

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76544

AT AUCKLAND

Before: M A Roche (Chairperson)
R P G Haines QC (Member)

Counsel for the Appellant: K Gore

Appearing for the Department of Labour: No Appearance

Date of Hearing: 18 & 19 August 2010

Date of Decision: 15 November 2010

REASONS FOR DECISION

INTRODUCTION

[1] This is an appeal against the decision of a refugee status officer given on 28 May 2010, declining refugee recognition to the appellant, a citizen of the Peoples Republic of China.

[2] The appellant arrived in New Zealand on 17 September 2009 after securing a work visa under the Working Holiday Scheme which stipulated that she could not work for the same employer for more than three months. The work permit required her to leave New Zealand on or before 17 September 2010. The refugee claim itself was filed on 28 January 2010. The appellant's case is that as a person who has practised *Falun Gong* both in China and in New Zealand she is at risk of being persecuted for reason of her political opinion or religion.

THE APPELLANTS' CASE

[3] The appellant is a single woman aged in her mid-20s. She is currently

living in Auckland. She is from a city in Liaoning Province, China.

[4] Neighbours of the appellant's family in China have been *Falun Gong* practitioners from at least the mid-1990s. Following the 1999 banning of *Falun Gong* and the suppression of *Falun Gong* practitioners by the Chinese government, those neighbours continued to be practitioners. This led to the arrest and detention of the wife in 2002. She was released after signing a guarantee that she would no longer practise *Falun Gong*. Although thereafter kept under a form of surveillance, she and her husband continued to be practitioners. In approximately September 2005, the appellant's mother started to practise *Falun Gong* with them.

[5] At this time the appellant was attending university and was not living at home. It was on her return home during an academic break in 2005 that she learnt that her mother had become a *Falun Gong* practitioner. The appellant was persuaded to join the *Falun Gong* group now comprising her mother, the two neighbours and several other persons. The appellant has considered herself a *Falun Gong* practitioner from that time.

[6] The appellant's maternal grandmother had been living in the family household from the end of 2003 following a period of severe ill-health. The grandmother also started to practise *Falun Gong* and as a result her health improved to the point that she stopped taking various medications she had previously required.

[7] The other members of the appellant's household were her father and younger brother. The father, while sympathetic and understanding towards the involvement of his wife and daughter in *Falun Gong*, was not himself a practitioner. The appellant's brother was too young to be aware of what was happening.

[8] The group of *Falun Gong* practitioners to which the appellant and her mother belonged practised the *Falun Gong* exercises together. However, they took great care to avoid detection by the authorities, meeting at different homes at 3.30am and practising with lights off, curtains drawn and the exercise music playing very softly. When the appellant was at university the dormitory accommodation she was in precluded practising and for that reason she studied *Falun Gong* texts only. There was only one person (a close friend she could trust) to whom she confided that she was a *Falun Gong* practitioner.

[9] In her evidence the appellant explained that *Falun Gong* practitioners must

'clarify the truth', 'study the *Fa*' (ie *Falun Dafa* literature) and 'send forth righteous thoughts'. "Clarifying the truth" involves alerting the world to the plight of practitioners in China and their persecution by the Chinese Communist Party.

[10] From 2006, on her visits home during university breaks, the appellant and her mother would clarify the truth by distributing "messages" in different forms. This included writing messages on bank notes to the effect that the Chinese Communist Party is evil and urging people to withdraw from it. The notes would then be used when the pair were out shopping. They would also leave "truth telling" stickers on shopping trolleys or on escalator rails in shopping malls. These stickers were about the size of a conventional business card and were made by other *Falun Gong* practitioners.

[11] It was not until March 2008 that problems were encountered by the pair, and even then, the difficulty attached to the appellant's mother as the incident in question occurred at a time when the appellant was living away at university. It was in this month that the mother's two sisters arrived to announce that they had come to take their mother (the appellant's grandmother) back "home". Both the appellant's mother and the grandmother resisted but the two sisters accused the mother of exacerbating the grandmother's medical condition by persuading her to refuse medication.

[12] The dispute escalated to the point that the two sisters made a complaint to the police alleging that the appellant's mother, as a *Falun Gong* practitioner, was refusing to administer the grandmother's medication. When police officers went to the apartment to investigate, they carried out a search for *Falun Gong* materials. In this they were unsuccessful but by deploying police intervention as leverage, the sisters were able to take the grandmother away and she died approximately twelve months later. The appellant believes that the motivation of the sisters was to gain possession of the grandmother's house upon her death.

[13] The authorities having been alerted to the fact that the appellant's mother was a *Falun Gong* practitioner, the family was under suspicion with the result that at least four times a year, on the occasion of big festivals, they would be visited by the police who checked who was present in the apartment. On none of these occasions did the authorities actually enter the home and indeed, on occasion, the family would leave their lights off and pretend not to be at home. The police visits continued into 2009 with regularity. The appellant was not present at all of these visits but does recall being at home on two of them. She acknowledges that

neither she nor her mother have been arrested or taken away for questioning by the authorities.

