

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2007 1375 JR**

**BETWEEN**

**B. C.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL (MICHELLE O’GORMAN) AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 12th day of November, 2009.**

1. The applicant is seeking leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendation of the Refugee Applications Commissioner that he should not be granted a declaration of refugee status. Ms. Eilin O’Dea B.L. appeared for the applicant and Mr. David Conlan Smyth B.L. appeared for the respondents. The hearing took place at the Kings Inns, Court No. 1, on the 25th March and 27th October, 2009.

**Factual Background**

2. The applicant is a national of China. The information provided in support of his asylum claim is that he was born in 1983 and completed a four year degree course in electronic engineering in 2002. He says he worked as an electrician or an electrician’s assistant. He has a brother who lives in Ireland. In March, 2002 he obtained a Chinese passport. He applied in Beijing city for a visa to enter Ireland. His problems began in 2004, when he was residing in a house with nine people who practiced Falun Gong. He himself did not practice the discipline but during a police check of the house, Falun Gong books were found beside his bed which belonged to one of his housemates. He says he was taken to a camp where he was severely mistreated and beaten while held for two months. Although he was not believed when he said that he was not a follower of Falun Gong he was not tortured to the same extent as his friends with whom he shared the house. Ultimately, he was forced to sign a document saying he would renounce Falun Gong and was released. After his release he felt he was being followed and his house was visited by the authorities who were able to open locked doors and who kept asking him for information on Falun Gong followers.

3. The applicant therefore fled China in December, 2004. He obtained a visitor’s visa for Cambodia and paid a trafficker to arrange his travel there where he worked illegally for three months. From there he entered Vietnam on a further visitor’s visa. He obtained a forged passport for travel to Russia, where he

remained for ten days before travelling on to Paris where he spent four further months working illegally. He then moved to Belfast where he spent twelve months working illegally in a Chinese restaurant before coming to join his brother in Cork where he spent seven months before applying for asylum.

4. During the ORAC stage of his asylum application, the applicant gave a number of explanations for not applying for asylum in Paris or Northern Ireland, and for waiting seven months before applying in Ireland. He said did not apply for asylum in Paris as he felt France did not have a good human rights record and because it had good relations with China and he was afraid his documents would go back to China and his parents would be involved. His friends told him not to apply for asylum in a country that had good relations with China. The trafficker had organised for Ireland to be his final destination. He did not apply for asylum when in Northern Ireland as he depended on his friend who provided him with work to make enquiries as to how he could make an asylum application but that friend seemed always too busy and delayed. He said he did not apply for asylum after arriving in Cork because he had "a dispute" with his brother who was afraid that the Chinese government would send spies who would send his documents back to China and his parents would get involved in the matter. After considering his brother's concerns for seven months the applicant determined to apply for asylum because he decided to trust that Ireland is a country that protects human rights.

#### **Procedural Background**

5. On the basis of the information given by the applicant the s. 13 report contained a negative recommendation. The ORAC officer found that the applicant did not leave China by reason of his fear of the authorities but rather, to engage in a working holiday. A finding was made under s. 13(6) (c) of the Refugee Act 1996, as amended, i.e. that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State. The consequence of such finding was that the applicant would have a paper based appeal.

6. A Form 2 Notice of Appeal was filed on behalf of the applicant. His appeal was not successful and the ORAC recommendation was affirmed. The negative RAT decision is now the subject of challenge.

#### ***The RAT Decision***

7. The impugned decision commences by summarising the applicant's account and his immigration history. The Tribunal Member then sets out various legal principles and provisions at length, before analysing the applicant's claim. The Tribunal Member noted that the applicant spent time in Cambodia, Russia, France and Northern Ireland before coming to Ireland. She stated that given the applicant's age, education and the fact that he had travelled through and spent time in France and Northern Ireland, it would be expected that if he was fleeing persecution he would have applied for asylum in one of those countries. She also stated that it is reasonable to expect the applicant would have applied for asylum as soon as possible after arriving in Ireland. The Tribunal Member then noted that the applicant was not a Falun Gong practitioner and had signed a document renouncing Falun Gong, that he had not been beaten or re-arrested during the two months between his release and before leaving China, that country of origin information suggests that former detainees who show an inclination for 'causing further trouble' are particularly targeted for monitoring, and that his fear of being persecuted if returned to China was therefore not well founded.

