

**AT AUCKLAND**

<b>Appellant:</b>	<b>AJ (China)</b>
<b>Before:</b>	C M Treadwell (Member)
<b>Counsel for the Appellant:</b>	C Curtis
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	1 August 2011
<b>Date of Decision:</b>	26 January 2012

---

**DECISION**

---

**INTRODUCTION**

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining to grant refugee status or protected person status to the appellant, a citizen of China.

[2] The crux of the appeal is that the appellant is a Falun Gong practitioner, who says he is at risk of detention and mistreatment in China for his activities both in that country and in New Zealand. The primary issues for determination are whether his account is credible and, if so, whether he is of such adverse interest to the Chinese authorities that there is a real chance of him suffering serious harm if he returns there.

[3] For the reasons which follow, his account is found to be credible and his fear to be well-founded.

[4] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

## THE APPELLANT'S CASE

[5] The Tribunal heard from the appellant, his wife BB, three Falun Gong practitioners, CC, DD and FF, and from the appellant's employer GG. The account which follows is that given at the appeal hearing. It is assessed later.

[6] The appellant is a 38 year old man from Liaoning Province in the north of China. He is the only child of his parents, who are now retired. They continue to live in China.

[7] The appellant was a carpenter employed by a work unit (*dan wei*) in his city. He married in 1995 but was divorced in about 2000. He was left with custody of his son, who is currently residing with the appellant's parents.

[8] In mid- 2003, the appellant went to a friend's house for dinner. There, he met AA, a former soldier who had recently been released after serving six months in a re-education through labour (*lao jiao*) camp for having openly promoted Falun Gong at a local meeting of the Chinese Communist Party. On release, AA had been dismissed from the army, with the loss of all benefits.

[9] The appellant listened to AA's account of Falun Gong with interest. He was attracted to the idea that it taught selflessness and tolerance. He was concerned at the mistreatment of practitioners by the government which AA described and was given a book to read on Falun Gong.

[10] Soon thereafter, the appellant began trying to learn the Falun Gong exercises at AA's house. He would practise weekly or fortnightly. He talked to his mother about the health benefits. She was interested but his father was not.

[11] One day in late 2003, AA asked the appellant to drive him to Dalian city – some 300kms away – to collect some boxes. The appellant did so and they met a man with a cart at a pre-arranged point. AA took delivery of three boxes which, the appellant was concerned to discover, contained a quantity of booklets and CDs about Falun Gong. They returned without incident to Dandong.

[12] In Dandong, AA distributed the materials to others. The appellant did not assist him in this because of his fear of the authorities and the banned status of Falun Gong. He did take some of the materials home for himself but thinks that his mother later threw them out.

[13] The appellant and AA made two further trips to Dalian in early 2004, for the same purpose. Again, the trips were made without incident. Thereafter, the appellant did not take part in any further trips because he was increasingly concerned about the risk.

[14] A year later, in March 2005, AA was arrested for distributing Falun Gong materials. The appellant learned of his arrest from AA's wife. Thereafter, the appellant stopped practising Falun Gong.

[15] AA was sentenced to two years' imprisonment. On hearing this, the appellant became concerned for his own safety, fearing that AA would reveal his connection to the appellant. He resolved to leave China and began looking for a way to leave.

[16] In the interim, in March 2006, the appellant married BB, a woman with a young daughter.

[17] In October 2006, the appellant was issued a work visa for New Zealand. Apart from some brief questioning at the airport, he had no difficulty in leaving the country. He does not know why he was questioned.

[18] The appellant arrived in New Zealand in November 2006 and began living in Christchurch, where he had found work as a carpenter. He would occasionally practise Falun Gong exercises at home, alone.

[19] On 28 December 2006, two Public Security Bureau ("PSB") officers visited the appellant's family home in Dandong, wanting to speak to the appellant about a "minor case". The appellant's father told them he was in New Zealand. They returned the next day and told the appellant's parents that they had verified this and that they wished to know whether the appellant practised Falun Gong and whether he had any Falun Gong materials. The appellant's parents were warned to have nothing to do with Falun Gong.

[20] The appellant did not learn of these visits to his family home until his wife BB was able to join him in New Zealand in December 2007, a year later.

[21] BB returned to China in mid-2009, because the appellant wanted to return himself to visit his family, but needed to know whether there was any risk if he did so.

[22] BB re-entered China without difficulty but, some weeks later, PSB officers came to the appellant's parents' house, where she was staying. They asked after the appellant and again stated that they wished to talk to him about a "minor matter". As before, they returned the following day. This time, they searched the house.