[14] In late 2008 or early 2009, the neighbours through whom the appellant and her mother had been introduced to *Falun Gong* passed on information they had received from an acquaintance in New Zealand, AA, regarding the New Zealand Working Holiday Scheme which had recently been negotiated. Under this scheme, one thousand places per annum were available to PRC nationals who did not have to satisfy normal New Zealand immigration requirements relating to qualifications or a pre-existing job offer. AA had first begun practising *Falun Gong* in China in 1997 and in 2003, was arrested truth-telling and had consequently served three years' imprisonment. On her release she had moved to New Zealand where she was recognised as a refugee by the Refugee Status Branch of the Department of Labour.

[15] After successfully obtaining a passport, the appellant employed an agent to assist with the New Zealand visa and, as mentioned, she arrived in New Zealand on 17 September 2009. She was met at the airport by AA and has lived in the same household as her since then, along with other *Falun Gong* practitioners.

[16] From the time of her arrival in New Zealand, the appellant has been fully immersed in activities relating to *Falun Gong*. These include:

- (a) Attending "truth clarification" (ie protests) outside the PRC Consulate in Auckland two to three times a month.
- (b) Handing "truth materials" to Chinese tourists at Mission Bay, Auckland every Sunday afternoon. She also engages the tourists in discussion and where opportunity presents, endeavours to persuade them to quit the Chinese Communist Party.
- (c) Attending on a regular basis the Avondale Racecourse where a weekend market is held. It is attended by many Chinese people. Again, in these surroundings she and other practitioners endeavour to "tell the truth" and try to persuade people to withdraw from the Chinese Communist Party. She is involved in these activities most weekends.
- (d) "Truth telling" activities in Queen Elizabeth Square.
- (e) Participation in *Falun Gong* floats at Christmas Parades in Auckland,

Wellington and Christchurch.

- (f) Selling tickets for the Shen Yun Performing Arts Show. While the main purpose of the show is to showcase traditional Chinese culture, all performers are *Falun Gong* members and sections of the performance relate to *Falun Gong*, its tenets and the persecution of practitioners in China.
- (g) Working as a volunteer with a telephone operation which contacts people in China to encourage them to withdraw from the Chinese Communist Party and also tells them the truth about *Falun Gong*. It is an automated service in which telephone numbers in China are selected and dialled randomly. Neither the caller nor the individual receiving the call is able to identify each other.
- (h) Working part time as an unpaid production/lay out editor for the *Falun Gong* publication known as the *Epoch Times* and being involved in its distribution.
- (i) Taking part in a *Falun Gong* protest in Auckland during a visit to New Zealand in June 2010 by the Chinese Vice-President, Xi Jinping. In a TV3 news item about the protest, the appellant can be clearly seen holding a banner and is facing the camera.

[17] The appellant's evidence is that in December 2009, members of the Public Security Bureau (PSB) visited her parents' home and enquired as to her whereabouts and activities. The parents told the PSB officers that their daughter had travelled to New Zealand to work and study. The officers informed the parents that they would be gathering evidence about the appellant's activities overseas. The mother was threatened and warned to be careful. Three such visits occurred in December 2009.

[18] The appellant believes that the authorities are aware of her activities in New Zealand, particularly as a result of her being photographed while practising *Falun Gong* outside the PRC Consulate in Auckland.

[19] It was in these circumstances that the refugee claim was filed on 28 January 2010.

[20] In addition to submitting voluminous country information the appellant called AA who, after detailing the circumstances in which she was recognised in New

Zealand as a refugee, described the circumstances in which she communicated the Working Holiday policy to the neighbours of the appellant and later assisted the appellant with accommodation in Auckland. AA was able to confirm the account given by the appellant of her (the appellant's) activities in New Zealand.

[21] Also called as a witness was BB, a *Falun Gong* practitioner who was subjected in China to "re-education through labour" for two years for attempting to practise *Falun Gong* exercises in public with others and who has also been recognised by New Zealand as a refugee. She confirmed that since September or October 2009, the appellant has been involved in making telephone calls to China encouraging people to quit the Chinese Communist Party and its associated organisations. She also confirmed the appellant's active participation in many *Falun Dafa* activities.

[22] The final oral witness was Max Shen, the chief executive officer for the *Epoch Times* Newspaper, New Zealand branch, who confirmed that the appellant began working for the *Epoch Times* in early May 2010 following her assistance with the promotion of the Shen Yun Performing Arts stage show. The appellant has worked as a page production/layout editor on a voluntary basis.

[23] In addition to these three oral witnesses, the appellant relies on the written statements of further individuals who have been persecuted in China for being *Falun Gong* practitioners and because of their work for the *Epoch Times*.

[24] Perhaps of most significance is a statement by a witness who knew the appellant, her mother and their neighbours in China and who participated in the *Falun Gong* study group which met with the appellant and her mother in the appellant's home. This witness was detained in 2002 and imprisoned for two and a half years for being a *Falun Gong* practitioner.

