FEDERAL COURT OF AUSTRALIA

NACR of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 318

MIGRATION – refugee – practitioner of Falun Gong – imputed political opinion -– whether appellant could evade risk by practising in private – whether persecution based on denial of access to employment - whether primary Judge erred in holding that decision of Refugee Review Tribunal refusing a protection visa had not involved an error of law

Migration Act 1958 (Cth)

Minister for Immigration & Multicultural & Indigenous Affairs v Guo (1997) 191 CLR 559 cited

Abebe v Commonwealth (1999) 197 CLR 510 cited

N989/01 v Minister for Immigration & Multicultural Affairs [2002] FCAFC 237 followed

Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 cited

Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 followed

Gao v Attorney General of the United States (2002) 299 F.3d 266 cited

Wang v Minister for Immigration and Multicultural Affairs (2000) 179 ALR 1 cited

Farajvand v Minister for Immigration and Multicultural Affairs [2001] FCA 795 cited

Win v Minister for Immigration and Multicultural Affairs [2001] FCA 132 cited

A v Secretary of State for the Home Department [2002] EWCA Civ 1171 cited

N989/01A v Minister for Immigration & Multicultural Affairs [2002] FCA 434 cited

W375/01A v Minister for Immigration and Multicultural Affairs [2002] FCA 379 cited

WAIZ v Minister for Immigration & Multicultural Affairs [2002] FCA 1375 cited

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 cited

Craig v South Australia (1995) 184 CLR 163 applied

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR applied

Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 cited

He v Secretary of State for the Home Department [2002] EWCA Civ 1150 cited

NACR of 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 131 OF 2002

BEAUMONT, LEE& KIEFEL JJ

15 NOVEMBER 2002

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY N 131 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: NACR OF 2002

APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	BEAUMONT, LEE & KIEFEL JJ
DATE OF ORDER:	15 NOVEMBER 2002
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed, with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 131 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACR OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, LEE & KIEFEL JJ
DATE:	15 NOVEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BEAUMONT J:

INTRODUCTION

1 This is an appeal by an unrepresented party, a Chinese citizen, from a decision of a Judge of the Court, which, in turn, was a review of a decision of the Refugee Review Tribunal ("the Tribunal"), whereby the Tribunal affirmed a decision of the delegate of the Minister not to grant the appellant a protection visa. The Notice of Appeal appears to have been drafted by the appellant and sets out only one ground of appeal, as follows:

"The appellant is a keen Falungong practiser. If he goes back to China the police will arrest him and put him into prison so he needs to grant a protection visa."

Background

2 The appellant arrived in Australia on 6 January 2000 and applied for a protection visa on 3 February 2000. In a written submission accompanying his protection visa application, dated 3 February 2000, the appellant made a number of claims:

- That he had a well-founded fear of persecution because of his membership of "a particular social group", that group being practitioners of Falun Gong.

- That he was introduced to the practice of Falun Gong by a school friend in April 1996.

- That, after Falun Gong was declared to be a counter-revolutionary organisation by the Chinese Government, he was fired by his employer, forced to write statements of repentance, and also forced to hand over his exercise books, clothes and cassettes.

- That the Chinese government forced him to make a list of the names of his introducer and of other Falun Gong members.

- That his father suffered a “cerebral concussion” as a result of these events.

- That his girlfriend of six years ended their relationship as a result of her fear of being associated with him.

- That a number of Falun Gong supporters had been admitted to psychiatric institutions, and that he feared that a similar thing may happen to him.

Proceedings before the Tribunal

3 On 20 March 2000, the appellant lodged an application for review with the Tribunal. In an additional written statement prepared for the Tribunal proceedings, dated 21 March 2000, the appellant criticised the decision of the Minister’s delegate and provided information in support of his contention that the Communist Party in China wished to defeat any perceived challenge to its power by the Falun Gong movement.

4 The appellant attended a hearing before the Tribunal on 23 November 2000. Before the Tribunal, the appellant claimed that, after a media report in February 1997, stating that the movement was involved in criminal activities and publicised superstition, the Chinese Public Security Bureau (“the PSB”) announced that the practise of Falun Gong in public places must cease.