[23] The next day, the appellant received a fax from his mother, sent from her workplace. She told him to cancel his ticket to return home because the police were still looking for him.

[24] The appellant duly cancelled his ticket and did not return to China.

[25] Following his decision not to return to China, the appellant decided to start practising Falun Gong openly. He knew of a group who practised near a supermarket and so joined them on Saturdays and Sundays and attended lessons with them once a week. He would spend several hours each weekend distributing Falun Gong literature to passers-by in the Square and would talk to Chinese tourists about the benefits of Falun Gong. He also tried to persuade Chinese people at work and elsewhere to resign from the Communist Party. Several people did so at his urging.

[26] In mid-2009, BB returned to New Zealand with her daughter. The family all participated in a 2009 Christmas parade, on a Falun Gong float.

[27] In March 2010, on the advice of other Falun Gong practitioners, the appellant lodged a refugee claim. Since then, he has continued to practise Falun Gong openly and to engage in public protests against the mistreatment of Falun Gong practitioners in China. He took part in such a protest in April 2010. He has also taken part in protests on Falun Gong Days every May and July. On such occasions, he distributes materials to the public and sits in protests with banners and posters, informing the public of the mistreatment of practitioners in China. Such protests have taken place in front of a Chinese supermarket and in the Square. Since the earthquakes in Christchurch, he and the other practitioners have moved their weekend practices to a park.

[28] The appellant has often been photographed by Chinese persons while practising Falun Gong in public. He cannot say whether they are innocent passers-by or people from the Chinese embassy.

**Evidence of BB**

[29] BB confirmed that she had met and married the appellant in China. Each had a child from a previous relationship.

[30] At the time they met, the appellant was already making plans to go overseas. It was an idea which BB had long wanted to pursue herself and, though the appellant had told her of his intent to go overseas, she was content to marry in the hope that he would then be able to arrange for her to join him.

[31] BB had not been aware of the appellant's interest in Falun Gong before he left China. He had kept it from her because it was a banned practice and he had been worried that she might not approve. He told her for the first time when she joined him in New Zealand.

[32] After BB had returned to China in 2006, the PSB came to the appellant's parents' house, where she was staying. She was chatting with the appellant's mother when the appellant's father answered a knock on the door. Two PSB officers asked whether the appellant was at home. His father replied that he was overseas. When the appellant's mother and BB also came to the door, the officers gestured to them to stay out of the discussion. The officers then went with the appellant's father to another room. Later, BB was told that they had searched drawers and cabinets. They had asked how long the appellant would be out of the country. They had then left, saying that it was only a minor matter and that, when the appellant returned to China, he should report to them.

[33] The same officers returned the following day. They told the appellant's parents and BB that they knew the appellant had left China and they asked whether he was a Falun Gong practitioner and whether there were any Falun Gong materials in the house. Both questions were answered in the negative and they departed.

[34] FF, was also at the appellant's parents' house when the PSB visited again, asking the same questions, in 2009. She believes that the further visit was prompted by her own return to China.

**Evidence of CC**

[35] CC first met the appellant in Christchurch, in 2009. At that time, the appellant was still learning the ways of Falun Gong practice in public.

[36] The appellant is, in CC's view, a genuine and committed practitioner of Falun Gong. He practises weekly and has attended almost every event which has been put on. He is enthusiastic about talking to Chinese tourists and engaging in truth clarification.

[37] Truth clarification (including the truth of what is happening to practitioners in China at the hands of the government) is an important aspect of Falun Gong practice. Adherents are expected to engage in truth clarification. If they are in China, they will have to keep themselves safe but that does not absolve them of the responsibility to engage in truth clarification.

### **Evidence of DD**

[38] DD is a Falun Gong practitioner from Christchurch. He met the appellant in mid-2009, when they were both practising in public, as part of a group of some 20 practitioners. He confirms that the appellant was a regular attendee. Each practice session would last for about an hour, after which the group would gather together to undertake 'truth telling sessions'. The appellant impressed him as "nice and honest".

[39] On finding out that the appellant was a carpenter, DD, encouraged him to make displays for truth telling and to design and build the float used in street parades, showing how the Chinese authorities brutally repress practitioners. The appellant did an excellent job, both with the displays (he paid for the materials himself) and the float.

[40] The display boards that the appellant made showed instances of brutality by the Chinese authorities, including the torture and murder by Mao Zedong of those who had helped him on the Long March.

