

Government Members' Minority Report

Senator David Johnston

Chapter 1

Introduction

Background to the inquiry

1.1 Mr Chen Yonglin, a Chinese diplomat working at the Chinese Consulate in Sydney, approached the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) on 26 May 2005 to request political asylum for himself and his wife and daughter. Questions soon arose over whether contact with the Chinese consulate by DIMIA to confirm Mr Chen's identity on 26 May was appropriate. Further to this it was the decision of the Minister for Foreign Affairs to reject Mr Chen's request for political asylum and his role in such requests was also questioned. The Committee further examined the actions of and meetings with DIMIA and the Department of Foreign Affairs and Trade (DFAT) which took place from 27 May to 3 June 2005 and Mr Chen's claims regarding the persecution of Falun Gong, the existence of an extensive Chinese spy network in Australia, kidnapping allegations and the monitoring and harassment of Australian citizens.

Chapter 2

Mr Chen Yonglin's request for political asylum

2.1 Mr Chen Yonglin, a 38 year old Chinese diplomat, arrived in Australia on a diplomatic passport in August 2001 and assumed the role of Consul for political affairs at the Chinese Consulate in Sydney. He tells the Committee that he was 'in charge of implementing the PRC Central Government policy in relation to the Five Poisonous Groups (Falun Gong, pro–democracy movement activists, pro–Taiwan independence force, pro–Tibet separation force and Eastern Turkistan force)'.¹

2.2 In particular, he noted he was required to persecute Falun Gong practitioners overseas, a task which, if he is to be believed at all, presumably Mr Chen accepted and carried out for some time as his chosen diplomatic role, notwithstanding his subsequent comments that it distressed him to work for an authority which he deemed unjustifiably placed Falun Gong practitioners in labour camps, jails, forced re–education courses and put uncooperative practitioners to death.² He claims to have grown to hate his work because he supports democracy and the information he collected on these groups could be used against the individuals and their families.³

Initial contact with DIMIA

2.3 On 26 May 2005, Mr Chen Yonglin approached the Australian Government, more particularly the Sydney offices of DIMIA, to seek political asylum. According to Mr Chen:

I approached DIMIA on the morning of 26 May to ask for an appointment with the state director of DIMIA. I stood in the public space outside the entrance to the department's inquiry office and I used my mobile phone to call the department. I said I wished to speak to Mr Nick Nicholls. A male official indicated that Mr Nicholls was no longer the director and that the new director was Mr O'Callaghan. The male official transferred the call to the state director's office, but the phone line to the state director's office was busy.

A few minutes later I called the director's office directly. I introduced myself and identified myself. I said that I was the consul for political affairs in the Chinese consulate in Sydney and requested an urgent meeting. The female official asked whether I had made a prior appointment and I said 'no'. The female official then asked for the phone number of the Chinese consulate. I said, 'I would prefer not to give you the phone number but if you insist I can give it to you', and later I gave the phone number to the female official. I said: 'Please don't call them. It is an unusual meeting

1 *Submission 7* (Refugee Advice and Casework Service), pp. 11–12.

2 *Submission 7* (RACS), pp. 11–12.

3 *The Weekend Australian*, 11 June 2005, p. 19.

request. I have a very important matter to talk to the state director about and I can prove myself with my ID issued by DFAT and my passport'. The official later indicated that the state director was in a meeting and asked if it was an urgent matter. I said 'Yes'. She later talked to the director and asked me to leave my mobile phone number and said that she would call me back.

I waited and about 10 minutes later I called again. The first official responded that the director already knew of my request but that he was in a meeting. She asked if it was necessary to interrupt the meeting. I said 'yes'. She went to talk to the state director and I approached the reception desk and showed my ID to the security guard and the security guard called the state director's office to prove that I held the ID card issued by DFAT.

At that time I called the state director's office again. The phone was answered by another female secretary and she said that the first official was connecting to the Chinese consulate to check my ID. I said that would not be necessary, that I had shown my ID to the security guard, and said that I would be in danger—my life would be in danger—if they contacted the Chinese consulate and I feared that.

The second female official said that the first one was connecting. I was very shocked to learn that. She said that the first one was transferring the call to my mobile, so that I was frightened and hurried to say, 'No, I have to go; I can't stay here any more'. I left two letters. One was addressed to the state director and I changed the name to Mr O'Callaghan. The other letter was addressed to Mr Illingworth. Then I left the immigration building. At that time, because I was frightened that the immigration office was too close to the Chinese consulate—it is about 10 minutes drive by car—I hurried to take a taxi and go to Chatswood railway station and go away to my hiding place.⁴

2.4 The submission from Mr Chen and his lawyer describes his concerns regarding contact with the Chinese embassy:

A DIMIA official informed the Chinese consulate that Mr Chen was present in the Department on 26 May despite Mr Chen's protestations that such action may endanger his life. This action, we submit, may reasonably be construed as an attempt to refole Mr Chen. We submit that the Department, by failing to keep Mr Chen's visit confidential, made it impossible for Mr Chen to re-avail himself of the protection of the PRC [People's Republic of China] government and in fact enhanced his chances of being persecuted. In this regard we submit that the mere act of seeking political asylum could be seen by the PRC as an act of treason or an act endangering state security.⁵

2.5 This account fails to address the fact that Mr Chen left a detailed letter addressed to his superiors setting out his intentions and indicating his disposition to his Government and its diplomatic mission as discussed below.

4 *Committee Hansard*, 26 July 2005, pp. 45–46.

5 *Submission 7* (RACS), pp. 12–13.

2.6 DFAT told the committee the consulate advised them that Mr Chen also left a letter in his apartment which stated he was not happy in his job and was not going back to China.⁶ The committee failed to question Mr Chen about the alleged letter as it had no knowledge of it at the time they spoke to Mr Chen. This was a consequence of Mr Chen failing to inform the Committee, either in his evidence or in the written submission made to the Committee, of the existence of this letter and accordingly the Committee was not afforded the opportunity to properly examine Mr Chen on this important aspect of matter.

DIMIA's version

2.7 According to Mr Jim O'Callaghan, the current State Director, New South Wales, Mr Chen's calls on 26 May 2005 did not come to him personally but were handled by executive assistants as he was in a meeting in another part of the building at the time of the calls. Mr Chen was told that Mr O'Callaghan was unavailable. Mr O'Callaghan stated 'at one point the executive assistants sought to confirm he (Mr Chen) was who he said he was. He provided some telephone numbers for us to confirm that with the Chinese consulate'.⁷ Mr O'Callaghan said that Mr Chen did not offer to wait when told he was unavailable but called back three or four times. When he could not meet the State Director or get past the security guards he left two identical letters addressed to two people with the security guards at the front desk.

2.8 Mr O'Callaghan indicated one of the executive assistants called the Chinese consulate mid-morning. He said he did not ask for the call to be made but that it had occurred by the time he returned to his office. Mr O'Callaghan stated:

I recall coming back into the office and saying, 'There is someone from the Chinese consulate seeking to talk to me. Where is the number?' and so on, I had returned, I had undertaken to follow up, and at that stage I was advised that one of the executive assistants had made contact with the Chinese consulate. That was done on the basis that Mr Chen was advised by the executive assistant that we wanted to confirm his identity as part of the process of determining whether he should be having an appointment with the state director. Mr Chen was asked to provide some telephone numbers. He provided two telephone numbers at the Chinese consulate. At no time did Mr Chen indicate any difficulty about following up his identity with the Chinese consulate.⁸

2.9 Mr O'Callaghan emphasised that until he read Mr Chen's letter there had been 'no information about what Mr Chen's interest in calling the immigration office was'.⁹ He further stated, 'I asked what were the circumstances of the contact with the Chinese consulate and I was advised—and I did double check this on more than one

6 *Committee Hansard*, 26 July 2005, p. 80.

7 *Committee Hansard*, 25 July 2005, p. 56.

8 *Committee Hansard*, 25 July 2005, p. 66.