#### ***Extension of Time***

8. The applicant commenced these proceedings two weeks outside of the fourteen

day period set out in s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. In his grounding affidavit the applicant sets out an explanation for the delay. The Court is satisfied that there is good and sufficient reason to extend time and accordingly will do so.

### **The Applicant's Submissions**

9. Ms. O'Dea B.L., counsel for the applicant, argued that although the Tribunal Member set out the law verbatim, she failed to apply it to the facts of the applicant's claim. Her primary complaints about the RAT decision may be summarised as:-

- a. Failure to consider the applicant's explanations for not seeking asylum before coming to Ireland;
- b. Error of law with respect to the direct-flight rule; and
- c. Failure to consider his evidence about his experiences in China.

### **(a) Explanations**

10. Ms. O'Dea argued that the Tribunal Member failed to give reasons for rejecting the explanations given by the applicant in his questionnaire and s. 11 interview as to why he did not apply for asylum in France and Northern Ireland and why he delayed before applying for asylum in Ireland. Those explanations are set out at paragraph 4 above. Ms. O'Dea relied on the decision of Peart J. in *Memishi v. The Refugee Appeals Tribunal & Anor* [2003] I.E.H.C. 65 which confirms that an applicant's evidence can only be rejected for cogent reasons connected to a convention reason. She relied heavily on Professor Hathaway's *The Law of Refugee Status* where he reviewed a number of decisions of the Canadian courts and stated (at p. 50):-

*"[...] the Federal Court's position is that a claimant's credibility cannot be discounted if there is a reasonable explanation for failure to claim refugee status during passage through or sojourn in other countries which adhere to the Convention. The Court has this far accepted as plausible reasons the lack of impending threat of return, a desire to distance oneself from incursions by authorities of the home state, concern regarding the true adequacy of protection, and preference to make a claim in a country in which one's language is spoken. Similarly, one ought reasonably to take account of such factors as desire to be reunited with family, close friends, or an ethnic community; the compatibility of the asylum state with personal needs or goals; and a decision by the claimant to delay seeking status in a country with a fully adequate determination procedure."*

11. Ms. O'Dea argued that the explanations provided by the applicant, as set out at paragraph 4 above, fall within all four of what Professor Hathaway described as "reasonable" explanations.

### **(b) Direct Flight rule**

12. Ms. O'Dea argued that the Tribunal Member erred by applying a direct-flight rule in holding against him because he did not apply for asylum in any of the countries through which he had travelled. She relied on the writings of Professor Hathaway in the 1988 edition of *The Law of Refugee Status* on the subject of delayed applications for asylum and the dangers of impugning the credibility of an applicant who has failed to apply for asylum in the first safe country in which he

arrived without first considering any explanations offered. Ms. O'Dea argued that the applicant's delay in applying for asylum is not necessarily inconsistent with a fear of persecution and was therefore an extraneous consideration. She argued that it has not been accepted in this jurisdiction that one can incorporate an implied direct-flight rule by impugning the credibility of an applicant who has failed to apply for asylum in the first safe country in which he arrived. She submitted that the applicant throughout his questionnaire explained why he did not apply for asylum in France or Northern Ireland and why he delayed in applying in this country, and he said that throughout his journey, his final destination was Ireland.

**(c) The Applicant's Evidence**

13. The applicant was critical of the observation made by the Tribunal Member that the applicant was not a Falun Gong practitioner and that he had not been beaten or re-arrested during the two months after his release and before he left China, and that his fear of persecution upon return was therefore not well founded. Ms. O'Dea noted that it was the applicant's evidence that he felt he was being watched during that time, that people entered his home, and that he was repeatedly asked to provide information on Falun Gong practitioners and to sign papers saying he was sorry for practicing Falun Gong. She argued that this conduct was capable of amounting to persecution and that the applicant's account is supported by objective country of origin information. This, it was submitted, indicated a flawed assessment of credibility.