### **Material and Submissions Received**

[41] Counsel has lodged written submissions dated 13 June 2011, and the appellant has provided the following:

- (a) photographs of the appellant distributing Falun Gong literature and attending protests in New Zealand;
- (b) statement dated 19 July 2011 by EE, president of the ABC group;

- (c) statement (undated) by FF, a Falun Gong practitioner in Christchurch (confirmed on oath, by telephone);
- (d) statement (undated) by GG, the appellant's employer in Christchurch (confirmed on oath, by telephone), confirming that he gave the appellant the use of his factory in which to make the Falun Gong float for the 2009 Christmas parade and his own observation of the appellant's devotion to Falun Gong; and
- (e) various items of country information.

[42] The Tribunal also has before it the Department of Labour's file in respect of the appellant's claim at first instance.

## **ASSESSMENT**

[43] By section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[44] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

### **Credibility**

[45] The appellant's account is accepted as truthful. In particular, the evidence of his wife as to events in China, which was not before the Refugee Status Branch at the time of its decision, is credible and provides significant reinforcement to the assertion that there have been enquiries for the appellant in China since he began his Falun Gong activities in New Zealand.

[46] It is accepted that the appellant is a Chinese national who first became involved with Falun Gong while living in China. On the arrest of his friend, he curtailed his activities but began making plans to leave the country. Since being in New Zealand, he has regularly participated in public Falun Gong activities and there have been enquiries made for him at his family home in China whenever his wife has returned there. His family have been warned that he should stop his involvement with Falun Gong and that he should report to the PSB on his return.

### **The Refugee Convention**

[47] Section 129(1) of the Act provides that:

“A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.”

[48] 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.”

[49] In terms of *Refugee Appeal No 70074* (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 Claim to Refugee Status**

[50] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[51] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration*



*and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

*Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to China?*

[52] In addressing this issue, it is necessary first to record the general country information relating to the repression of Falun Gong in China.

[53] In July 1999 the Chinese government banned the practice of Falun Gong, whether in public or in private, and prohibited the distribution of Falun Gong literature. The initial focus was on leaders and high-level organisers, while ordinary followers were subjected to ideological education – see Human Rights Watch *China Uses ‘Rule of Law’ to Justify Falun Gong Crackdown* (9 November 1999).

[54] Amnesty International has reported that the Falun Gong movement has become “a key target of repression”. Many of its followers have been arbitrarily detained and subjected to *lao jiao* (re-education through labour), an administrative detention of up to three years’ duration, during which they are at high risk of ill-treatment, intended to coerce them into renouncing their belief – see Amnesty International *AI Report: China 2005* (May 2005).

[55] Another 2005 report stated that even low-level members risk detention of up to four years in *lao gai* (reform through labour) camps – see the United Nations High Commissioner for Refugees’ *Position Paper on Falun Gong* (1 January 2005).

[56] According to Amnesty International, the Chinese government’s “severe and systematic” campaign against Falun Gong intensified in 2009, with sweeping detentions, unfair trials leading to long sentences, enforced disappearances and deaths in detention following torture and ill-treatment – see *Amnesty International Report 2010 – China* (28 May 2010).

[57] Recent information indicates that the attitude of the authorities to Falun Gong practitioners has remained repressive. In 2010, the United States Department of State *Country Reports on Human Rights Practices: China* (27 March 2010) observed:

“These ‘cults’ included not only Falun Gong and various traditional Chinese meditation and exercise groups (known collectively as ‘qigong’ groups) but also religious groups that authorities accused of preaching beliefs outside the bounds of officially approved doctrine.

Public Falun Gong activity in the country remained negligible, and practitioners based abroad reported that the government’s crackdown against the group continued. In the past the mere belief in the discipline (even without any public practice of its tenets) sometimes was sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Falun Gong sources estimated that since 1999 at least 6,000 Falun Gong practitioners had been sentenced to prison, more than 100,000 practitioners had been sentenced to RTL, and almost 3,000 had died from torture while in custody. Some foreign observers estimated that Falun Gong adherents constituted at least half of the 250,000 officially recorded inmates in [*lao gai*] camps, while Falun Gong sources overseas placed the number even higher.”

[58] The picture continues to be concerning. The State Department’s report for last year, *Country Reports on Human Rights Practices: China* (8 April 2011), noted the following:

“In June Guangxi Litang Prison authorities reported the April 2009 death of He Zhi, a Falun Gong practitioner who was sentenced to eight years’ imprisonment in 2005. Authorities at Guangxi Litang Prison, where many Falun Gong practitioners reportedly are imprisoned, stated the cause of death was “falling from bed,” but He’s brother claimed he found other injuries and bruises on He’s body....

