecution by reason of the applicant's religious beliefs was said to be discriminatory treatment by the authorities in relation to the registration of her children, or at least her third child, the son who was born in 1996.

12 After this case was heard, a five-member Full Court of this Court held in *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469, that the Tribunal is obliged to set out its findings on any material question of fact. In the joint judgment of Black CJ, Sundberg, Katz and Heerey JJ, it was observed, at pars 47-48;

"Ordinarily, materiality is an objective concept. If the RRT fails to make a finding on a fact which is in truth, as a Court subsequently determines, a material fact, then s 430(1)(c) will not have been complied with, even though the RRT has recorded its findings in relation to the facts before it that it regarded as material.

The generally accepted view in this Court has been that the RRT is under a duty to make, and to set out, findings on all matters of fact that are objectively material to the decision it is required to make. It must make findings on questions of fact that are central to the case raised by the material and evidence before it. In this respect, s 430 sets a standard of decision-making the RRT is required to observe."

13 The findings of fact made by the Tribunal in relation to the applicant's case, as outlined in par 10 above, and recorded in the first paragraph quoted at par 7 of these reasons were;

"I have considered the applicant's claims that she was detained because she was helping print material for a particular home church after a demonstration to enable the church to be registered. However, I have concern about this aspect of her story. Country information indicates that Fujian is one of those provinces which is relatively tolerant in relation to religion."

14 Mr Star of Counsel for the respondent, contended that the Tribunal was only required to make findings on the "ultimate question" of whether an applicant has a well-founded fear of persecution for a Convention reason. However, that submission has been contradicted by this observation at par 53-54 of the joint judgment in *Singh* (supra);

"The view has been consistently taken in the past that where, for example, the well-founded fear of persecution is said to derive from past experiences, s 430(1)(c) obliges the RRT to set out its findings in relation to those claims because of their relevance to the ultimate question. As we understand it the majority in Xu would deny that obligation.

We do not accept that the material facts referred to in s 430(1)(c) are confined to the facts the statute requires to be decided. Obviously they include those facts, but whether a question of fact is otherwise material may be influenced or determined by the way the Tribunal has approached the case, as revealed by its reasons for decision."

15 This was pre-eminently a case where the applicant's fear of persecution was said to derive from past experiences. In my view, the passage just repeated did not set out a finding, as required by the joint judgment in *Singh*, about the applicant's claim to have been detained at a forced labour farm. It was, of course, open to the Tribunal to reject or disbelieve the whole of the applicant's claim to have been so detained. As McHugh J held in *Re Minister for Immigration and Multicultural Affairs Ex parte Durairajasingham* (2000) 74 ALJR 405 at pars 64-66;

"In Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940 at 24 and 31,the Court said:

> "Section 430(1) does not impose an obligation to do anything more than to refer to the evidence on which the findings of fact are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s 430(1) of the Act.
>
> …
>
> It is not necessary, in order to comply with s 430(1), for the Tribunal to give reasons for rejecting, or attaching no weight to, evidence or other material which would tend to undermine any finding which it made."

In my opinion, this passage correctly sets out the effect of s 430(1)(c) and (d). However, the obligation to set out "the reasons for the decision" (s 430(1)(b)) will often require the Tribunal to state whether it has rejected or failed to accept evidence going to a material issue in the proceedings. Whenever rejection of evidence is one of the reasons for the decision, the Tribunal must set that out as one of its reasons. But that said, it is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where

there is evidence that is contrary to findings of material fact made by the Tribunal. Indeed, to do so would be contrary to the direction in s 420 of the Act that:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

In this case, the Tribunal made an express finding that it did not accept the prosecutor's wife's evidence. That was sufficient to comply with the requirements of s 430(1)."

16 I am not persuaded that the Tribunal in the present case has stated that it rejected or failed to accept the applicant's evidence of her alleged detention. The statement, "However, I have concern about this aspect of her story" does not, to my mind, signify an actual rejection, rather than an expression of reservation or doubt in respect of this aspect of the applicant's case. Indeed, Counsel for the Minister was inclined to characterise that sentence as an observation which was merely prefatory of the ensuing discussion of the "country information". However, there is nothing in that discussion which compels a rejection of the applicant's claim to have been detained. Nor is there elsewhere in the Tribunal's reasons an explicit finding that the applicant had not been detained as she described.