9 *Committee Hansard*, 25 July 2005, p. 66.

occasion—that Mr Chen provided two numbers and consented to his identity being checked at the Chinese consulate'.¹⁰ Mr O'Callaghan told the committee that after he read Mr Chen's letter he asked the two executive assistants to prepare an account of what occurred that morning before he returned to the office.¹¹ This account was provided to the committee and is consistent with Mr O'Callaghan's evidence. It is attached at Appendix 4 to the majority report. In all of the evidence and the conduct and demeanour of Mr O'Callaghan before the Committee there is nothing to cause this account to be brought into any doubt.

Identity check

2.10 During a phone call with Mr Chen, the executive assistant heard laughing in the background and became concerned that the call may not be genuine. She then asked for his number at the consulate to confirm his identity and Mr Chen said that he had no problem with them being contacted.¹²

2.11 Mr O'Callaghan further explained to the committee:

In this case Mr Chen provided numbers to the executive assistant and indicated no difficulty about that contact being made and that is why the contact was made. I think what that indicates is a responsiveness on behalf of this junior officer to Mr Chen's request to escalate his situation to see a senior officer. She was doing her job to test the appropriateness of him being able to see a senior officer.¹³

2.12 It would seem that Mr Chen and DIMIA had a different understanding of the reason for providing the number of the Chinese consulate. Mr Chen told the committee 'I just wanted to ensure that giving the consulate phone number should be enough'.¹⁴ Mr O'Callaghan, however, took the view that Mr Chen was clearly being asked to provide assistance to confirm his identity and gave no indication that he had any difficulty with his identity being checked at the consulate.¹⁵

2.13 Mr Hughes, First Assistant Secretary, Refugee, Humanitarian and International Division in DIMIA, reiterated that Mr Chen did not indicate a problem with his identity being confirmed with the consulate and indicated to the committee that Mr Chen was not known to be an applicant for political asylum or a protection

10 *Committee Hansard*, 25 July 2005, p. 67.

11 *Committee Hansard*, 25 July 2005, p. 68.

12 Statement of events on 26 May 2005 by the Executive Assistants to State Director, DIMIA, NSW Office.

13 *Committee Hansard*, 25 July 2005, p. 75.

14 *Committee Hansard*, 26 July 2005, p. 52.

15 *Committee Hansard*, 25 July 2005, p. 71.

visa at the time DIMIA spoke to the consulate and no information was provided to the consulate.¹⁶

2.14 DIMIA stated its position regarding contact with the consulate in a media release dated 8 June 2005. It emphasised that Mr Chen had not indicated any problem with his identity being confirmed with the consulate, DIMIA did not provide any information to the consulate and at the time of the call, DIMIA had no knowledge of the matter Mr Chen wanted to discuss.¹⁷

Discrepancies between Mr Chen and DIMIA's accounts of 26 May

2.15 DIMIA's account of this period contradicts evidence provided by Mr Chen on the following points:

- Mr Chen claimed that he asked the executive assistant not to call the Chinese consulate. DIMIA officials stated to the committee and issued a media release saying that Mr Chen did not indicate any difficulty with the Chinese consulate being contacted;
- Mr O'Callaghan's evidence and the media release indicate Mr Chen provided more than one telephone number for the Chinese consulate. According to Mr Chen, he provided only one;
- Mr O'Callaghan indicated that the phone call with the Chinese consulate was only to check identity. Mr Chen's evidence seems to indicate that they were trying to transfer the Chinese consulate to his mobile; importantly, DIMIA's version does not mention that Mr Chen expressed concerns for his safety. Mr Chen told the committee that he tried to persuade the executive assistant not to call as he feared for his life if the Chinese consulate were contacted;
- DIMIA asserted that the call to the consulate was made without further information being provided. Mr Chen's submission notes that a DIMIA official informed the Chinese consulate that Mr Chen was present in the department on 26 May 2005; and
- there may also be an additional discrepancy as the DIMIA media release seems to suggest that Mr Chen offered the phone number of the Chinese consulate without being asked whereas Mr O'Callaghan told the committee that Mr Chen was asked to provide the number for the Chinese consulate.

2.16 The committee reminded Mr O'Callaghan that Mr Chen was on the public record saying he asked the consulate not to be called, that he had an unusual request and it was a serious matter. Mr O'Callaghan replied 'that is inconsistent with the

16 *Committee Hansard*, 25 July 2005, p. 50.

17 8 June 2005, Department of Immigration and Multicultural and Indigenous Affairs, *Media Release*, titled *Setting the Record Straight—Contact with the PRC Consulate*. Accessed at http://www.immi.gov.au/media_releases/media05/d05018.htm on 5.7.05.

advice my officers have given me'.¹⁸ He further stated 'all I can say is what I have been factually advised, and that is that Mr Chen provided phone numbers for the consulate to be contacted and gave no indication that he had any difficulty with his identity being checked at the consulate'.¹⁹

2.17 There was, as has been stated, nothing save for Mr Chen's subsequent account to cause this version to be brought into doubt. Accordingly, the minority members of the committee make no determination as to which version of events regarding the contact with the Chinese embassy is correct. It is clear, however, that DIMIA did contact the Chinese consulate about Mr Chen.

2.18 The committee sought further explanation from DIMIA regarding why the phone call to the Chinese consulate was made. Mr Chen claims to have been offering his ID card and, according to Mr Chen, also his passport. Mr O'Callaghan stated several times that the call was made to confirm Mr Chen's identity and he indicated he had answered this question previously and had nothing to add.²⁰

2.19 The circumstances surrounding Mr Chen's visit to DIMIA were highly unusual, quite rare and extraordinary and obviously took the Sydney office by surprise. Despite this unique turn of events it nevertheless raises the question of whether DIMIA should have been more sensitive to his circumstances. Mr Green asserted that:

Mr Chen, who was then an accredited diplomatic representative of the People's Republic of China made a very serious attempt to communicate his fear of persecution and the reasons for that fear to the Australian government. In taking that step Mr Chen and indeed his family clearly indicated that they no longer wished to avail themselves of the protection of the People's Republic of China.²¹

2.20 Mr Green told the committee that 'Mr Chen made several protestations on that day to Department of Immigration officials that, were they to take certain courses of action, his life would be in danger. These are not mere words; these are things which, when said, need to be taken very seriously'.²² He further stated:

The department and the government of Australia throughout this case should have been aware, we would submit, that the mere act of seeking political asylum in Australia could always be seen by the government of the People's Republic of China as an act of treason and an act that endangered state security.²³

18 *Committee Hansard*, 25 July 2005, p. 70.

19 *Committee Hansard*, 25 July 2005, p. 71.

20 *Committee Hansard*, 25 July 2005, p. 67.

21 *Committee Hansard*, 26 July 2005, p. 45.

22 *Committee Hansard*, 26 July 2005, p. 45.

23 *Committee Hansard*, 26 July 2005, p. 45.

2.21 The letter from Mr Chen dated 25 May seeking political asylum clearly stated that he believed his life was at risk.²⁴ Mr Chen informed the committee that if he returned to China 'I definitely would have been persecuted. My life and my career would all be finished. Even my family would also be facing certain persecution. Freedom would be limited'.²⁵

2.22 Mr Chen now claims to have said:

I said I would give the phone number, but please do not call the Chinese consulate. I just wanted to ensure that giving the consulate phone number should be enough. I persuaded her not to call the consulate, because, once she called, the consulate would definitely know that I was there to make some unusual, special meeting and that would definitely alert them.²⁶

2.23 DIMIA's account of the telephone call to the Chinese consulate does not mention that Mr Chen expressed fears for his safety.

2.24 The minority members of the Committee have been presented with two conflicting accounts regarding whether Mr Chen made concerns for his safety known to DIMIA before it made contact with the Chinese consulate and are unable to determine the clear facts. Clearly, if Mr Chen did express fear for his safety, this should have been of importance to DIMIA and treated responsively.

2.25 With the benefit of hindsight, any contact with the Chinese consulate by a junior departmental official or others, albeit with innocent intentions, in the apparent circumstances of an asylum seeker also raises some concerns about the maintenance of confidentiality and protocols. Although it should be mentioned here that there was no specific evidence at all, of any prejudicial disclosure of matters which might be considered "confidential" to Mr Chen.

