Neutral Citation Number: [2004] EWCA Civ 1441

Case No: C4/2003/2668

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2004

Before :

LORD JUSTICE BROOKE
(vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE POTTER
and
LORD JUSTICE CLARKE

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Between :

L (China)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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Martin Soorjoo (instructed by **Thompson & Co**) for the **Appellant**
Michael Fordham (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date : 21st September 2004

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Judgment

Lord Justice Brooke : This is the judgment of the court.

1. This is an appeal by L against a determination by the Immigration Appeal Tribunal ("IAT") dated 21st October 2003 whereby it allowed an appeal by the Secretary of State against the decision of an adjudicator dated 27th January 2003. The adjudicator for his part had allowed the appellant's appeal against the decision of the Secretary of State dated 27th August 2002 to refuse her leave to enter this country and to refuse her asylum and human rights claims. The Secretary of State was not represented before the adjudicator.

2. The appellant is a single woman who is now 30 years old. She is a citizen of China. She left that country on 16th July 2002 and arrived here by air the following day. Although the IAT was minded to overrule some of the adjudicator's findings of fact, it decided to consider the legal issues arising in this appeal on the basis of the adjudicator's findings, for reasons we will explain (see para 13 below).

3. The adjudicator in essence accepted what the appellant told him. She lived in a Chinese city where she was introduced to the practice of Falun Gong by a friend in 1998. Once within the Falun Gong movement she joined in demonstrations; practised Falun Gong in public places with others; recruited new members; helped to organise meetings and demonstrations; organised people who sold pamphlets and literature; and assisted in the arrangements for people to come and practise Falun Gong.

4. She attended all the local meetings and demonstrations from July 1999 onwards, and although the police tried to break them up, she always managed to escape arrest. In January 2002, however, she was arrested while she was watching others practising Falun Gong in a park in her home city. She was then detained in cramped, unsanitary and rudimentary conditions in a re-education centre for three days, with little food and water. While she was there she was beaten and berated for up to ten hours each day. After money was paid to secure her release, she was set free with a warning concerning her future conduct.

5. This incident instilled in her a greater determination to promote the cause of Falun Gong. To this end she increased her activities on their behalf, distributing pamphlets and leaflets or arranging their distribution and sale. Five months later she was attending a Falun Gong gathering in her home city when she was arrested again. There was an unresolved discrepancy in her evidence as to whether she was detained for a week or for nearly a month on that occasion. At all events she was beaten and badly treated, and when she was released she was told that if she was arrested again she would be detained and treated far more severely. As things stand, she is not obliged to return to the police station and is not on a list of wanted people.

6. It was this second arrest which led to her flight to this country where she sought asylum on arrival. Although she considered moving to another part of China, she would have had to go through a registration process and she believed that the authorities there would know of her earlier Falun Gong activities and would treat her severely if she continued to practise them.

7. The adjudicator received objective country evidence in the form of a Country Information and Policy Unit ("CIPU") report to the effect that Falun Gong was a banned organisation in China and that there was clear and increasing evidence of practitioners being arbitrarily arrested and detained, and of their suffering inhuman and degrading treatment whilst in custody. Her appeal was based on the proposition that if she were to be taken into custody once more, given her interest and activity within the movement, she would be liable to further persecution and breach of her human rights.

8. The adjudicator found that she was indeed a Falun Gong practitioner and that she was indeed detained and ill-treated in detention on two occasions. He found that the objective material before him pointed to an increased crackdown on the Falun Gong movement by the Chinese authorities, and he accepted the appellant's reasons for saying that an internal flight alternative was not a viable option. He found that she was more than a mere practitioner of Falun Gong and that she supported the movement in some measure, by arranging and leading practice sessions on a day to day basis.

9. Against the background of these findings he was satisfied that she would be the subject of ill-treatment for participating in those activities if she was returned, and that this ill-treatment would amount to persecution. He said she had made out her case on the basis of her membership of a social group, rather than on grounds of religion. He went on to hold that she had made out her case under Articles 2, 3 and 5 of the European Convention on Human Rights but not Article 9. He did not consider that the "question of religion or conscience" applied in this case.

10. The Secretary of State's appeal to the IAT was based on two grounds. He challenged the adjudicator's findings on credibility, asserting that the adjudicator had not taken into account certain discrepancies in the appellant's evidence. And he disputed the reasonableness of his rejection of an internal flight alternative.

11. At the outset of the appeal hearing the IAT raised two further matters of its own motion. The first was the question whether L would be at risk on her return, given her own evidence that she was not wanted in China. The second, which took up most time on this appeal, was whether the adjudicator had erred in defining the Refugee Convention reason as relating to membership of a "social group" rather than "membership of a particular social group", and whether he had also erred by not identifying the "particular social group" which applied in this case.