THE ISSUES

[25] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

[26] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANTS' CASE

Credibility

[27] The evidence given by the appellant and her witnesses was found to be both credible and reliable. It was given in a straightforward manner, without embellishment and with little significant inconsistency. The evidence is also consistent with the voluminous country information to which reference has been made.

Risk assessment

[28] The real issue in this case is whether the appellant's fear of being persecuted reaches the well-founded standard mandated by the Refugee Convention.

[29] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm plus the failure of state protection; *Refugee Appeal No 71427* (17 August 2000).

[30] The Authority has consistently adopted the position taken in the decision in *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted will be well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

[31] The risk to *Falun Gong* practitioners in China has been addressed in several decisions of the Authority, the most significant of which (for present purposes) are *Refugee Appeal No 76323* (30 June 2010) and *Refugee Appeal No 76536* (15 November 2010) which is being published simultaneously with the present decision. The latter decision is possibly the most analogous, the appellant in that case having not only been a *Falun Gong* practitioner prior to her arrival in New Zealand, but also involved in promoting the Shen Yun Performing Arts Group on its visit to New Zealand and involved in the production of the *Epoch Times* in New Zealand. She too participated in a public protest against a visiting senior official of the PRC.

[32] In the current appeal the appellant's case rests on two pillars:

- (a) Prior to leaving China for New Zealand, she and her mother were *Falun Gong* practitioners. Following allegations by the mother's sisters, the mother and other members of the family have been brought to the attention of the authorities and are under a degree of surveillance. The appellant in particular was the subject of three police enquiries in December 2009, the mother being told that the authorities would be gathering evidence regarding the appellant's activities in New Zealand.
- (b) In New Zealand the appellant has continued practising and has taken part in a number of *Falun Gong* activities of a very visible kind. This has included participation in Christmas parades on the North Shore, in west Auckland, in east Auckland, in Wellington and Christchurch, protests outside the Chinese Consulate and protesting at the visit of the Chinese Vice-President. She has actively sought out Chinese tourists and Chinese members of the Auckland community at the Avondale racecourse and at Mission Bay urging them to abandon membership of the Chinese Communist Party. She has distributed the *Epoch Times* and worked part time as an unpaid page production/layout editor. Her participation in the "call centre" operated by *Falun Gong* practitioners has been mentioned as has her assistance in the promotion of the Shen Yun Performing Arts Group.

[33] Of the activities in New Zealand, participation in the telephone campaign, the *Epoch Times* and the promotion of the Shen Yun Performing Arts Group is not,

in the circumstances of the highest significance. More relevant to the risk assessment is the appellant's participation in the other activities described in para (b) of the preceding paragraph (or in the appellant's language, her "truth clarification").

[34] This, coupled with her family's existing profile and the three visits to the family home in December 2009, are of the most significance to the risk assessment. Added to this is the fact that the appellant's mother remains under a form of surveillance in China and the return of the appellant to the family home is unlikely to go unnoticed by the authorities. Finally, the appellant and her mother have shown themselves to be strong and consistent practitioners who are unlikely to desist from the forms of "truth clarification" they have participated in in the past (writing on bank notes, leaving stickers in public places and practising with their neighbours). The appellant can be expected to resume these activities on return to China.

[35] In light of all the above, there is a real risk that following the appellant's return to China, the authorities will detain and question her about her activities in New Zealand. Given the nature of the activities in which she has participated, the depth of her commitment to *Falun Gong*, and current country information about the treatment of *Falun Gong* practitioners in China, it is accepted that such questioning may result in her detention and mistreatment. As noted in *Refugee Appeal No 76536*, country information indicates that rather than any softening of attitude on the part of the Chinese authorities, the repression of *Falun Gong* practitioners in China has increased in recent times. Various reports indicate that a majority of those detained in re-education through labour camps in China are *Falun Gong* practitioners. The treatment meted out in such camps (including the fact of detention in itself) constitutes being persecuted; see *Refugee Appeal No 76536* [56] to [66].

[36] Cumulatively, albeit by a narrow margin, the evidence establishes that the appellant's fear of being persecuted in China satisfies the well-founded standard set by the Refugee Convention, a standard which sits below the balance of probabilities.

[37] In these circumstances there is no need for there to be an examination whether the problems anticipated by the appellant will commence at the airport immediately upon her arrival in China. We are satisfied that the real chance of harm will come into existence, at the very least, upon her return to the family

home. This being a case in which the state is the agent of persecution, it would not be realistic to apply the internal protection alternative.

Convention ground

[38] As explained in the related decision of *Refugee Appeal No 76536* at [100] – [102], the most appropriate and relevant Convention ground on the present facts is political opinion.

CONCLUSION

[39] In the circumstances the appellant is recognised as a refugee. The appeal is allowed.

“M A Roche”

M A Roche
Member