17 It is true, as recounted in par 8 of these reasons that the Tribunal said that "it was "not satisfied that the applicant was ever detained for reason of her religious beliefs or participation in printing materials for an unregistered church". However, that "rolled up" conclusion leaves open the possibility that the Tribunal accepted, perhaps with reservations, that the applicant had been detained in a forced labour camp but concluded that such detention had been for some reason other than her religious beliefs or her participation in printing materials for an unregistered church. It may also have been true, as Counsel for the Minister contended, that the applicant's claim in relation to her alleged detention and the reason or reasons for it, had itself been "rolled up", but, in my view, that did not relieve the Tribunal of the obligation articulated in *Singh* of setting out its finding in relation to each material question of fact. The relevant passage is to be found at pars 55 and 56 of the joint judgment in *Singh*, where it was observed;

"The reasoning process a Tribunal adopts may require a decision on a question of fact in order to complete the logical chain the Tribunal has adopted as the basis for its decision. Failure by a Tribunal to set out its findings in relation to that fact would involve a contravention of s 430(1)(c), as the

process of reasoning adopted by the Tribunal has made that fact a material fact, since the decision is dependent upon it. Conversely an applicant may propose facts as material, but if the ultimate conclusion reached by the Tribunal is not dependent upon and does not require a finding on those facts, then they will not be material questions of fact, because the decision does not turn upon them. .....

.....

Accordingly if a decision, one way or the other, turns upon whether a particular fact does or does not exist, having regard to the process of reasoning the Tribunal has employed as the basis for its decision, then the fact is a material one. But a requirement to set out findings on material questions of fact, and refer to the material on which the findings are based, is not to be translated into a requirement that all pieces of conflicting evidence relating to a material fact be dealt with: see Durairajasingham at pars [65] and [67]."

18 The process of reasoning adopted by the Tribunal may have involved a finding that the applicant had not been detained at all in a forced labour camp so that no question arose as to the reason for her alleged detention. The discussion of "country information" about the attitude of PRC authorities to the practice of religion in registered and unregistered churches was relevant to the primary question of whether the applicant had been detained at all, because her activism on behalf of an unregistered church was the only reason which she advanced for her alleged detention. If "country information" suggested that detention for that reason was unlikely, the Tribunal was entitled to take it into account as supporting a conclusion that there had been no detention at all. The same kind of "country information" was also relevant to the assessment which the Tribunal was still required to make, even after rejecting a past experience of detention, as to whether the applicant would be likely to attract persecution in the future if she were to return to the PRC.

19 I have been mindful of the caution articulated by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-2, that the reasons of the Tribunal and other administrative decision-makers are not to be read with an over-zealous concern to detect error. However, after according the reasons of the Tribunal in the present case, the benefit of a generous interpretation favouring a conclusion that there has been no error, I have been unable to resolve the ambiguity identified in pars 16 and 17 of these reasons. Accordingly I have been compelled to conclude that the Tribunal has failed to "set out" its finding on a material question of fact, ie, whether the applicant had been detained at all in a forced labour camp. That failure, I consider, constituted non-compliance with the requirement of s 430(1)(c) of the Act as explained by the Full Court in *Singh*.

Impact of the form of the Tribunal's findings on application of "What if I am Wrong?" test.

> 20 The defective form of the finding discussed in the preceding paragraphs cannot be dismissed as going merely to a matter which the Tribunal touched on in passing and which was not central to the likely effect of the applicant's religious beliefs and the likely future attitude to her of PRC authorities. That is because the Tribunal, if its reasons indicate a certain degree of diffidence in making a finding as to a material question of fact, is required, as part of its assessment of whether the applicant faces a real chance of persecution in the event of return to his or her country of origin, to consider what might happen if the material fact had been otherwise. The task which the Tribunal is required to perform in this context was described in these terms by Kirby J in *Wu Shan Liang* (supra) at 293;

"Because the test propounded by this Court in Chan involves the necessity of a measure of speculation about what the chances held in store for an applicant, and whether there was a "real chance" that made an established fear of persecution "well founded", an indication that the delegates had put all speculation out of account would certainly show legal error. So would an indication that the evaluation of the "chance" and its "reality" had been made by a test of weighing the probabilities. Two points must be made here.

First, it is not erroneous for a decision-maker, presented with a large amount of material, to reach conclusions as to which of the facts (if any) had been established and which had not. An over-nice approach to the standard of proof to be applied here is undesirable. It betrays a misunderstanding of the way administrative decisions are usually made. It is more apt to a court of law conducting a trial than to the proper performance of the functions of an administrator, even if the delegate of the Minister and even if conducting a secondary determination. It is not an error of law for such a decision-maker to test the material provided by the criterion of what is considered to be objectively shown, so long as, in the end, he or she performs the function of speculation about the "real chance" of persecution required by Chan.