**The Respondents' Submissions**

14. Mr. Conlan Smyth B.L., counsel for the respondents, pointed out as a preliminary matter that there was no affidavit of translation before the Court and that the applicant was a Mandarin speaker who spoke no English. He argued that the core of the case is that the applicant came to Ireland because his brother is here. His own evidence is that he was aware of the asylum process at all relevant stages.

**(a) Explanations**

15. Counsel for the respondents noted that the Tribunal Member is required under s. 11B (b) of the Refugee Act 1996, in assessing the applicant's credibility, to have regard to "whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence." Mr Conlan Smyth argued that the applicant provided no "reasonable explanation". He submitted that the explanations given by the applicant were somewhat preposterous and quite simply were not reasonable. He argued that the explanation for not applying for asylum in France, which is the cradle of fundamental human rights and the home of the European Court of Human Rights, during the four months the applicant spent there in 2005 – i.e. that France is not a country with a lot of human rights and has good relations with China – was wholly incredible and that it would be ludicrous to expect the Tribunal Member to accept that as a reasonable explanation. Likewise his reasons for failing to apply for asylum in Northern Ireland and for waiting for a period of seven months before applying for asylum in Ireland were unreasonable and provided no genuine explanation.

16. Mr. Conlan Smyth urged the Court to take account of several curiosities in the case which were before ORAC and the RAT: the applicant applied for a visa to enter Ireland in March, 2002, some two years before he had any problems with the police. Another unusual feature is that he was assisted in completing his ORAC questionnaire by Mr. Seán Mulvihill, Solicitor although on his s. 11

interview attendance form it was stated that he was represented by the Refugee Legal Service. Although aware of the fact that the Commissioner had not found his explanations to be credible and even though he knew he would not have an oral hearing before the RAT, he chose not to submit any written statement or affidavit with his Form 2 Notice of Appeal. Instead he dealt with the issue in a very scant fashion in the Form 2, stating only that he worked illegally in order to pay off his traffickers and "*he dealt with asylum genuinely by working illegally*".

17. Another aspect of his evidence which raises questions about its validity is that at his s. 11 interview the applicant said he threw away his original passport at the airport in Vietnam and used someone else's passport to travel to Russia. As the interviewer had his valid passport before him, the applicant then changed his story and said he did not throw his passport away but he had actually arranged for his trafficker to send his passport to his family in China. The applicant then travelled to Russia, France and Northern Ireland using the passport of another person, which he threw away in Northern Ireland. When he was in Northern Ireland he arranged for his parents to send his original passport to him by post.

### **(b) Direct Flight Rule**

18. Mr. Conlan Smyth argued that there was no question of a direct flight rule being applied in this case. He argued that if the jurisprudence of the Canadian Federal Court is to be read as the applicant claims it should, its approach conflicts with the Refugee Act 1996 and the Dublin II Regulation (Council Regulation 343/2003). He relied on a decision of the Canadian Federal Court referred to by Professor Hathaway in relation to an applicant who travelled from Ghana through Togo, Nigeria and Brazil before journeying to Canada where he applied for asylum. Mr. Conlan Smyth noted that none of the factors listed by Professor Hathaway which had been accepted as reasonable explanations by the Federal Court are present in this case.

### **(c) The Applicant's Evidence**

19. Mr. Conlan Smyth pointed out that the applicant does not claim to have fled China in fear of his life and if anything he appears to have suffered harassment rather than persecution. He argued that the Tribunal Member was entirely correct to state that the applicant does not claim to have been a Falun Gong practitioner and that he does not claim to have been persecuted during the two months following his release, and he submitted that the applicant's account accords with the COI which indicates that Falun Gong practitioners are in a difficult and uncomfortable position in China, but it does not suggest that refugee status should be granted to them.