12. The appellant's solicitor confirmed that he was ready to address the Tribunal on these additional issues, and the hearing proceeded. As things turned out, it is a matter of regret that a point of such difficulty has reached this court following a one-sided hearing before the adjudicator and without the parties having had the opportunity to prepare arguments on this important issue in advance of the hearing before the IAT.

13. The IAT determination falls into three parts. In paragraphs 1-10 it stated succinctly what the case was all about, the course of proceedings before the Adjudicator, the grounds of appeal (including the two extra issues it introduced), and the submissions it received from the parties. In paragraphs 11 to 13 it considered the Secretary of State's original grounds of appeal and concluded that

the adjudicator's credibility assessment was unsafe. It wondered whether this meant that it ought to remit the appeal for a fresh hearing, but as we have said (see para 2 above), it concluded that no purpose would be served by remitting the appeal because it was able to determine it "taking the claimant's evidence at its highest". It added the caveat that this was not to say that it accepted the truth of her account.

14. In paragraphs 14-19 it gave its reasons for making findings adverse to the appellant on both the new points it had identified. It found that the adjudicator's finding that there was an acceptable Refugee Convention reason for fearing persecution was plainly wrong. And it considered that because the adjudicator did not take into account the appellant's own evidence that she was not wanted by the Chinese authorities, he was also wrong in his approach to what it called the internal flight option. We will describe its reasons for these conclusions after we have said a little more about the facts.

15. Apart from the appellant's two brief statements, the evidence about the Falun Gong movement and its treatment by the Chinese authorities could be found in the following documents that were before the court.

    i) Chinese Country Report (CIPU, October 2003)

    ii) US Department of State Country Reports on Human Rights Practices in China (2001 and 2002)

    iii) Amnesty International Reports on China (2002 and 2003)

    iv) Six short reports drawn from the Internet (1999-2002)

    (v) "Dangerous Minds" (Human Rights Watch and Geneva Institute of Psychiatry, 2002) Chapter VIII.

    This evidence ran along the following lines.

16. Falun Gong means "the law of the wheel". The movement was founded in 1992 by a man named Li Hongzhi. It was developed from a traditional form of Chinese martial arts called qigong. Qigong contains elements of philosophy, with an emphasis on self-realisation and spiritual development, and Falun Gong blended these components with elements of Buddhist and Taoist teachings. It promises better health and happiness to its adherents, who learn to practise five main exercises, which encompass 20 different movements, preferably to the accompaniment of special music. These five exercises are:

    i) Buddha showing a thousand hands

    ii) The Falun standing stance

    iii) Penetrating the cosmic extremes

    iv) The great heavenly circuit

    v) Strengthening divine powers.

17. Most of its adherents were middle-aged and middle class, and until the authorities drove the movement underground they would gather in parks and open spaces to practise traditional meditation and breathing exercises, which are similar to tai-chi. There were no arrangements for formal membership of the movement, and no membership lists. The symbol of the movement (the Wan) was a golden yellow right-hand swastika symbol on a red circular background within a larger circle with a further Wan at the cardinal compass points. In one Chinese province in 1998 a survey showed that 70% of its followers were women, and over 50% more than 50 years of age.

18. Li Hongzhi had a unique status as the principal teacher and final arbiter of Falun Gong doctrine. The Bible of the movement is Zhun Falun, a book which has now been translated into several languages. At first the movement was warmly received, but by 1995 the authorities in one Chinese province had taken action to stop it spreading. In July 1996 the Falun Gong was banned, and in February 1997 Li Hongzhi was formally expelled from the China Qigong Science Research Association and applied for asylum in New York. He and his family are believed to be in hiding somewhere in the United States, and they have not returned to China since then.

19. L first encountered the movement in 1998, and has practised Falun Gong ever since. She says that its basic beliefs are truthfulness, compassion and forbearance, and she also believes that it is good for its adherents' spiritual health and harmony. In particular it will lead them to a good and bright state of stability of mind and make them physically fit.

20. It was not until 1999 that the Chinese authorities sought to proscribe the practice of Falun Gong in a heavy-handed and sometimes brutal way. The escalating campaign of official criticism of Falun Gong and its leaders led to a series of protest meetings in different Chinese cities, culminating in a silent day-long vigil by over 10,000 people on 25th April 1999 outside the headquarters of the Chinese communist party in Beijing. The scale of these protests appears to have taken the authorities by surprise, but they retaliated three months later when "dozens" of the leading organisers and practitioners of Falun Gong were rounded up by the police on the night of July 19th-20th. Two days later the movement was formally banned.

