EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Philip
Lord Kingarth
Lord Eassie

[2006] CSIH 59
XA82/05

OPINION OF THE COURT

delivered by LORD KINGARTH

in

APPEAL

under section 103B of the Nationality, Immigration and Asylum Act 2002

by

QU WEN CAI
Appellant;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent:

_____

Act: Frain-Bell; Drummond Miller (Appellant)
Alt: Lindsay; Solicitor to the Advocate General (Respondent)

8 December 2006

[1] This is an appeal under section 103B of the Nationality, Immigration and Asylum Act 2002 against a decision (following reconsideration) of an Immigration Judge dated 15 April 2005, dismissing the appellant's appeal against a decision of the respondent of 5 October 2000 refusing his claim for asylum. Although leave to appeal

was refused by the Asylum and Immigration Tribunal on 15 July 2005, leave was granted, unopposed, by this court on 15 March 2006.

[2] The appellant is a citizen of China. He arrived illegally in the United Kingdom on 22 January 2000. He sought asylum on 26 January 2000. His claim to asylum is based on the fact that he was, and remains, a practitioner of Falun Gong. In particular he became an adherent in October 1998. He took part in a demonstration in Beijing in April or June 1999, when some people were arrested. The organisation was banned on 22 July 1999. Police visited his house in August 1999 when he was not at home, apparently wanting him to report to the police station. He left China in the same month. Some time after he left he learned that the police had called at his home again. After spending some time in Mongolia and Russia he made his way to the U.K. He regularly practices Falun Gong with other followers in the U.K.

[3] In rejecting the appellant's claim for asylum the Immigration Judge found (at para. 23)

> "There is ample evidence that many practitioners of Falun Gong have been persecuted. However, although the attitude of the authorities is rather erratic and unpredictable, mere 'low level' practitioners are not generally at risk".

He found further (at para. 25)

> "The risk arising from past activities is ... said to be manifested through two police visits to his home either in mid 1999 or one then and one in 2000. The police on these occasions simply asked for him to report to the police station. This was at the time of the first crackdown on Falun Gong. They did not say that they proposed to detain him. They may have been interested in interviewing him as a witness, or in giving him a warning. If they seriously intended to detain him for a lengthy period, it is unlikely they would have

explained to his wife the nature of their interest, or asked him simply to report. Whatever the position was then, there is no sign that they have followed up their interest since".

[4] Further, at paragraphs 26 to 29 it is said

"26. Crucially, there is no background evidence to suggest that people known to have taken a low level part in Falun Gong prior to the ban in 1999 are pursued today. The vast majority of those in such a position remained in China without being incarcerated. The vicious treatment which the Chinese authorities have inflicted on many Falun Gong practitioners can hardly be overlooked; but it would be far-fetched to suppose that someone in the Appellant's position remains at risk from the authorities six years later.

27. Although Ms Byfield's evidence was heartfelt and interesting, it has no connection with the individual aspects of the Appellant's case and is of no relevance to the outcome. It is a courageous act for a UK citizen to travel to China to demonstrate in favour of Falun Gong, but it is something else altogether for a Chinese citizen publicly to defy the national authorities. The Appellant has given no indication that he would do so. The argument that his past public practice shows that he would do the same in future ignores the significant difference that his practice was legal then but would not be now.

28. The Appellant is an earnest practitioner of Falun Gong in the UK. There was an attempt to advance his case on the basis that he might expose himself to risk in China in future, but his own evidence did not amount to saying that he would publicly practice or promote Falun

Gong in China. He did practice publicly in 1998 and early 1999, but that is no indication that he would do so in the future, as circumstances have radically changed. Nothing in his evidence suggested that if he did practice at all in China he would do so other than privately in his own home. I am satisfied that he would not do so in such a way as to attract punitive measures from the Chinese authorities.

29. The Appellant's account, even putting the highest realistic interpretation on it, does not in my view disclose a need for protection."