Secondly, the decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation upon the chances of persecution emerging from a consideration of the whole of the material. Evaluation of chance, as required by Chan cannot be reduced to scientific precision. That is why it is necessary, notwithstanding particular findings, for the decision-maker in the end to return to the question: "What if I am wrong" (81)? Otherwise, by eliminating facts on the way to the final conclusion, based upon what seems "likely" or "entitled to greater weight", the decision-maker may be left with nothing upon which to conduct the speculation necessary to the evaluation of the facts taken as a whole, in so far as they are said to give rise to a "real chance" of persecution."

21 The approach to be taken to the application of the “real chance” test was indicated in a joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. Their Honours observed, at 575-576;

“For the reasons that we have given, the Tribunal was entitled to weigh the material before it and make findings before it engaged "in any consideration of whether or not Mr Guo's fear of persecution on a Convention ground was well-founded." Moreover, given the strength of some of the Tribunal's findings - for example, "the treatment the Applicant received on return to the PRC in October 1992 [is] reflective of punishment for illegal departure and not because of his political activities, application for refugee status or contact with Australian officials", "the Applicant's illegal departure in 1993 will not result in an imputed political profile", "these matters will not result in persecution to the Applicant for Convention reasons if returned to China" - the Tribunal was not bound to consider the possibility that its findings were inaccurate or that the punishment was Convention based.

It is true that, in determining whether there is a real chance that an event will occur or will occur for a particular reason, the degree of probability that similar events have or have not occurred or have or have not occurred for particular reasons in the past is relevant in determining the chance that the event or the reason will occur in the future. If, for example, a Tribunal finds that it is only slightly more probable than not that an applicant has not been punished for a Convention reason, it must take into account the chance that the applicant was so punished when determining whether there is a well-founded fear of future persecution.

In the present case, however, the Tribunal appears to have had no real doubt that its findings both as to the past and the future were correct. That is, the Tribunal appears to have taken the view that the probability of error in its findings was insignificant. Once the Tribunal reached that conclusion, a finding that nevertheless Mr Guo had a well-founded fear of persecution for a Convention reason would have been irrational. Given its apparent confidence in its conclusions, the Tribunal was not then bound to consider whether its findings might be wrong.”

22 This gloss has been put on that passage by Sackville J, as a member of a Full Court of this Court in *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at 238;

“It can be seen from this passage that if the RRT **finds** that it is only slightly more probable than not that an alleged relevant event has not occurred, it **must** take into account the chance that it did occur when determining whether there was a well-founded fear of persecution. It is clear that the comment in the joint judgment is not confined to a past event (as in Wu Shan Liang) involving persons other than the applicant. Their Honours give as an example a finding that it was slightly more probable than not that **the applicant** had not been punished for a Convention reason.

If, on the other hand, it **appears** that the RRT had no “real doubt” that its findings were correct, it is not bound to consider whether those findings might be wrong.” (original emphasis)

23 In the passage from its reasons reproduced at par 7 above, the Tribunal said "However, I have concern about this aspect of her story", being a reference to the applicant's claim that she had been detained because she was helping to print material for a particular home church after a demonstration to enable the church to be registered. The context suggests that the Tribunal's "concern" was focused on the reasons for the alleged detention, rather than the fact of detention itself. However, the "rolled up" form of the finding makes it impossible to impute to the Tribunal that it had no real doubt that the applicant had not been detained at all, so that it was relieved of the need to ask "What if I am wrong?".

Other matters

24 The conclusion which I have just reached, that there has been non-compliance with s 430(1)(c) entails that the application for review should succeed and the Tribunal's decision be set aside. However, out of deference to the careful arguments advanced by Counsel on the hearing of the review, and in the hope that they may illuminate the Tribunal's reconsideration of the application, it is appropriate to make some observations about other matters not essential to my principal conclusion.

Tribunal's treatment of applicant's claim to have suffered discrimination on the ground of religious belief in relation to registration of her children.