5 The appellant further claimed that the head of his district and the head of the police station came to him and specifically told him not to practise Falun Gong in public places; and that he, and other practitioners, protested about the unreasonableness of the PSB’s demands and continued to practise Falun Gong.

6 The appellant claimed that, in July 1997, he resigned from his work and accepted his uncle’s invitation to work in Nanching City, where he also helped his uncle organise gatherings of Falun Gong practitioners.

7 When asked by the Tribunal member what had prompted him to leave China for Australia, the appellant said that the municipal authorities started monitoring the activities of Falun Gong in January 1999, and that in July 1999 he and his uncle were taken by the authorities to a detention centre. He claimed that during his detention he was beaten and tortured, being freed after four days upon his undertaking not to practise Falun Gong.

8 When asked whether there were any ill effects on his father as a result of his practising Falun Gong, and the crackdown by the Chinese Government, the appellant replied that there were not.

9 The appellant claimed that he feared returning to China because many people who practised Falun Gong had been sent to labour camps or psychiatric hospitals; that he could not practise Falun Gong privately in his own home as Falun Gong required listening to cassettes and these cassettes can be heard by informants to whom rewards are given by the Government.

The Tribunal's Decision

10 The Tribunal accepted that the appellant was a Chinese citizen who had arrived in Australia on 6 January 2000. It accepted that the appellant had knowledge of, and practised, Falun Gong. However, the Tribunal found that the appellant did not assist his uncle to organise gatherings of Falun Gong practitioners, nor did he play any role other than as an ordinary practitioner of Falun Gong. The Tribunal pointed to several inconsistencies between the appellant's written statements and his evidence given orally to the Tribunal and found that the appellant had been evasive and had given inconsistent responses when important inconsistencies were put to him.

11 The Tribunal noted that the appellant's evidence concerning his assault by fellow detainees was "strained in the telling and not in the least convincing. It was not a description of mistreatment that suggested the [appellant] might have personally experienced it".

12 The Tribunal was not satisfied that the appellant had been detained or mistreated for being associated with Falun Gong. Noting that the appellant had been able to leave China on his own passport without any difficulties, and referring to the independent country information, the Tribunal said that it was not satisfied that the appellant had been under adverse notice from the Chinese authorities; neither was it satisfied that he had any reason to fear that on return to China he would be arrested for any association he has had with Falun Gong.

13 The Tribunal was not satisfied that the appellant had truthfully stated his intention to resume his practise of Falun Gong on his return to China and did not, therefore, give weight to the argument that the appellant may come to the attention of the Chinese authorities and suffer harm of a persecutory nature if he should practise Falun Gong upon his return to China.

14 In making its findings, the Tribunal relied on the independent country information that ordinary adherents of Falun Gong who practised privately in China were unlikely to be the subject of particular attention by the authorities.

15 The Tribunal was not convinced of the appellant's devotion to Falun Gong, stating that it was "not convinced that [the appellant] would take the risk of detention and mistreatment for himself or for his family by practising Falun Gong, even privately".

16 The Tribunal found that, even if the appellant did practise Falun Gong privately, according to the independent country information, he could do so without facing a real chance of treatment amounting to persecution.

17 Accordingly, the Tribunal was not satisfied that the appellant would be persecuted for reasons of his practice or support of Falun Gong on his return to China. It therefore held that he did not have a well-founded fear of persecution.

Application for judicial review

18 On 7 August 2001, the appellant lodged his application for review, which did not identify any ground of review, but merely restated the claims already made in relation to the potential for practitioners of Falun Gong to be persecuted in China. At the hearing before the primary Judge, the appellant appeared for himself assisted by an interpreter. The appellant then reiterated the claims that he had made before the Tribunal and emphasised his belief that he would be persecuted if he returned to China.

the primary judge's Decision

19 The primary Judge found that the appellant was impermissibly seeking to reagitate the facts of the material before the Tribunal; the appellant was: "[i]n essence … taking issue with the weight that the Tribunal attributed to the evidence and seeking to reagitate some of the Tribunal's adverse findings of fact such as whether he would continue to practise Falun Gong if returned to China"; and the gist of the appellant's submissions was that the Tribunal had come to the wrong conclusion.