### **The Court's Assessment**

20. This being an application to which s. 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* applies, the applicant must show substantial grounds for the contention that the RAT decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

### **(a) and (b) Relevance of the Applicant's Journey to Ireland**

21. The first thing that has to be said is that this is not a case about any "direct flight rule" but rather it concerns a person who claims to be fleeing persecution in China and who travelled through six countries over almost two years before he finally, after another seven month delay from his date of arrival, sought asylum in the State. It is not a case where explanations for the travel and delay were not considered but where no reasonable explanations were offered.

22. Without repeating what has already been outlined in the facts of the case it must be said that in the immediate aftermath of the relied upon acts of persecution, the applicant spent time in two Asian countries without seeking asylum. No explanation was offered for his failure to seek asylum in Cambodia during the three months spent there or at the airport in Vietnam. No explanation was offered for why he did not apply for asylum in Russia where he spent 10 days. As the applicant does not speak English the language preference explanation provided by many asylum applicants who travel to English-speaking countries was not a consideration.

23. His explanations for not seeking asylum when he arrived in France were correctly described by the respondents' counsel as ludicrous and the only inference that can be drawn is that those explanations were considered inadequate and unconvincing by the Tribunal Member. Perhaps of more importance to the Tribunal Member in rejecting the applicant's reasoning was his explanation that Ireland was always his final destination and hence his four months in France and a one year in Northern Ireland without claiming asylum.

24. The passages relied upon by the applicant from Hathaway were as set out at paragraph 10 above. While this statement of the law remains eminently sensible, it has to a great extent been overtaken by the provisions of the Refugee Act 1996, as amended, the Dublin Convention and Dublin II Regulation, and the *European Community (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006). Section 11B (b) of the Refugee Act 1996 requires a decision maker to consider whether there is any reasonable explanation for an applicant's claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence and s. 11B (d) mandates consideration of "whether the applicant has provided a reasonable explanation to show why he or she did not claim asylum immediately on arriving at the frontiers of the State."

25. An asylum seeker is expected to establish that he / she acted in a manner consistent with a person fleeing persecution. Spending more than two years travelling and working illegally for long periods before a university educated adult finally applies for asylum requires some reasonable explanation. The Tribunal Member's finding that there was no reasonable explanation was in the circumstances inevitable and consistent with the evidence.

### **(c) Ground 3**

26. The next issue for consideration is whether the applicant has identified a substantial ground in relation to the consideration afforded to his evidence relating to events following his asserted release from the detention centre where he had been held as a suspected adherent of Falun Gong. COI quite unequivocally describes an unhappy situation and gross invasions of basic human rights for Falun Gong adherents who practice in public and who refuse to "recant". This is clear from an extract from a Canadian IRB "response to information request" dated the 31st October, 2005 dealing with the situation of Falun Gong followers, which was appended to the s. 13 report. That report notes that former detainees who show an inclination for causing trouble are particularly targeted for monitoring, especially those suspected of holding information which they may wish to send overseas or post on the internet. It notes that the extent of monitoring of former detainees varies according to region and the number of released practitioners in a particular locale. Reference was made in particular to the treatment of practitioners who refused to sign a renunciation. The report indicates that the only difficulty for those who are released from the camps is that

they may face difficulties in obtaining a passport, state housing or a pension, or a work promotion due to the perception that they are troublemakers.

27. The remainder of the COI that was before the Tribunal Member related to the persecution of active Falun Gong practitioners. None of the information indicated that persons who were released from camps after signing renunciation letters were at risk of persecution or even harassment.

28. It is clear that the Tribunal Member took the view that as the applicant said he was not a Falun Gong follower, the risks associated with practitioners would not apply to him. In addition, he had signed a document saying he had given up Falun Gong so that he would be released. In those circumstances it was neither a cynical exercise nor a failure to properly consider information to conclude that the applicant was not at risk of future persecution in China.

**Result**

29. No substantial ground sufficient to set aside the decision of the Refugee Appeals Tribunal has been identified. Accordingly, I **refuse** leave.