2.26 UNHCR has advised the following principles should inform the application of the Migration Act 1958, its regulations and guidelines concerning the maintenance of confidentiality, for any consular officials or staff who apply to DIMIA, DFAT, or their respective Ministers for territorial asylum and/or protection visas:

Confidentiality in the context of Refugee Status of Determination

The consent of the asylum seeker should be sought before individual case information about his or her claim for refugee status is shared with other parties. In addition, individual case information about asylum seekers should be kept strictly confidential because of the potential risk to the asylum seeker and others. Confidentiality in asylum procedures is particularly important because of the vulnerable situation in which refugees and asylum-seekers find themselves. As discussed during the Global Consultations in International Protection, 'the asylum procedure should at

24 Letter from Mr Chen to Mr O'Callaghan seeking political asylum dated 25 May 2005.

25 *Committee Hansard*, 26 July 2005, p. 57.

26 *Committee Hansard*, 26 July 2005, p. 52.

all stages respect the confidentiality of all aspects of an asylum claim, including the fact that the asylum-seeker has made such a request' and highlighted that 'no information on the asylum application should be shared with the country of origin'. State practice also shows that the principle of confidentiality is paramount in asylum procedures.

The decision-making authority in the country of asylum should not share any individual case information about an asylum seeker with the authorities of the country of origin...A decision-making authority should not confirm to the authorities or other entities in the country of origin whether or not a particular individual is or has been in contact with the decision-making authority, regardless of whether the person concerned is an asylum-seeker, a refugee, a resettled refugee, or whether she or he has been denied refugee status or excluded.

The decision-making authority in the country of asylum should not communicate with entities within the country of origin, whether they are governmental or non-governmental, in order to verify or authenticate declarations or documents provided by an asylum seeker.²⁷

2.27 There was no conclusive evidence or at all, that any of these criteria were breached in Mr Chen's case.

The Migration Act 1958

2.28 DIMIA, DFAT and the Minister for Foreign Affairs were also criticised in the press with suggestions that the Migration Act 1958 may have been breached by providing compromising information to the Chinese government about Mr Chen Yonglin's bid for political asylum.²⁸

2.29 Part 4A of the Migration Act (obligations Relating to Identifying Information) contains the following provisions regarding the prohibitions on the authorisation to disclose and the disclosure of identifying information to foreign countries which are central to determining whether a breach occurred.

2.30 Section 336 E, Disclosing identifying information, states that:

A person commits an offence if:

the person's conduct causes disclosure of identifying information; and
the disclosure is not a permitted disclosure.

Penalty: Imprisonment for 2 years, or 120 penalty units or both.

A permitted disclosure is a disclosure that:

is for the purpose of data matching in order to:

identify, or authenticate the identity of a non-citizen; or

27 *Submission 2* (UNHCR), pp. 1–4.

28 *Sydney Morning Herald*, 11 June 2005, p. 6.

facilitate the processing of non-citizens entering or departing from Australia; ...

2.31 Section 336 F (3), Authorising disclosure of identifying information to foreign countries etc, states:

... (3) A disclosure is taken not to be authorised under this section if:

the person to whom the identifying information relates is:

an applicant for a protection visa; or

an offshore entry person who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; and

the disclosure is to a foreign country in respect of which the application or claim is made, or a body of such a country.

2.32 Section 336 F also states:

However, if:

the person to whom the identifying information relates has requested or agreed to return to the foreign country in respect of which the application or claim is made; or

the person is an applicant for a protection visa, and the application has been refused and finally determined...

2.33 Section 336A states:

In this Part :

"identifying information" means the following:

- (a) any personal identifier;
- (b) any meaningful identifier derived from any personal identifier;
- (c) any record of a result of analysing any personal identifier or any meaningful identifier derived from any personal identifier;
- (d) any other information, derived from any personal identifier, from any meaningful identifier derived from any personal identifier or from any record of a kind referred to in paragraph (c), that could be used to discover a particular person's identity or to get information about a particular person.

2.34 Section 5A states:

In this Act:

“personal identifier” means any of the following (including any of the following in digital form):

- (a) fingerprints or handprints of a person (including those taken using paper and ink or digital live scanning technologies);

- (b) a measurement of a person's height or weight;
- (c) a photograph or other image of a person's face and shoulders;
- (d) an audio or a video recording of a person (other than a video recording under section 261AJ);
- (e) an iris scan;
- (f) a person's signature;
- (g) any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the Crimes Act 1914."

2.35 The definition of personal identifiers in the Migration Act 1958, Section 5A, does not include names but it does include 'any other identifier prescribed in the regulations'.²⁹ A review of the regulations indicates that a person's name is not a personal identifier and the scheme of the Act and Regulations appears designed to establish identity over and above and separate from a person's name. In all of the circumstances of the facts before the committee, the minority members can conclude or comment that there is no evidence to support any objective contention that there has been any breach of the Migration Act by either the DIMIA executive assistants in Sydney, any DIMIA or DFAT officers in Sydney or Canberra or Minister for Foreign Affairs.

Action taken on 26 May AM after Mr Chen delivered his request for political asylum

2.36 Once DIMIA became aware that Mr Chen was seeking political asylum, the government and Mr Chen became engaged in a formal process arising from the government's obligations under the Migration Act 1958.

2.37 Mr O'Callaghan clarified for the committee that he became aware of Mr Chen's approach somewhere between 10:30am and 11:00am on 26 May. He said that while in a meeting he received a message that someone was seeking to talk to him but he did not know about what saying 'I had no information about that because our officers had no information and Mr Chen provided no information'.³⁰ Mr O'Callaghan said the message he received indicated that the person wishing to speak with him

29 According to the *Migration Act 1958*, 5A personal identifier means any of the following (including any of the following in digital form): (a) fingerprints or handprints of a person (including those taken using paper and ink or digital livescanning technologies); (b) a measurement of a person's height and weight; (c) a photograph or other image of a person's face and shoulders; (d) an audio or a video recording of a person (other than a video recording under section 261AJ); (e) an iris scan; (f) a person's signature; (g) any other identifier prescribed by the regulation, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of section 23WA of the *Crimes Act 1914*. Accessed at <http://www.comlaw.gov.au> on 2.8.05.

30 *Committee Hansard*, 25 July 2005, p. 61.

claimed to be an official of the Chinese consulate. He said his response to the executive assistant providing the message to him in the meeting was that 'I would respond when I got back to my office'.³¹

2.38 Mr O'Callaghan explained why he did not respond immediately to a matter which seemed to be of sufficient importance to his executive assistant that she chose to interrupt his meeting:

It was suggested that someone claiming to be an official of the Chinese consulate was seeking to speak to me. Many people seek to speak to the state director of the immigration department. We have between 1,000 and 1,500 people come into that office alone each day. We have 80,000 calls come into the contact centre in the office each month. We have many calls come through to the executives' numbers on a daily basis, where people are seeking to speak to the state director or the deputy state directors. As you know, Immigration is an agency dealing with people. There are a lot of people in New South Wales and beyond who seek to speak to me.³²

2.39 Mr O'Callaghan went on to explain that on occasions his executive assistant does interrupt meetings to bring him messages that people want to speak to him and on that occasion he expected to be back in the office in 30–40 minutes 'and there was no reason to think that it could not wait until then'.³³

2.40 Mr O'Callaghan told the committee that the letters left at the security desk by Mr Chen were taken by the security guards to the mail opening area where they were opened and brought to his office.³⁴ He clarified that he returned to his office about 11:20am and the letter was delivered around 11:30am.³⁵

2.41 These identical letters were Mr Chen's request for political asylum. One was addressed to the former state director and this had been crossed out and Mr O'Callaghan's name written in handwriting and the other was addressed to Mr Robert Illingworth, Assistant Secretary of the Onshore Protection Branch in the Refugee, Humanitarian and International Division, DIMIA.³⁶

2.42 Mr O'Callaghan told the committee that upon reading the letter his first reaction was surprise and then he called the business manager of the onshore protection area, Ms Louise Lindsay, to his office and asked her to contact Mr Chen. He then put a phone call through to Canberra to speak to any of the senior executive officers in the Refugee, Humanitarian and International Branch but all those officers

31 *Committee Hansard*, 25 July 2005, p. 62.

32 *Committee Hansard*, 25 July 2005, p. 62.

33 *Committee Hansard*, 25 July 2005, p. 63.

34 *Committee Hansard*, 25 July 2005, p. 59.