25 The Tribunal's discussion of this issue has been reproduced at par 3 of these reasons. It was submitted on behalf of the applicant that the Tribunal had failed properly to refer to the evidence on which those findings were based. However, in my view, the Tribunal, by noting that the applicant had made only at the hearing, the claims of denial of registration for all of her children and of the reasons for that denial, indicated that it rejected those claims as recent inventions. It further indicated, as a reason for rejecting the claim that the birth of the second trial had attracted persecution, the fact that the applicant did not claim that she or her husband had been counselled to undergo sterilisation after that birth. The Tribunal was entitled to infer from "country information", as it did, that such counselling would have occurred had the second birth been regarded as evidence of a breach of local birth control policies. As McHugh J pointed out in the passage from *Durairajasingham* quoted at par 15 above, the Tribunal is only obliged to set out as one of its reasons the rejection of a particular piece of evidence and it not required to give a "line-by-line" refutation of that evidence. In my view, the Tribunal, in the present case, went beyond what was needed to discharge the obligation described by his Honour.

26 It was also open to the Tribunal to find that the applicant had only been penalised after the birth of her third child and that penalty had been imposed pursuant to a law of general application. It follows that it was also

open to the Tribunal, having made those findings, to reject the applicant's claim that, by virtue of her Christianity, she had been subjected to different treatment in respect of her children. The evidence on which that rejection was based seemed to have consisted entirely of "country information". The applicant apparently made no attempt to adduce evidence of other persons, not of her religious persuasion, who had been treated more favourably after the birth of a second or subsequent child.

Was there an error of law in the evaluation of the applicant's claim to a well-founded fear of persecution by reason of religion?

27 The Tribunal based its rejection of the applicant's claim on this ground on its assertion that "There is nothing which the applicant has described in her evidence about her religion and things which she believed in, which are central tenets of her religion and could not be undertaken in a registered church." Underlying that passage may be an implicit assumption that "religion" for purposes of the Convention connotes only an organised body of beliefs and practices which can be identified on an objective examination of the doctrines of the church or religious movement of which an applicant claims membership. In some cases the genuineness of an applicant's fear of persecution will fall to be assessed by reference to the attitude taken by authorities in the country of origin to practices, observances or professions of faith which are ordained as essential to an organised body of doctrine, like Roman Catholicism, or Islam, to which the applicant asserts adherence. That seems to have been the sole criterion applied by the Tribunal in finding (correctly as the Full Court held) in *Minister for Immigration and Multicultural Affairs v Ming Xiong Zheng* [2000] FCA 50 (unreported, 10 February 2000) that the applicant was not prohibited from practising his Catholic religion in the PRC. In that case, Hill J observed, at par 42;

"There was evidence before the Tribunal which was accepted by it that, while problems were encountered by members of the underground Catholic church, there was not prohibition upon Catholics practising their religion. The fact that religious congregations were required to register was not itself persecution as the Tribunal held. The Tribunal was of the view that there was no doctrinal difference in religious practice between the underground church on the one hand and the open registered Catholic church on the other. The difference between them lay only in the need for registration, what the Tribunal referred to as "the governance of the church". Put another way, the country information showed that the recognised or patriotic Catholic church was required to be self-supporting and self-propagating with choice of bishops being left to Chinese authorities rather than the Vatican but the underlying religious faith was the same."

28 However, a risk of persecution will also vary according to the degree of zeal with which an applicant professes or gives expression to his or her religious beliefs. There may be cases where there is a need to assess the risk of persecution by reference to eccentric, or even highly idiosyncratic, religious

beliefs or practices of an applicant. Thus, in *Ahmad v Secretary of State for the Home Department* [1990] Imm AR 61, Farquharson J said, at 66;

"In a religious context the position of a priest may be different from that of an ordinary member of the community, or the offending statute itself may be so draconian that it would be impossible to practise the religion at all. It would depend to a very large extent on where, in the spectrum of religious observance, a particular applicant proposed to be active; somebody who merely attended his place of worship from time to time throughout the year would, as I have just indicated, be contrasted with an active clerical figure. However that may be, these matters should in my judgment be taken into account by the Secretary of State in relation to the particular individual whose application for asylum he is considering."

29 To similar effect, a Full Court of this Court, observed in *Omar v Minister for Immigration and Multicultural Affairs* [2000] FCA 1430 (unreported, 16 October 2000) at par 39;

"There is, however, nothing fanciful about the idea of people with strong religious or political convictions having a present fear of persecution founded upon apprehensions of what they may do and what may happen to them if they come face to face with repression. The long and relentless history of religious persecution provides examples of people of all faiths who, in the face of certain reprisal and even torture and death, have been unable or unwilling to accept the repression of their beliefs and practices. In times of religious change particularly, there are numerous examples of people who suffered extreme but predictable persecution for adhering to the beliefs and practices of the "old" religion. The history of political persecution also provides examples in abundance of people who have felt compelled to speak out in the direct face of oppression."