20 The primary Judge concluded that the appellant had not identified any relevant ground of review and that no error of law in the reasons of the Tribunal could be discerned. Accordingly, the application was dismissed.

conclusions on the appeal

21 In my opinion, the primary Judge correctly characterised the application for judicial review as an attempt, impermissibly, to have the Court take a different view of the facts. Given first, the independent country information, and secondly, the Tribunal's conclusions on the credibility of the appellant's principal claims, the primary Judge did not err in holding that judicial review was not available in the present circumstances (see, e.g., *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 576; *Abebe v Commonwealth* (1999) 197 CLR 510 at [84] – [87]; *N989/01 v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 237).

22 Accordingly, I propose that the appeal be dismissed, with costs.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beaumont.

Associate:

Dated: 15 November 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 131 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACR OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, LEE & KIEFEL JJ
DATE:	15 NOVEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

LEE J:

23 This is an appeal from a decision of a Judge of this Court which dismissed an application for review of a decision of the Refugee Review Tribunal ("the Tribunal") that affirmed a decision of a delegate of the respondent ("the Minister") not to grant the appellant a "protection visa" under the *Migration Act 1958* (Cth) ("the Act").

24 Under s 65 of the Act, if the Minister is satisfied that, *inter alia*, the criteria for a visa prescribed by the Act have been satisfied, the Minister is to grant the visa, but if the Minister is not so satisfied, the grant of the visa is to be refused.

25 At material times, s 36(2) of the Act provided the following criterion in respect of a protection visa:

"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

26 In s 5 of the Act, "Refugees Convention" and "Refugees Protocol" (together referred to hereafter as "the Convention") are defined respectively as "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and "the Protocol relating to the Status of Refugees done at New York on 31 January 1967". The phrase "protection obligations under the [Convention]" is not defined in the Act and is not a term used in the Convention.

27 The Convention is a treaty pursuant to which the "Contracting States" agree to apply the provisions of the Convention to "refugees". Sub-Article 1(A) of the Convention provides the following definition of "refugee":

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who:…(2)…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;…"

28 As a Contracting State, Australia has the obligations imposed on Contracting States by the Convention. The said "protection obligations" undertaken by Australia under the Convention may be said to be an obligation not to penalize, or restrict the movement of, a refugee who has entered Australia without authority, having come directly from a territory where the life or freedom of that person was threatened for a Convention reason, and not to expel or return a refugee from Australia to the frontiers of territories where the life or freedom of the refugee would be so threatened.

29 The appellant's claims in support of the application for a visa read as follows:

"I apply for your protection because I have been persecuted as a member of a particular social group and I am afraid of being persecuted upon returning to China, which is relevant to the definition of refugee. Therefore I believe that I am a true refugee. From the following statement you may understand me and may grant me protection.

I used to be an optimistic young man. I was interested in sports, philosophy and religions, so I read many relevant books and got much knowledge. I began to think over many social questions, such as the relationship among people in modern society, human's right and duty, etc, and I found so much dark side of the Chinese government. On April 12,1996, one of my friend, Guo Yougang, introduced me to learn Falungong. I believed this Qigong, because it not only taught people how to avoid illness and keep good health, but also advocated equality and friendship

among people. Mr. Li Hongzhi taught people to be honest, friendly and try out best to do some good things for the society. From him, I learnt one word, noble.

It seemed that everything changed in one night. Falungong was defined as a reactionary organization by the Chinese government, while I was enjoying Falungong exercise everyday. I could not believe my ears, nor my eyes, and I never thought disaster was coming to me, even my relatives. I was fired and forced to write repentance statement and hand in all the exercise books, clothes and cassettes. They forced me to write the names of my introducer and all the members I knew, even some stories about Falungong caused people poor healthy, family broken and dead. I hated lies and refused cheating, so that I wrote five times and they were still not satisfied.