[5] Before us counsel for the appellant argued that the Immigration Judge had erred in law. In particular, although no issue was taken with the finding that there was nothing to suggest that if the appellant returned to China he would practice Falun Gong other than privately in his own home, the conclusion of the Immigration Judge that the appellant could not be said to have been at real risk of persecution could be said - in light of certain passages in the objective evidence before him - to have been perverse. Reference was made to a U.S. Department of State Report dated 28 February 2005 and, in particular, to a passage where it was said

"As recently as 2003, the Government continued its effort to round up practitioners not already in custody and sanctioned the use of high-pressure tactics and mandatory anti-Falun Gong study sessions to force practitioners to renounce Falun Gong. Even practitioners who had not protested or made public demonstrations of belief reportedly were forced to attend anti-Falun Gong classes or were sent directly to re-education-through-labor-camps, where in some cases, beatings and torture reportedly were used to make them recant.

> These tactics reportedly resulted in large numbers of practitioners signing pledges to renounce the movement".

In addition reference was made to a passage in a U.S.S.D. Religious Freedom Report 2003 where it was said

> "The Government continued its repression of groups that it determined to be 'cults' in general and of the Falun Gong in particular. The arrest, detention and imprisonment of Falun Gong practitioners continued. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons and re-education-through-labor-camps. There have been credible reports of deaths due to torture and abuse".

Finally, reference was made to a passage in a Canadian I.R.B. Report of 10 December 2003 wherein it was said

> "The 610 Office is a bureau specifically created by the Chinese Government to persecute Falun Gong, with absolute power over each level of administration in the Party, as well as all other political and judiciary systems".

The appeal should be allowed and the appellant's claim remitted to the A.I.T. for reconsideration.

[6] Counsel for the respondent's primary submission was that it could not be said that the Immigration Judge had erred in law. There was nothing in the passages referred to which amounted to evidence from which it could be said that the relevant conclusion which the Immigration Judge reached was perverse. This was the test that had to be met. Reference was made to *R (Iran)* v *Secretary of State for the Home Department etc.* 2005 I.N.L.R. 633. At best the information in the U.S. State Department Report showed only that there were some reports that certain practitioners who did not practice in public had suffered ill-treatment. The background information,

including that report, made it clear that the vast majority of practitioners were able to practice without persecution. It was to be noted that on 9 August 2005 the Asylum and Immigration Tribunal in *LL (Falun Gong - Convention Reason - Risk), China CG* [2005] U.K.A.I.T. 00122 had, on the basis of apparently similar background information, found *inter alia*

> "However our first conclusion as to risk, from the objective evidence as a whole, is that, apart from special factors, there will not normally be any risk sufficient to amount to 'real risk' from the Chinese authorities for a person who practices Falun Gong in private and with discretion".

This was consistent with observations made earlier (in the same application) in the Court of Appeal in *L (China)* v *Secretary of State for the Home Department* [2004] E.W.C.A. Civ. 1441, at para. 33, where reference was also made (at para. 31) to a decision, apparently to the same effect, of the Federal Court of Australia in 2002. Counsel's secondary submission was that, in any event, since the Immigration Judge had decided, for reasons relating to his credibility, that the appellant "has not persuaded me that he is subjectively in fear of persecution" (para. 35) (a decision not challenged in this appeal), the appeal in respect of claimed asylum, which depended, in the first place, on the existence of a subjective fear of relevant persecution, could not succeed.

[7] Having carefully considered the submissions made on behalf of the appellant, and the passages in the background materials to which we were referred, we have come to the view that this appeal must be refused. Neither the passage in the U.S.S.D. Religious Freedom Report 2003, nor that in the Canadian I.R.B. Report, does anything other than confirm that practitioners of Falun Gong may, in certain circumstances, be subject to persecution. The Immigration Judge did not purport to

find otherwise (see in particular paras. 23 and 26 of his decision). The passage in the U.S. State Department Report is different, in that it appears to suggest that there had been reports that even some practitioners who had not made public their beliefs had suffered ill-treatment. However, in our view, the passage, which lacks detail - for example as to the numbers involved or as to how the authorities became involved - falls far short of being evidence to the effect (or from which it could be concluded) that, in general, those who practice discreetly in private could be said to be at real risk of persecution. In these circumstances we are unable to say that the decision which the Immigration Judge made in this case, which was apparently consistent with that reached in *LL (Falun Gong - Convention reason - Risk) China CG*, could be said to have been perverse.

[8] We add only that, in any event, counsel for the appellant appeared (in a brief response) to have no obvious answer to the respondent's secondary submission.