30 The dichotomy just suggested between the central doctrines and dogma of an organised religion on the one hand, and the expression likely to be given to personal conscientious religious convictions by a particular applicant on the other, has been recognised by Hathaway, *The Law of Refugee Status* (1991). The learned author has observed, at p 146;

"Because religion encompasses both the beliefs that one may choose to hold and behaviour which stems from those beliefs, religion as a ground for refugee status similarly includes two dimensions. [See, "Persecution for 'reasons of nationality' is also understood to include persecution for lack of nationality, that is: persecution of stateless persons": A. Grahl-Madsen, The Status of Refugees in International Law, p. 218; and G. Goodwin-Gill, The Refugee in International Law, pp. 27-28.] First is the protection of persons who are in serious jeopardy because they are identified as adherents of a particular religion. [For example, "[t]he present century has **...** seen large scale persecution of Jews under the hegemony of Nazi and Axis powers up to 1945, while more recent targets have included Jehovah's Witnesses in Africa, Moslems in Burma, Baha'is in Iran and believers of all persuasions in totalitarian and self-proclaimed atheist states": G. Goodwin-Gill, The Refugee in International Law, pp. 27-28.] It is not necessary that a claimant have taken any kind of active role in

the promotion of her beliefs, nor even that she be particularly observant of its precepts or rituals. In the case of Francisco Jorge Carvalho Penha, [Immigration Appeal Board Decision T87-9305X, December 16, 1987] for example, the Immigration Appeal Board remarked that " [t]he fact that [the claimant] had not received baptism does not detract from the **. . .** claim since he was perceived by members of his community as being a Jehovah's Witness." [Immigration Appeal Board Decision T87-9305X, December 16, 1987,at 2, per P. Ariemma.] This decision contrasts favourably with other cases in which protection on the ground of religion was limited to objectively defined religious practitioners. [See, e.g., Joseph Maria Mpagi, Immigration Appeal Board Decision V80-6254, August 13, 1980, in which nominal membership in the Roman Catholic Church was adjudged insufficient to bring the claim within the scope of the Convention. Accord Tadeusz Adamusik, Immigration Appeal Board Decision 75-10405, January 15, 1976; affirmed on other grounds by the Federal Court of Appeal at (1976), 12 N.R. 262; Teresa Augustyn Immigration Appeal Board Decision T81-9103, March 18, 1981; Leczek Franciszek Bala, Immigration Appeal Board Decision V81-6136, May 11, 1981.] The central issue must be whether there is a linkage between the threat of persecution and the claimant's self-defined or externally ascribed religious beliefs, in which case refugee protection is warranted. Alternatively, because religion includes also behaviour which flows from belief, it is appropriate to recognize as refugees persons at risk for choosing to live their convictions. This proposition is constrained only by the limitation expressed in the International Covenant on Civil and Political Rights:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are Prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. [International Covenant on Civil and Political Rights, U.N.G.A. Res. 2200 (XXI), December 19, 1966, entered into force March 23, 1976, at Art. 18(3).]"

31 In the present case, it does not seem that the Tribunal accepted that the applicant's objection to membership of a registered church was so fundamental that to limit her public religious expression to practising in such a church would amount to persecution. Indeed, the Tribunal expressly noted in the passage quoted at par 7 above, the applicant's claim to have been detained "because she was helping to print material for a particular home church after a demonstration to **enable the church to be registered**" (emphasis added). It was also open to the Tribunal to take account, as it seems to have done, of "country information" suggesting, first, varying degrees of State interference in, or direction of, registered churches, and, secondly, increasing tolerance of unregistered churches and co-operation between them and their registered counterparts. Because of the conclusion reached in par 19 above, it is unnecessary definitively to resolve this issue on the present application. However, it is to be borne resolutely in mind that the ultimate question in cases of this kind is whether there is a real chance that the individual applicant would be persecuted by reason of religion if returned to the country of origin. That requires an assessment in the light of all the circumstances, including, where relevant, the "central tenets" of an organised religion, of how that applicant would be likely to manifest his or her religious

beliefs upon return and the likelihood of that manifestation attracting a persecutory reaction from the authorities.