In February 2009 authorities detained rights lawyer Gao Zhisheng, who had represented Christians and Falun Gong practitioners. At year’s end his whereabouts and legal status remained unknown. According to NGO and media reports, he was seen in his hometown in August 2009 under heavy police escort. Gao was seen briefly in Beijing in March and April, but subsequently disappeared again....

Family members of activists, dissidents, Falun Gong practitioners, journalists, unregistered religious figures, and former political prisoners were targeted for arbitrary arrest, detention, and harassment...

The government continued to refuse reentry to numerous citizens who were considered dissidents, Falun Gong activists, or “troublemakers”. Although some dissidents living abroad were allowed to return, dissidents released on medical parole and allowed to leave the country often were effectively exiled. Activists residing abroad were imprisoned upon their return to the country.”

[59] For further consideration of country information as to the the treatment of Falun Gong practitioners, see *AB & AC (China)* [2011] NZIPT 800006-07, *Refugee Appeal No 76147* (29 February 2008), *Refugee Appeal No 76536* (15 November 2010) and *Refugee Appeal No 76554* (23 November 2010).

[60] In particular, *Refugee Appeal No 76536* (15 November 2010) notes, at [60] *et seq*, that *lao gai* camps amount to “torture” in the opinion of Manfred Nowak, the (then) United Nations Special Rapporteur on Torture and Other Cruel and Inhuman or Degrading Treatment. See, in this regard, his *Report of the Special*

*Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 March 2006) and the Congressional Executive Commission on China's "*Communist Party Calls for Increased Efforts to "Transform" Falun Gong Practitioners as Part of Three-Year Campaign*" (22 March 2011).

[61] It is against this background that the appellant's circumstances must be assessed.

[62] In New Zealand, the appellant has been a regular attendee at public Falun Gong events, including practice sessions, protests and the use of a float in parades which highlights human rights abuses against practitioners in China. The enquiries made for him by the Chinese authorities on the two occasions his wife has returned to China have included references to his Falun Gong beliefs and his activities in this country. The authorities are aware that he is a practitioner, that he has been involved in public Falun Gong activities overseas and are monitoring his family, at least at a level sufficient to alert them to his return to the country. Given the country information above, there is a real chance that, if he returns to China, he will be detained and sent to either a *lao jiao* camp or a *lao gai* camp for a period of some years, with consequential exposure to serious physical and mental mistreatment.

[63] The appellant's fear of being persecuted if returned to China is well-founded.

*Is there a Convention reason for the persecution?*

[64] In a number of past New Zealand decisions in Falun Gong cases, the Convention ground has been found to be religion. In other jurisdictions, the Convention grounds of particular social group and imputed political opinion have also been relied on. In *Refugee Appeal No 76536* (15 November 2010), however, it was observed that, at [102], while there are a clear number of overlapping Convention grounds available, the most relevant was political opinion. Ultimately, as explained in *Refugee Appeal No 76536* (15 November 2010), little turns on the point because aspects of political opinion and religion are often both present and either will suffice. There is little doubt that adverse political views are imputed to Falun Gong practitioners by the Chinese government, whether justifiably or not. The ground of political opinion is thus available.

[65] The second issue is answered in the affirmative – the relevant ground being political opinion.

### **Conclusion on Claim to Refugee Status**

[66] For the foregoing reasons the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Pursuant to section 129 of the Act he is recognised as a refugee. Refugee status is granted.

### **The Convention Against Torture**

[67] Section 130(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.”

### **Conclusion on Claim under Convention Against Torture**

[68] Because the appellant has been recognised as a refugee he is entitled to protection against *refoulement* to China. In other words, he cannot be deported from New Zealand to China – see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act (the exceptions to section 129 which are set out in section 164(3) of the Act do not apply). Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in China. It follows that the appellant is not a person requiring protection under the Convention Against Torture. He is not a protected person within the meaning of section 130(1) of the Act.

### **The ICCPR**

[69] Section 131(1) of the Act provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

### **Conclusion on Claim under ICCPR**

[70] Again, because the appellant has been recognised as a refugee he is entitled to protection against *refoulement* to China – see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act (the exceptions to section 129 which are set out in section 164(3) of the Act, do not apply). Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to either arbitrary deprivation of life or cruel, inhumane or degrading

treatment or punishment in China. It follows that he is not a person requiring protection under the ICCPR. He is not a protected person within the meaning of section 131(1) of the Act.

## CONCLUSION

[71] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[72] The appeal is allowed.

"C M Treadwell"

C M Treadwell  
Member

Certified to be the Research  
Copy released for publication.

C M Treadwell  
Member