35 *Committee Hansard*, 25 July 2005, p. 63.

36 *Committee Hansard*, 25 July 2005, p. 59.

were before a Senate estimates hearing and were unavailable. He then spoke to a director in that division, Ms Kathleen Dunham.³⁷

Contact with senior executives in Canberra and DFAT

2.43 Mr O'Callaghan told the committee that he understood that Ms Dunham sought to contact senior officers who were in Parliament House for Senate estimates hearings. She also spoke with some other senior officers in the Canberra office and contact was made with DFAT.³⁸ Mr Illingworth, DIMIA, clarified that Mr Chen's letter was faxed from the NSW office to Ms Dunham and she made a number of calls within the department and calls to contact him at Senate estimates hearings which she eventually did.

2.44 According to Mr Illingworth, 'The upshot was that we received the letter around noon, DFAT was called, they were briefed on the content of the letter and the issue of territorial asylum visas orally over the phone and the letter was faxed to DFAT at 1.06pm'.³⁹ Mr Hughes, DIMIA, said that he was not aware of DIMIA contacting the office of the Minister for Foreign Affairs.⁴⁰

2.45 Mr Illingworth told the committee that DIMIA's response was to see this as a request for political asylum and to deliver it to the appropriate portfolio to be actioned. He added that at a practical level they continued to be in contact with the NSW office regarding the efforts to contact Mr Chen. Mr Illingworth said that there was communication during the afternoon between officers of the division in Canberra and DFAT but 'there was no response in terms of the outcome of the request put in the letter'.⁴¹

2.46 DFAT officers told the committee that DFAT first became aware of this matter:

...when it received from DIMIA a copy of Mr Chen's letter addressed to DIMIA New South Wales office seeking political asylum. We received this letter by fax from DIMIA on the afternoon of Thursday 26 May. This letter was brought to the attention of Mr Downer's office later that evening...about 7pm.⁴²

2.47 Mr O'Callaghan said that Ms Louise Lindsay tried to contact Mr Chen around 11:30am on 26 May but his mobile phone was switched off. She was able to contact

37 *Committee Hansard*, 25 July 2005, p. 65.

38 *Committee Hansard*, 25 July 2005, p. 73.

39 *Committee Hansard*, 25 July 2005, p. 73.

40 *Committee Hansard*, 25 July 2005, p. 79.

41 *Committee Hansard*, 25 July 2005, p. 74.

42 *Committee Hansard*, 26 July 2005, p. 76.

Mr Chen mid-afternoon on 26 May and they had a discussion regarding setting up a meeting for 27 May.

2.48 Ms Lindsay explained:

I attempted to contact him at about 11:30am or 25 past 11 as I had been requested to by the state director. His mobile was turned off. I got the message about the phone being out of range or switched off. I rang back later that afternoon, just after 3pm. I spoke to him and invited him to come in to our office for a chat about his visa options. We had been conversing with Canberra, who in turn had been conversing with DFAT as they have explained. Following the claim for territorial asylum, we wanted to inform Mr Chen of the kinds of options that would be open to him if he did indeed want to remain in Australia.⁴³

2.49 Ms Lindsay told the committee that they organised for Mr Chen to come to the Parramatta office on 27 May and she arranged for one of the other business managers to attend as they had a lot more information and knowledge of the visa classes.⁴⁴

Conclusion

2.50 The Committee examined the events which took place on 26 May 2005 from the time Mr Chen called to make an appointment to see the state director until the appointment was made for a face-to-face meeting on 27 May 2005. This examination included an assessment of all accounts regarding the telephone contact made by DIMIA with the Chinese consulate on 26 May to verify Mr Chen's identity. The minority members see it a clear that there was no breach of the Migration Act.

2.51 From the evidence now provided by Mr Chen, he was clearly anxious to see the state director, calling several times in a short timeframe. Although not providing a reason for wanting to speak to Mr O'Callaghan, he stated the matter was urgent, important and unusual. In the circumstances of Mr Chen's surprise and extraordinary request, it is doubtful that any other reasonable response could have been anticipated by Mr O'Callaghan and his staff in Sydney.

2.52 The contact with the Chinese consulate, was, in the minority senator's view unfortunate, inadvertent and an error in judgement, but was to some extent excusable in the peculiar circumstances of Mr Chen's attendance at the DIMIA Sydney offices.

43 *Committee Hansard*, 25 July 2005, p. 85.

44 *Committee Hansard*, 25 July 2005, p. 85.

2.53 On the basis of any proper and objective assessment of the evidence presented to the committee, the minority members do not consider obligations regarding confidentiality were breached when DIMIA contacted the Chinese consulate to confirm Mr Chen's identity.

Chapter 3

The Minister's decision and Ministerial responses

Territorial asylum/subclass 800 Visa

3.1 In his initial request, Mr Chen was seeking political asylum which DFAT treated as a request for territorial asylum.

3.2 The Procedures Advice Manual 3 – Schedule 2 – Territorial Asylum, states that:

...territorial asylum is commonly known as 'political asylum' and is granted by instrument by a Minister (usually the Foreign Minister). It should not be confused with refugee status. Persons who have been recognised as refugees have not been granted territorial asylum. Most requests for asylum have been found to be, more accurately, requests for refugee status. Therefore, if a person enquires about 'asylum', officers should seek to establish whether the enquiry is, in fact, about refugee status and, if so, explain the procedures for applying for a Protection Visa. Anyone who insists on pursuing a request for (territorial) asylum should be advised to contact the nearest office of DFAT.¹

3.3 The Manual further notes:

There is no approved application form for this visa. Rather, Schedule 1 (item 1131(3) (a)) requires application for this visa to 'be made...in a manner approved by the Minister'. Officers may expect further procedures to be notified as need arises ie if a person is granted territorial asylum (by DFAT). Any purported visa 800 application is incapable of being a valid application for the purposes of s46 of the Act unless territorial asylum has been granted. Schedule 1 item 1131 (3) (aa) requires that 'when the application is made, there is lodged...documentation that ...evidences the grant...to the applicant of territorial asylum.'²

3.4 Regarding Subclass 800 – Territorial Asylum, the Migration Regulations notes one of the criteria to be satisfied at the time of application is that 'the applicant must have been granted territorial asylum in Australia by instrument of a Minister'.³ Mr Hughes from DIMIA clarified that under the Migration Act 1958 'you cannot make an application for a territorial asylum visa until you have an instrument of grant of asylum issued by the Minister for Foreign Affairs. So there is a precondition for any application under the Migration Act. If there is no instrument issued then you cannot get to the stage of making an application'. He added that 'it is generally

1 DIMIA Procedures Advice Manual 3 – Schedule 2 Visa 800 – Territorial Asylum.

2 DIMIA Procedures Advice Manual 3 – Schedule 2 Visa 800 – Territorial Asylum.

3 Migration Regulations – Subclass 800 – Territorial Asylum.

accepted that the Minister for Foreign Affairs would be the minister exercising that power'.⁴

3.5 In Mr Chen's case the Minister decided in the national interest not to issue the instrument for territorial asylum which would have led to an application being considered. However it should be acknowledged that at no time was he declared an unlawful non-citizen, was subsequently afforded a protection visa and will no doubt be eligible for Australian citizenship in the future.

3.6 Mr Larsen, Legal Adviser, DFAT, advised the committee that 'the decision as to whether or not to grant territorial asylum is at the discretion, in our case of the Minister for Foreign Affairs. It is an executive power and it is an executive discretion' and is non-reviewable.⁵ Regarding guidelines, Mr Larsen further advised there are no guidelines for the making of this decision, 'the minister would have various considerations in mind when he makes such a decision. No doubt, the national interest is a critical one of those, but there are no express criteria which limit how the minister exercises that discretion'.⁶

Concerns regarding refusal of territorial asylum visa

3.7 Dr Neumann told the committee that traditionally, government have let their decisions about asylum claims be influenced by a combination of four factors: national interest; legal obligations; humanitarian considerations and public opinion.⁷ He explained that when cabinet agreed on Australia's first asylum seeker policy a few months before the Melbourne Olympics, it decided three agencies would be involved in decisions about requests for asylum: ASIO would advise the government whether the person was a security risk; immigration would advise whether the person was a suitable immigrant and external affairs was left to weigh up humanitarian considerations and the national interest. He explained that 'Once Australia's response to asylum seekers became guided in a large part by international refugee law and its interpretation in Australian legislation, the immigration department became the principle agency responsible for decisions about asylum requests. But foreign affairs apparently retained the right to grant territorial asylum in sensitive cases'.⁸

3.8 The following concerns regarding the response of the Foreign Minister were voiced to the committee:

3.9 Mr Chen told the committee that at the 31 May meeting, he asked why political asylum had been denied and:

4 *Committee Hansard*, 25 July 2005, p. 78.