Actual bias

32 It was submitted on behalf of the applicant that the decision of the Tribunal had been vitiated by actual bias so as to afford the ground of review made available by s 476(1)(f) of the Act. The alleged bias was said to have been revealed by the attention which the Tribunal paid to other persons who had left the PRC from the same area, Fujian Province, as the applicant, using false passports. As to that matter, the Tribunal in its reasons, said;

"I have considered the applicant's claims that she left China on a false passport, but I place little weight on this statement, given the extent to which people leave China and appear in other countries on fraudulent documentation, and that the reason for their travel may be for a number of reasons not necessarily connected with the Convention. This practice appears particularly common from Fujian Province, from where people have for many generations left for other countries. The following information gives examples of recent information about the sophistication of false travel documentation arrangements."

33 There were then set out several references to information about "people smuggling" activities in which the "clients" of the smugglers were Fujianese or "affluent business people from Guandong". The Tribunal then concluded;

"I have considerable sympathy with the applicant. I accept that she has outlayed [sic] a great deal of money to come to Australia and that her family is in debt."

34 It was said that by referring to that, allegedly irrelevant, evidence related to persons other than the applicant, the Tribunal had indicated that its mind had been prejudicially affected by improper considerations and that such effect constituted actual bias as that concept has been explained, eg by North J in *Sun Zhan Qui v Minister for Immigration and Multicultural Affairs* (1997) 81 FCR 71 at 134-136. I do not agree. I consider that the Tribunal's reference to the use of false travel documents by clients of people smugglers was only by way of explaining its rejection of the applicant's claim that her resort to use of a false passport was confirmatory of a well-founded fear of persecution. The Tribunal was doing no more than pointing out that persons desirous of leaving the PRC, even those with no fear of persecution for a Convention reason, frequently had recourse to the expedient of false passports. In thus rejecting the possession of a false passport as confirmatory of the applicant's claim to a well-founded fear of persecution, the Tribunal did not reveal a mind closed to the possibility of the independent truth of that claim.

Was there no evidence to justify the making of the Tribunal's decision generally or as to the "central tenets" of the applicant's religion?

35 Section 476(1) of the Act provides;

"Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

.....

(g) that there was no evidence or other material to justify the making of the decision."

36 Sub-section (4) of s 476 stipulates;

"The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

37 It was contended on behalf of the applicant that a failure by the Tribunal to refer to evidence on which it based "crucial" findings of fact gives rise to a presumption that there was no evidence for those findings. However, in the present case, the Tribunal was not required by the Act to reach a decision refusing the application only if a particular matter was affirmatively established which, I consider, s 476(4) requires. The Tribunal was entitled to make a decision refusing the application upon being satisfied that the applicant did not have a well-founded fear of persecution for a Convention reason. The attainment of that state of satisfaction did not require the affirmative establishment of a particular matter. As explained in par 19 of these reasons, the Tribunal is obliged by s 430(1)(c) of the Act to set out its findings on each material question of fact which it is necessary to resolve on the way to the ultimate conclusion which underpins the decision. However, a failure to discharge that obligation does not entail that there was no evidence to justify the making of the decision.

38 Nor am I persuaded that the Tribunal's finding recorded at par 27 above, that "There is nothing ..... which are central tenets of her religion and could not be undertaken in a registered church" was based on a particular fact

which did not exist within the meaning of s 476(4)(b). Rather, the finding was based on the **non-existence** of a particular fact, ie, a requirement, as a central tenet of the applicant's religion, that some practice or observance be undertaken otherwise than in a registered church. It is not open to an applicant to turn s 476(4)(b) on its head by attempting to persuade the Court that a particular fact existed.

Conclusion

39 For the reasons which I have endeavoured to explain, the applicant's challenge to the decision of the Tribunal has succeeded on the ground of the Tribunal's failure to set out its findings on certain material questions of fact as required by s 430(1)(c). Accordingly, the decision of the Tribunal must be set aside and the application should be remitted to the Tribunal, differently constituted, to be heard and determined according to law. It has therefore been unnecessary to reach a concluded view on whether the Tribunal's evaluation of a risk of persecution by reason of the applicant's religion has been affected by error of law. Although the applicant has failed on the remaining issues argued on her behalf, I consider that the respondent should pay her costs of and incidental to the application.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Ryan.

Associate:

Dated: 23 April 2001

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Solicitor for the Respondent:	Australian Government Solicitor

Date of Hearing:	12 May 2000
Date of Judgment:	23 April 2001