21. The official reason given for the ban was that Falun Gong was a cult which undermined the ancient spiritual discipline of qigong and posed as a religious organisation. Although the criminal law already legitimised the suppression of "heretical cult organisations", in October 1999 the Standing Committee of the National People's Congress issued a proclamation in the following terms:

> "Heretical cult organisations shall be resolutely banned according to law, and all of their criminal activities shall be dealt with severely. Heretical cults, operating under the guise of religion, qigong or other forms, employ various means to disturb social order and jeopardize people's lives and property and economic development, and they must be banned according to law and punished severely."

22. It is unnecessary for the purposes of this judgment to describe in any great detail the scale of the crackdown. The US State Department's report for the year 2001 recorded evidence from various sources to the effect that thousands of Falun Gong adherents had been arrested, detained and imprisoned, and that at least 200 had died in detention since 1999. There were numerous credible reports of practitioners being abused by the police and other security personnel and their ill-treatment included beatings, detention under extremely harsh conditions, and torture. It was said that the atmosphere created by the nationwide campaign against Falun Gong had a spillover effect on unregistered churches, temples and mosques in many parts of China.

23. The equivalent report for 2002 took up the story. It recorded that the Government crackdown had continued, and that thousands of protesters were detained in prisons, labour camps providing "extrajudicial re-education", psychiatric institutions, or "special deprogramming centres". Falun Gong adherents were said to have conducted far fewer public demonstrations than in previous years, a matter attributed to the effectiveness of the crackdown. A Human Rights Watch report concluded that after September 2001 Falun Gong had been forced to go totally underground in mainland China.

24. The movement continued to thrive outside China, however. One estimate suggested that it had attracted 100 million adherents on a worldwide basis, of whom 30% were outside China. Extensive use was made of Internet websites for publicising the benefits attributed to Falun Gong, and a BBC report in 1999 suggested that there were teaching centres in almost every city in China. From time to time enterprising Falun Gong adherents interfered with domestic broadcasts transmitted to China by satellite in order to publicise the movement, and in 2001 heavy prison sentences were handed down to people convicted of interfering with cable TV systems in order to give publicity to the movement.

25. The question the IAT asked itself was whether membership of the Falun Gong could be equated with membership of a particular social group within the meaning of Article 1A of the Refugee Convention. The IAT considered that it could not, because members of the Falun Gong possessed no immutable characteristics. Membership is a matter of choice, and a person can become a member and then cease to be a member at any time. The fact that members of the Falun Gong were persecuted could not itself qualify them for this purpose as members of "a particular social group", because it has been repeatedly stated that the particular social group must exist independently of the persecution. The adjudicator's finding that L would not be persecuted on the grounds of religion had not been challenged on appeal, and L could not therefore show that as a member of Falun Gong she shared characteristics with other members "which it is beyond her power to change or is so fundamental to her identity or conscience that she ought not to be required to change it".

26. It is clear from its reasoning that the IAT was familiar with the test it had to apply. As a matter of English law the governing principles are most conveniently to be found in the speech of Lord Steyn in *R v IAT ex p Shah* [1999] 2 AC 629 and in the determination of the IAT in *Montoya* (Appeal No OOTH 00161), where certain basic principles were set out in a summary accepted by this court to be

"broadly correct" on the later appeal in that case (see [2002] EWCA Civ 620 at [15], [2002] INLR 399,412).

27. The test applied by the IAT was ultimately derived from the decision of the Board of Immigration Appeals in the US case of *re Acosta* (1985) 19 I & N 211, 233, which was cited with approval by Lord Steyn in *Shah* (at pp 640-1). In Montoya the IAT explained the second part of this definition as meaning a characteristic that is "one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements".

28. In arriving at this definition the IAT derived benefit from the formula proposed by La Forest J in the Supreme Court of Canada in *Attorney General of Canada v Ward* (1993) DLR (4^{th}) 1, 33-34:

> "… groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association."

The IAT in *Montoya* placed emphasis on "core human rights entitlements", a phrase which echoes the phrase "fundamental to … individual identities or consciences" adopted by Pill LJ in *Ouanes v Home Secretary* [1998] 1 WLR 218, 225. A potential breach of any of the rights identified in a human rights convention will not suffice: something more is required. As the Appeals Board in *Acosta* said:

> "refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."

29. Mr Soorjoo, who appeared for L, suggested to us that some lower threshold test might suffice. He sought to derive assistance from the UNHCR's May 2002 Guidelines on International Protection (HCR/GIP/02/02), particularly where it is suggested (in para 3) that the term "membership of a particular social group should be read in an evolutionary manner open to evolving human rights norms". We do not see that it is open to this court to depart from the guidance given by the House of Lords in *Shah*, by which we are bound.