5 *Committee Hansard*, 26 July 2005, p. 87.

6 *Committee Hansard*, 26 July 2005, p. 88.

7 *Committee Hansard*, 26 July 2005, p. 34.

8 *Committee Hansard*, 26 July 2005, p. 35.

The reason I was given by the senior protocol officer was that the decision had been made and the Australian government could deny my application for political asylum for reasons of foreign affairs.⁹

3.10 Ms Morton told the committee 'The minister has said that he believed that it would not be appropriate to give a territorial asylum certificate in that case and that it was appropriate that, if Mr Chen wished to stay in Australia, he apply for a visa and that it be considered under the Migration Act in the normal way.'¹⁰

9 *Committee Hansard*, 26 July 2005, p. 48.

10 *Committee Hansard*, 26 July 2005, p. 88.

Chapter 4

The government's response to Mr Chen's request for political asylum

DFAT's response after the Minister declines Mr Chen's request

4.1 Recognising that this was a complex issue involving a number of portfolios, DFAT convened an Interdepartmental Committee meeting (IDC) on the morning of 27 May at around 10:30am. It was attended by officers from PM&C, DIMIA, ASIO and AFP. Mr Hughes, DIMIA, told the committee that the first part of the meeting was to 'provide feedback on the issue of territorial asylum and then to discuss where things went from there'. Ms Morton, First Assistant Secretary, North Asia Division, DFAT, told the committee that she had informed the IDC of Mr Downer's decision not to grant Mr Chen's request for political asylum.¹

4.2 Mr Jeff Robinson, Assistant Secretary, East Asia Branch, DFAT, explained that 'Mr Downer advised the department that he would not sign an instrument to allow Mr Chen to apply to DIMIA for a territorial asylum visa. Mr Downer said that if Mr Chen wished to stay in Australia he could apply for another sort of visa and that it was appropriate that Mr Chen's claim for such a visa be considered by DIMIA on its merits as part of a normal process'.²

DIMIA's response after the Minister declines Mr Chen's request

4.3 Mr Illingworth, DIMIA, informed the committee that he was made aware of the Foreign Minister's decision not to grant political asylum at around 10:30am or 11:00am on 27 May by DFAT officers.³ He further stated 'I do not know if the language was as clear as 'reject', but it was a very strong indication that the request would not be successful'.⁴

4.4 The decision to reject his application for political asylum was conveyed to Mr Chen by Ms Lindsay by phone on 27 May 2005.⁵

4.5 Mr Hughes told the committee that DIMIA was prepared 'should political asylum not be on offer, for the matter to default to a request for a protection visa or to stay in Australia on migration grounds or some other option'.⁶ To prepare for this, Mr

1 *Committee Hansard*, 26 July 2005, p. 79.

2 *Committee Hansard*, 26 July 2005, p. 77.

3 *Committee Hansard*, 25 July 2005, p. 75.

4 *Committee Hansard*, 25 July 2005, p. 77.

5 DIMIA talking points for 27 May conversation with Mr Chen.

6 *Committee Hansard*, 25 July 2005, p. 80.

Hughes advised that some work was undertaken in Canberra in conjunction with the NSW office 'to develop talking points to use in conversation with him to try to tease out for him the options that might be available to him'.⁷ DIMIA stated that they wanted to ensure Mr Chen was provided with advice that would offer the full range of possibilities to him.

4.6 Mr O'Callaghan told the committee that a meeting originally scheduled with Mr Chen on 27 May did not proceed as Mr Chen called at about lunchtime on that day to cancel the meeting.⁸

31 May 2005 Meeting

4.7 On 31 May 2005, Mr Chen was interviewed by a Senior Protocol Officer from DFAT, Canberra, the NSW Deputy State Director and Ms Lindsay.

Did DFAT encourage Mr Chen to return to and contact the consulate

4.8 According to Mr Chen's submission, the DFAT Protocol Officer:

Indicated to Mr Chen that his application for political asylum was rejected for foreign affairs reasons. She repeatedly stated that a diplomat at the end of his term should return home to their country. She repeatedly invited Mr Chen to reconsider his defection from the Chinese Consulate, informing him that the Consul-General and Mr Zhou, the Consulate's Protocol Officer were very worried about him. She told Mr Chen that he had a successful diplomatic career. She implied that a few days away from the Consulate amounted to nothing. Three times she asked Mr Chen to allow himself to be persuaded and to consider what she had said. Mr Chen again indicated that he wanted to apply for a protection visa.

Mr Chen explained how he was persecuted and why he left the Consulate. He explained the persecution to death of his father in the PRC when Mr Chen was aged three. He stated he believed the reason for his father's death was the 'evil political system'. He explained that he had witnessed and participated in the pro-democracy movement in 1989. He helped Falun Gong practitioners during his posting to Sydney and was afraid, should he be returned to China that he would be persecuted. He stated that the Chinese Government would not believe that he had not leaked confidential information. Mr Chen discussed the Lan kidnapping incident in some detail. Mr Chen stated that he was worried about his life...

Mr Chen was encouraged to consider applying for a tourist visa. Mr Chen took the requisite form, but indicated that he would not consider a tourist visa. The DFAT Protocol Officer told Mr Chen that a protection visa was extremely impossible. There was a limited number of successful cases. At

7 *Committee Hansard*, 25 July 2005, p. 80.

8 *Committee Hansard*, 25 July 2005, pp. 60-61.

the end of the interview Mr Chen was also given the Protection Visa application forms.⁹

4.9 Mr Chen's submission further asserts that:

On 31 May, DFAT and DIMIA officials attempted to persuade Mr Chen to return to the PRC consulate (avail himself of the protection of that country) and in so doing, we submit, increased Mr Chen's fears that he would be refouled. The depth of this fear is evidenced by the fact that on 4 June he wrote to the USA Embassy in Australia outlining his predicament and expressing his fear that the Australia government would probably refuse to offer him protection.¹⁰

4.10 Mr Chen told the committee:

Then I was forced to choose to apply for an onshore protection visa. The protocol officer actually persuaded me to consider it just a little bit. She repeatedly asked me to return to the Chinese Consulate and she told me that the Consul-General and Mr Zhou, who is known as the protocol officer in the Chinese consulate in Sydney, were very worried about my family and wanted to contact me and asked me to contact them. I said, 'No, I don't want to contact them.'

Even when the interview finished the senior protocol officer said, 'Please contact them'. She said they were worried about me and asked if she could transfer a message to the Chinese consulate in Sydney. I said, 'No'. At first I said, 'as you like,' but then she asked again and I said I would prefer it if she did not. She asked how many days I had left at the Chinese consulate and said it was quite normal for a consul who was not working to just return to the consulate, indicating it seemed that nothing had happened and that it was just as if I has gone for a holiday. She said: 'you have a successful career and you have been promoted to first secretary. At the end of your term you should return to your home country'. I said, 'No, you cannot understand it.'¹¹

Mr Chen further told the committee:

In the middle of that interview I told the senior protocol officer: 'Madam, you have repeatedly talked about your view and it seems that you are not helping me. It seems that you are repeatedly asking me to return to the consulate.'¹²

4.11 DFAT provided a different interpretation of the meeting:

An officer from DFAT Protocol Branch attended this meeting to outline to Mr Chen the normal processes on the completion of an officer's posting. As

9 *Submission 7 (RACS)*, p. 7.

10 *Submission 7 (RACS)*, p. 14.

11 *Committee Hansard*, 26 July 2005, pp. 48-49.

12 *Committee Hansard*, 26 July 2005, p. 54.

I noted earlier, Mr Chen was advised of the various options available to him and to consider them carefully – these are the visa options. He was told that there was no guarantee that he would receive a protection visa. Mr Chen was adamant that he would seek a protection visa and was not interested in any other option. So relevant forms were provided to him at that meeting.¹³

However, Mr Chen was subsequently granted a protection visa on 8 July 2005.

4.12 Ms Morton, DFAT, told the committee that:

If a foreign mission has a concern about one of their officials – for example, if he has not turned up for work – they are in fact expected to advise the protocol area of the department. That is usual practice. This had happened in this case. There had been two phone calls about him. She passed this on to Mr Chen and said 'It would be better if you could contact your consulate and tell them that things are all right; you are not having a problem'.¹⁴

4.13 In response to further questions regarding whether it was appropriate to ask Mr Chen to contact the Chinese consulate Ms Morton advised:

It is perfectly explicable that he would contact his embassy and say: 'I am not in any trouble. I am going through some process to stay in Australia.' I do not find that at all reprehensible. I find it absolutely normal that this is what we would encourage a Chinese consular official to do: to stay in touch with his government and advise them that he and his family were fine.¹⁵

4.14 The two versions are again unable to be fully reconciled. It is understandable that the government maintained that it expected and anticipated that this diplomat would, as in the normal course of events, return to China. A full and proper evaluation and assessment by government officers as to why such an expectation should be changed or reviewed is appropriate in the circumstances as presented in this case. It should always be remembered that notwithstanding the evaluation and review undertaken by government officials, Mr Chen was never declared an unlawful non-citizen, steps were taken to preserve his diplomatic passport and visa status and he was subsequently granted a protection visa.

Further contact with Chinese consulate

4.15 DIMIA and DFAT told the committee of further contact with the Chinese consulate.

DIMIA

4.16 Mr O'Callaghan told the committee that the NSW office received two follow-up calls from the Chinese consulate on 27 May, one in the morning to Mr

13 *Committee Hansard*, 26 July 2005, p. 80.

14 *Committee Hansard*, 26 July 2005, pp. 82-83.

15 *Committee Hansard*, 26 July 2005, p. 83.

O'Callaghan's executive assistant. This was the same person that she had called the day before and the executive assistant provided no information. The second call was early evening of 27 May from a different person in the Chinese consulate to Ms June Lee, manager of the detention and removals function in NSW which is someone with whom they have regular contact. Ms Lee then called Mr O'Callaghan who consulted Canberra and passed a message back to Ms Lee which she passed on to the inquirer that they should speak to DFAT.¹⁶

DFAT

4.17 Mr Chen told the committee that during the meeting on 31 May, the DFAT officer:

...gave a kind offer that, because under my current status my visa might be cancelled if requested by the Chinese consulate, she would suggest to the Chinese consulate not to cease my function as consul and maybe give me more time to consider the option of returning of the consulate...She said she would ask the Chinese consulate to consider not to give the note to the Australian government so that the consul status would not be cancelled, because she said that, if my visa status changed, according to Australian law I would be detained in the detention centre because I had no visa status.¹⁷

4.18 The committee was not advised whether this occurred but at no time does it appear that Mr Chen was ever declared an unlawful non-citizen.

4.19 Mr Chen further stated that the DFAT officer told him that she had received a call from Mr Zhou from the Chinese consulate who was worried about him and she asked him to contact the consulate to allay their concerns.¹⁸

4.20 Mr Robinson outlined the DFAT contact with the Chinese consulate:

...on the evening of Friday 27 May, the Chinese consulate general in Sydney, Mr Zhou Yujiang, telephoned the DFAT office in Sydney to advise of their concern that Mr Chen and his family had disappeared and had not been seen or heard from since the day before and to express concern for Mr Chen and his family's welfare. Our Sydney officer advised Mr Zhou on that Friday evening that if he was concerned for Mr Chen's safety he should phone the police or local hospitals. Mr Zhou asked our officer if she would call the police and hospitals for him, to which she replied that the consulate-general should do this in the first instance. This is normal procedure in such cases. Mr Zhou was advised that, if he had any further concerns he should telephone the officer again over the weekend. If not, she suggested that they speak again the following Monday.

16 *Committee Hansard*, 25 July 2005, p. 84.

17 *Committee Hansard*, 26 July 2005, p. 55.

18 *Committee Hansard*, 26 July 2005, pp. 55-56.

On Monday, 30 May at about 10:30, Mr Zhou telephoned the office in our Sydney office again. He advised that Mr Chen was not in hospital and had not reported for work and asked for advice about what to do next. Our officer in Sydney declined to provide any further information and suggested he call DFAT's protocol branch in Canberra. Our protocol branch had earlier told the Sydney office that any matters relating to Mr Chen should be referred to protocol and that no information concerning him was to be discussed with anybody else.

DFAT's Protocol Branch later the same day returned a call from the Chinese consulate-general. The consulate advised that they had subsequently found a letter left by Mr Chen in his apartment. According to Mr Zhou, Mr Chen had written that he was not very satisfied with his job and was not going back to China. Mr Zhou said that, on the basis of Mr Chen's letter, it was clear to the consulate that Mr Chen did not intend to return to his job at the consulate, but the consulate no longer held concerns for the physical welfare of Mr Chen and his family. Protocol noted the information provided by the consulate but declined to provide any further information about Mr Chen.

4.21 Mr Robinson also told the committee:

In the normal course of Protocol's work, there was further contact between Protocol Branch and the Chinese consulate-general on Wednesday 1 June. Protocol reassured the consulate-general about Mr Chen's physical welfare, but no other information concerning him was provided to the consulate-general, including his intentions regarding applying for any visa to stay in Australia. Later that same day – 1 June – an officer from the Chinese embassy in Canberra called on Protocol to inquire about Mr Chen's case. Protocol confirmed that there had been contact with Mr Chen but declined to provide any information about him, including in regard to his intentions or whereabouts.

The next day – Thursday 2 June – Chinese Ambassador Fu Ying approached Mr Downer following a formal meeting in his office with a senior Chinese visitor and asked to speak to Mr Downer about Mr Chen. Mr Downer is already on the public record concerning this meeting. He said that at no time did he or any other DFAT official improperly convey information about Mr Chen.

On 14 June the department received a formal note from the Chinese consulate-general advising it of the cancellation of the diplomatic passports of Mr Chen and his family. DFAT Protocol advised DIMIA that the Chen family diplomatic visas should be cancelled subject to the granting of bridging visas coming into effect at the same time.¹⁹

4.22 Mr Chen confirmed to the committee that it was the DFAT officer who had initially told him that the protection visa was extremely impossible.²⁰

19 *Committee Hansard*, 26 July 2005, pp. 80-81.

20 *Committee Hansard*, 26 July 2005, p. 50.

4.23 Ms Morton from DFAT told the committee that she had spoken with the DFAT Protocol officer, Ms Anne Plunkett, about the meeting on 31 May and explained to the committee that she attended the meeting because 'part of Protocol's role is managing the operational aspects associated with diplomatic and consular corps officials arriving in and departing Australia. That is part of her usual job'.²¹

4.24 Ms Morton further stated:

It is not something that happens every day. We and Protocol were very concerned that Mr Chen understood what he was seeking and the fact that there were other avenues for him to apply to stay in Australia should that be his wish. There is a lot of use of the word 'asylum' in a lot of contexts. He had applied in his letter to be given an instrument to allow him to apply for territorial asylum. Ms Plunkett explained to him that this was not going to be given to him and at that interview there was a range of options presented to him in relation to staying in Australia should he wish to do so.²²

4.25 Ms Morton clarified that the visa options were put to Mr Chen by a DIMIA officer and told the committee:

I do know and I can say that Ms Plunkett has said that during the interview she certainly did not make any statement that a protection visa was extremely impossible. She pointed out to Mr Chen that she could not guarantee that an application for a visa – for a protection visa or for any other visa – would be successful. She also pointed out, which we felt was the right thing to do, that under the legislation a protection visa can be refused on foreign policy grounds. That was pointed out to Mr Chen as a relevant matter that he should take into consideration.

...I think Ms Plunkett's advice to Mr Chen was very sensible advice. The advice was: the Australian government expect diplomats and consular officials to return to their country at the end of their posting; that is our expectation.