30. Mr Soorjoo also placed reference on the judgment of Dubé J in the Federal Court of Canada in *Hui Qing Yang v Minister of Citizenship and Immigration* [2001] FCT 1052 at [24] - [25]. After referring to La Forest J's definition of the relevant category of particular social group (see para 28 above) Dubé J said:

> "24. Falun Gong would fall under [this] category. The members voluntarily associate themselves for reasons so fundamental to their human dignity that they should not be forced to forsake the association. The [Immigration and Refugee] Board excluded the applicant from the definition as it concluded that forcing the applicant to disavow her attachment to Falun Gong would not involve giving up something fundamental to her human dignity.

> 25. The Board stated that in its view this is one organization from which the claimant can and should be expected to disassociate herself. That remark flies in the face of the applicant's opinions and beliefs. The evidence shows that the applicant took up the practice of Falun Gong because she was depressed to the point of being suicidal. Through Falun Gong she recognized the true meaning of life, enriched her culture and improved her health. She said that following Falun Gong gave her spiritual trust and made her life happier. Finally, group practice is a key part of Falun Gong. Together, the participants can share information, encourage each other and support each other just like Christianity…if a person go to attend a church [sic]."

This was the only case we were shown in which on the evidence a court had decided that the "particular social group" categorisation in the Refugee Convention was relevant in a Falun Gong case. Dubé J also found that Falun Gong was a religion within the meaning of the Convention, a proposition expressly disavowed by L in the case before us.

31. In *NACR of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 318, the majority of the Federal Court of Australia held that the Refugee Review Tribunal was entitled to find on the evidence that ordinary practitioners would be able to practise Falun Gong in private, if returned to China. Lee J, dissenting, considered that the matter should be remitted to the Tribunal for further findings on an issue that is not relevant in the present appeal, but in the course of his judgment he said that if a committed practitioner evinced an intention to practise Falun Gong in public, if returned to China, different issues would arise in contrast to those that arose on the appeal before him. In this context he cited certain observations made by Sedley LJ in *A v Secretary of State for the Home Department* [2002] EWCA Civ 1171 at [2], [14] and [17]. Although the appellant had averred that he had a well-founded fear of persecution because of his membership of a particular social group, the only member of the Federal Court of Australia who referred in his judgment to a particular Convention ground for persecution was Lee J, who in para 33 said that the material before the Tribunal established that the reason why the followers of Falun Gong had been persecuted in China appeared to be "imputed political opinion".

32. This was the ground on which asylum was granted by the Refugee Status Appellate Authority of New Zealend in *Refugee Appeal No 74477/02*, but in that case the appellant, who had escaped from custody after being detained for printing Falun Gong materials, was being introduced to Christianity and did not wholly commit himself personally to further involvement in Falun Gong.

33. Mr Fordham, who appeared for the Secretary of State, accepted that on appropriate facts a member of the Falun Gong might properly be held to have a well-founded fear of persecution in China on the grounds of imputed political opinion. In our judgment this would be the better approach to such a case, at any rate on the evidence relating to the Falun Gong which is before us. We are not prepared to accept that authoritarian pressure to cease the practice of Falun Gong

in public would involve the renunciation of core human rights entitlements. As the IAT observed, the Falun Gong has no membership lists. Anyone can become a member or cease to be a member at any time and practise Falun Gong exercises by him/herself in the privacy of his/her home without significant risk of being ill-treated. We were unwilling to entertain argument on this appeal about the possibility of Falun Gong qualifying as a religion. A court would have to understand a great deal more about it than is contained in the papers at present before us before it could be ready to go down that route.

34. A problem has arisen on the facts of this case, however, which requires us to remit it to the IAT. We were told that it was L's case before the adjudicator that if she were to be returned to China she would continue with her Falun Gong activities which we described in paragraph 5 above, and that the IAT failed to appreciate this. As we have said (see para 1), the Secretary of State was not represented before the adjudicator, and both L and her solicitor have filed witness statements since the hearing before the IAT attesting to this fact.

35. Since the IAT decided the "internal flight option" part of the appeal on a different factual basis (see para 14 above) we must remit this case to a differently constituted panel to reconsider the matter. At the new hearing the IAT will be at liberty to revisit the Secretary of State's original grounds of appeal, if it considers it fair to do so, and the appellant will be at liberty to advance arguments based on "imputed political opinion" if she believes that the evidence before the adjudicator would sustain such arguments. We have already expressed our view that a great deal more material would have to be placed before a court before it could seriously entertain the idea that Falun Gung might be a religion within the meaning of the Refugee Convention, and L has expressly disavowed any such suggestion in her own case.

36. We therefore direct that the appeal be allowed and the case be remitted to the IAT for the purposes set out in paragraphs 34-35 above.