...It was explained to Mr Chen that this was unusual, that normally at the end of a posting a diplomatic or consular official would return to their country. If they wish to stay in Australia there were various options that they could pursue and these options were open to Mr Chen. Those options were explained to him by a DIMIA official who is conversant with the Migration Act and the various categories of visa available onshore in Australia or offshore. It was explained to him also by Ms Plunkett that his consulate had rung to inquire whether we had any information about him because he had not turned up for work. This is something that happens in the course of Protocol's work.²³

21 *Committee Hansard*, 26 July 2005, p. 82.

22 *Committee Hansard*, 26 July 2005, p. 82.

23 *Committee Hansard*, 26 July 2005, pp. 82-83.

4.26 Ms Morton summed up for the committee that the 'information was provided to him by the DIMIA officers there at the time and not by the DFAT officers – we are not experts in that'.²⁴

Summary

4.27 The committee was unable to make a judgement on the discrepancies in the accounts of the 31 May meeting. Minority senators consider that in the circumstances Mr Chen was inclined to exaggerate his safety concerns and there is nothing in the nature of clear evidence to suggest that any of those concerns were born out or that he was ever at any risk.

Government response to protection visa application

4.28 On 3 June 2005, Mr Chen presented a Protection Visa application to Ms Lindsay.²⁵ On 8 July 2005, Mr Chen and his family were granted Class XA Subclass 866 protection visas.²⁶

Further Possible breaches - Foreign Minister and DFAT

4.29 The press suggested that Mr Downer may have breached the Migration Act 1958 when he discussed Mr Chen's case with the Chinese Ambassador. Shadow Foreign Affairs Minister Mr Rudd said that Mr Downer needed to provide the public with the assurance there had been no breach of the law.²⁷

4.30 On 15 June 2005, the press reported that the Foreign Affairs Minister, Mr Downer had spoken to Madam Fu Ying about the Chen case during a meeting on 2 June 2005. It asserted that 'His department has also spoken to Chinese officials in Sydney about the matter, but he denied any improper information was exchanged – saying the Chinese had initiated all the contact on the Chen issue'.²⁸

4.31 Further, it was reported that Mr Downer said that he could provide 'an absolute assurance that he had not breached the section of the Migration Act that prohibits the unauthorised disclosure of information identifying an applicant for a protection visa to the government from which protection is sought. Mr Downer said the ambassador raised Mr Chen's case with him briefly after a meeting in his office as she was walking to the door'.²⁹

24 *Committee Hansard*, 26 July 2005, p. 87.

25 *Submission 7 (RACS)*, p.7.

26 *Submission 7 (RACS)*, p.11.

27 *The Australian*, 13 June 2005, p. 5.

28 *The Canberra Times*, 15 June 2005, p. 3.

29 *Australian Financial Review*, 15 June 2005, p. 4.

4.32 Another possible breach was raised in the press by Mr Rudd who said protocols may also have been breached if Chinese Ambassador Fu Ying was correct when she said in the week starting 6 June that the embassy was contacted to inquire what would happen to Mr Chen if he was returned to China.³⁰ (which was after Mr Chen made his position public in any event). In an interview with Lateline, Madame Fu said she had been asked by the Australian government about whether Mr Chen would face prosecution if he returns to China.³¹ When asked about this contact, DFAT said they had already outlined their contact with the Chinese consulate and embassy for the committee and did not make such a request³²

4.33 Mr Downer has denied that he or his department disclosed improper or sensitive information to Chinese officials in Australia about Mr Chen Yonglin.³³ On the face of the legislation concerned and considering objectively the evidence the Committee has received there is nothing to contradict the Minister's position.

Conclusion

4.34 There are discrepancies surrounding the events which occurred on 27 May to 3 June 2005 when Mr Chen lodged an application for a protection visa. The discrepancies in accounts of the meeting on 31 May have been outlined and the minority senators are unable to definitively state which account is correct although it should be remembered that the officials have no apparent motive or benefit in providing the committee with other than the truth.

4.35 Mr Chen expressed concerns for his safety. These claims not completely denied or contested by DIMIA or DFAT. There can be no doubt that they were made aware of Mr Chen's concerns on more than one occasion. Indeed Mr Chen's whole application and all of his conduct is founded upon the notion (and probably had to be) that there are real reasons and circumstances for him to fear for his safety. It appears that these officials required clear evidence to support Mr Chen's allegations and were to some extent contented when such evidence did not materialise. To some extent their position is understandable in the circumstances.

30 *West Australian*, 13 June 2005, p. 4.

31 Transcript, Lateline, 6 June 2005, accessed at <http://www.abc.net.au/lateline/content/2005/s1385925.htm> on 4.8.05.

32 *Committee Hansard*, 8 August, p. 65.

33 See *The Age*, 15 June 2005, p. 4; the *Australian Financial Review*, 15 June 2005, p. 4.

Chapter 5

Mr Chen's claims and support for them

Mr Chen's claims

5.1 On 26 May 2005, Mr Chen left two letters at the DIMIA security desk outlining the reasons for his request for political asylum and detailing his claims. A summary of the claims is as follows:

- In his role as Consul for political affairs, Mr Chen has been in charge of implementing the PRC Central Government policy in relation to the Five Poisonous Groups (Falun Gong, pro-democracy movement activists, pro-Taiwan independence force, pro-Tibet separation force and Eastern Turkistan force). In particular, he has been required to persecute Falun Gong practitioners overseas;
- While in Australia, Mr Chen has assisted Falun Gong practitioners to avoid persecution in China;
- He is fearful that these activities undertaken over the last 4 years and 1 month will be discovered by his successor at the PRC Consulate-General in Sydney;
- Mr Chen has assisted Falun Gong practitioners to avoid persecution because the PRC Central Government's policy is against his conscience and will. Mr Chen believes that Falun Gong is a vulnerable, innocent social group in need of help, not persecution;
- Mr Chen is distressed that he has been working for an authority which has unjustifiably placed Falun Gong practitioners in labour camps, jails, forced re-education courses and put un-cooperative practitioners to death; and
- Mr Chen fears that should he return to China, he may continue to be asked to assist in the persecution of Falun Gong. He could not do this, even under pain of death.¹

Persecution in China

5.2 According to the Falun Dafa information centre, 'Falun Gong (or Falun Dafa) is an ancient form of qigong, the practice of refining the body and mind through special exercises and meditation. Since being introduced to the general public in 1992 by Mr Li, Falun Gong has attracted tens of millions of people in over 60 countries'.² This issue is surrounded by intrigue and claim and counterclaim. The Committee did not examine "Falun Gong" in any thorough sense and heard evidence on the periphery of a term of reference directed to Mr Chen. The minority senators consider it

1 *Submission 7* (RACS), pp. 11-12.

2 Australia Falun Dafa Information Centre, accessed at <http://www.falunau.org/aboutdafa.htm> on 14.7.05.

inappropriate to reach any conclusions or to offer any opinion on this subject without a considerable body of evidence being examined.

5.3 The Chinese government does not see the Falun Gong in the same light that its practitioners portray. It has made clear it regards the Falun Gong as an evil and intemperate cult.

Our struggle against Falun Gong is protracted, acute and complicated.³

5.4 In 2002, the Chinese Foreign Minister indicated that in the government's view 'there has been a tendency within the Falun Gong that merits our attention and alert, that is it's turning increasingly violent'. The Chinese government has taken measures to deal with Falun Gong but it states only legal means have been used.⁴ Although the government has said any measures they are taking are lawful, Falun Gong practitioners do not accept this view.

5.5 The minority reiterates that this is a matter largely relevant to a foreign government and therefore inappropriate for comment in the circumstances of this term of reference without considerable further evidence and investigation.

Spying in Australia

Mr Chen also sought to support his application for asylum with allegations of an extensive spy⁵ and information gathering and monitoring network in Australia:

I got the number of 1,000 secret agents and informants from a document and I know that there are two systems operating in the Chinese missions overseas in some important cities like Canberra and Sydney. One is the diplomatic system; the other is the information collection system reporting to the intelligence service of China. When I was working in the Chinese consulate in Sydney, I often accessed reports from Beijing, China, about some activities of dissidents that even we in Sydney did not know about. These were from certain intelligence services that indicated that they were very active in Australia, especially when there was a very senior official or leader visiting Australia including Chairman Li Peng in the year 2002, President Hu Jintao in the year 2003 and, this year, Chairman Wu Bangguo.

3 Luo Gan, member of the Political Bureau of the Chinese Communist Party Central Committee, addressing a national conference of directors of justice departments, 28 December 1999, quoted in a paper by Amnesty International, The crackdown on Falun Gong and other so-called 'heretical organisations' accessed at <http://web.amnesty.org/library/print/ENGASA170112000> on 6.7.05.

4 Chinese Minister for Foreign Affairs, Tang Jiaxuan, meeting with the Australian Minister for Foreign Affairs, Alexander Downer on 19 March 2002, accessed at http://www.dfat.gov.au/media/transcripts/2002/020319_pressconf_formin_china_au on 10.8.05.

5 See *The Australian*, 6 June, p.4; the *Australian Financial Review*, 6 June 2005, p. 8;

They gave all these information alerts. That made it very clear to me that there must be a network operating in Australia.⁶

5.6 Mr Chen repeated these allegations when invited to speak to a US House of Representatives Human Rights Committee:

According to my knowledge, the persecution on the Falun Gong by the Chinese Communist Party is a systematic campaign. All the authorities especially of public security, state security and Foreign Affairs are involved in the persecution... In each Chinese mission overseas, there must be at least one official in charge of the Falun Gong affairs, and the head and the deputy head of the mission will be responsible for the Falun Gong affairs. I am aware there are over 1000 Chinese secret agents and informants in Australia, who have played a role in persecuting the Falun Gong...⁷

5.7 These claims were supported indirectly by other witnesses although, save for Mr Chen, there was virtually no direct evidence of such matters.

Government response to allegations

5.8 Mr Downer has quite properly and reasonably refused to comment on the spy network claims saying that 'it is a time-worn tradition of Australian governments over many years not to get into any discussion about that aspect of intelligence matters'.⁸

5.9 ASIO advised that 'Mr Chen has made allegations in the media that the PRC government has been engaged in foreign interference and espionage in Australia. These allegations are being looked at closely and the Government has given Mr Chen the opportunity to bring forward any information he wishes'.⁹

Harassment of Australian citizens

5.10 Mr Chen's allegations went beyond spying activities to the harassment and intimidation of Australian citizens.

Kidnapping allegations

5.11 Mr Chen alleged that people have been kidnapped from Australia and cited a particular case of Lan Meng. According to the press, Lan Meng was kidnapped by Chinese agents which forced his father Lan Fu to return to China.¹⁰ This case was referred to the AFP for investigation on 9 June 2005 and they were asked to conduct

6 *Committee Hansard*, 26 July 2005, p. 53.

7 Testimony of Chen Yonglin at the United States Congress Committee on International Relations, 21 July 2005.

8 *Canberra Times*, 6 June 2005, p. 3.

9 *Submission 5* (ASIO), pp. 1-2.

10 Transcript, *Lateline*, 6 June 2005, accessed at <http://www.abc.net.au/lateline/content/2005/s1385925.htm> on 4.8.05.

inquiries to establish whether any criminal offences occurred in Australia regarding the allegations of abduction.¹¹

5.12 Ms Russ, Manager Economic and Special Operations, Australian Federal Police, informed the committee that the person who was alleged to have been abducted, Lan Meng, was located and interviewed. Following the completion of inquiries, the AFP concluded that there was no substance to the allegations.¹²[12] Notwithstanding that, Ms Russ confirmed that Lan Meng's statement could not be released to the committee because it contained important and sensitive information obtained during the interview.¹³ This would tend to suggest that Lan Meng was forthright and fearless in "naming names" and tends to refute any suggestion that he was intimidated or fearful and therefore was unlikely to substantiate the kidnapping allegation. The clear and salient point in this substantial allegation is that it was investigated thoroughly by the AFP and found to be baseless.

5.13 Notwithstanding, when Mr Chen was told of the AFP findings, he expressed surprise and questioned whether they had checked all the details. He thought that Chinese secret agents may have threatened Lan Meng. Mr Chen told the committee that Lan Meng's father is still in prison in China serving a life sentence.¹⁴

Other issues raised with the committee

Treatment of Chinese nationals applying for protection

5.14 The minority is however concerned about a number of cases of Chinese applying for protection visas who experienced some delay before being granted the visa. For example, Mr Hao Fengjun, who arrived in Australia and applied for a protection visa in February 2005, was not contacted by any government agencies until he went public on 7 June 2005.¹⁵ Professor Yuan Hongbing, a well recognised participant in the pro-democracy movement, had to wait 12 months to get a protection visa.¹⁶ Notwithstanding, there is no evidence of them being declared unlawful non-citizens and this provides some comfort that whilst delayed, the cases are nevertheless being dealt with sensitively.

Questioning of Chinese nationals by Chinese officials

5.15 Mr Deller, brought to the committee allegations that a number of Chinese nationals had been questioned by Chinese officials at Sydney's Villawood detention

11 *Committee Hansard*, 26 July 2005, pp. 1-2.

12 *Committee Hansard*, 26 July 2005, p. 3.

13 *Committee Hansard*, 26 July 2005, p. 10.

14 *Committee Hansard*, 26 July 2005, pp. 56-57.

15 *Committee Hansard*, 26 July 2005, pp. 68-69.

16 *Committee Hansard*, 26 July 2005, pp. 70-71.

centre in June 2005. He raised the issue that the Migration Act or Refugee convention may have been breached by these actions. Mr Deller told the committee that they have raised the issue with the Minister for Immigration and Multicultural and Indigenous Affairs on 31 May 2005 but have not yet received a reply.

5.16 In response, Mr Hughes, DIMIA, informed the committee:

There was a group of people at Villawood detention Centre many of whom, I am not sure if it was all, had been through visa processes and found not to be owed protection by Australia, so therefore the process was completed. However, they either did not have travel documents that were available to the department or were not cooperating with their removal. So in order to obtain travel documents for them, the removals area of the department has to liaise with the government of their home country about the issuing of travel documents so that the people can travel home. In some circumstances, the government of that country, as in this case, wants to actually be certain that the people are nationals of that country before issuing travel documents and so that is what that particular process was about. Otherwise, the people concerned would be potentially faced with very long-term detention. Having completed their visa possibilities and not got visas, if arrangements were not made to get them travel documents, they would face prolonged detention.¹⁷

I am advised that we do not give any information about the nature of any application to remain in Australia. We provide the source country with very limited biodata that may help them identify whether or not the person is a national of that country... We have a name and date of birth and some other basic details... but we tell them nothing about any applications that person may have made to stay in Australia or the content of those applications.¹⁸

5.17 Responding to a question regarding whether people who had applied for asylum were interviewed by Chinese officials, Hughes further stated:

I think the statement in the press at the time was that no-one who had not completed the asylum process was interviewed. That turned out to be wrong or partly wrong in one case, where I believe a person was subsequently found to have been finally determined in terms of a departmental and RRT decision but was still in litigation of some form, and the minister intervened to allow that person to stay.¹⁹

5.18 In additional information provided by DIMIA to the committee on 16 August 2005, Mr Hughes sought to clarify his answer and advised 'the interviews were conducted by three officials from relevant provincial areas in the PRC. The role of the officials was to assist the PRC Embassy in Australia in verifying the nationality and

17 *Committee Hansard*, 8 August 2005, p. 46.

18 *Committee Hansard*, 8 August 2005, p. 47.

19 *Committee Hansard*, 8 August 2005, p. 47.

identity of those persons in Villawood Immigration Detention Centre who may be from the PRC and who are to be repatriated'.²⁰

Conclusion

5.19 Minority senators acknowledge that these issues are of considerable sensitivity but also note that the allegations are broadly within a particular context. The context is one of a political asylum applicant seeking to advance his application “beyond the point of no return” so to speak. It is clear to the minority that at all times Mr Chen understood the need to render his position so prejudiced as to preclude his repatriation to his former country. It is the fact that he has been successful in that regard, save for the technicality of him being afforded a grant of asylum.

SENATOR DAVID JOHNSTON
DEPUTY CHAIRMAN

20 Additional Information from DIMIA on 16 August 2005.