My father got very serious cerebral concussion and was sent to hospital due to the sudden incident, and my mother worried everyday. My two brothers and one sister were involved in trouble. My girlfriend left me and our six year lover relationship finished because she was forced and afraid of being involved. I was a superior and experienced cook, but nobody dared to hire me, and my relatives suffered for me. I was hopeless, especially when I saw some of Falungong participants were arrested, punished, even sent to psychiatric hospital, I held so strong fear that the same thing would come to me. I had to escape."

30 After the delegate of the Minister refused the grant of a visa the appellant expanded upon his claims as follows:

"While sentencing a few people into prison was not strong enough to depress down the whole movement or destroy the beliefs to Falungong of most practitioners, the party knew better than that. They knew the real power that might remove them from their place were actually those general practitioners. That's why they had to announce suddenly that Falungong was a counter-revolutionary organization and should be put down immediately. That's why no exercisers were allowed to practice Falungong in any public or private places any more.

Believing what the CCP said to the public and foreign countries would be as naïve as a child. Any Chinese who had experienced a movement in China would not trust their words. Any Falungong exerciser who dare to practice at home would be given a warning by neighborhood committee members first, and if you consisted, the PSB would have a talk with you and 'persuade' you not to practice it any more, because Falungong is poisonous. The PSB would help you by many means to understand your 'mistake' or help you to 'cure' your 'wrong belief' if you still thought you were right.

In a society as China there is no human right or democracy at all. An ordinary person like me could be killed silently without arising any attention. As I hold strong belief to Falungong and still kept practicing it everyday, I did not think I would like to give up even if I returned to China. Therefore I believe I will be punished upon my return to China."

31 The material before the Tribunal, in particular the United States Country Report on Human Rights Practices 2000 (China), advised that by late 1999 Chinese authorities had confined hundreds of Falun Gong adherents in psychiatric hospitals and "by the end of that year" thousands of Falun Gong practitioners were in detention, "re-education" camps or mental institutions. The material also recorded that a number of people arrested as followers of the proscribed organisation had been doing no more than perform Falun Gong exercises on their own in a local park or had been in possession of Falun Gong literature.

32 Other material, also from authoritative sources, informed the Tribunal that Falun Gong followers detained by Chinese authorities were subject to degrading treatment and acts of torture. It was stated that approximately 100 or more Falun Gong practitioners had died in custody as a result of that mistreatment between 1999 and 2000.

33 That material established that followers of Falun Gong had been persecuted in China and that the reason for such persecution appeared to be imputed political opinion. At the time the Tribunal made its determination the material before it did not indicate that such repression had become a matter of history and that followers of Falun Gong no longer feared persecution in China.

34 The Tribunal stated, in the written statement provided by it pursuant to the obligation to do so imposed by s 430 of the Act, that at the hearing conducted by the Tribunal the appellant said as follows:

"He discussed the history of Falun Gong and gave the Tribunal some background on Master Li Hong Zhi. He spoke of the ideology and practice of Falun Gong and the life benefits it provides practitioners. He started practising Falun Gong on 12 April 1996. A classmate from school, [deleted], introduced him to it.

The [appellant] stated on 20 June 1996 the official newspaper reported FalunGong as an empty science, a superstitious practice. In July 1996 the Information Department and the Propaganda Ministry banned the publication of literature of Falun Gong. In 1996-1997 the Public Security Bureau (PSB) launched 2 major investigations into Falun Gong but found it had no political background and that it should be regulated like other social bodies. In 1997 another official newspaper article was published accusing Falun Gong of publicising superstition and being involved in criminal activities. So the PSB launched another investigation.

The [appellant] stated that in February 1997 the PSB announced that people should stop practising Falun Gong. He worked at the Yungang Hotel at the time. He stated that the head of his district and head of the police station came to him and told him not to join them in practising Falun Gong in public places. This was in February 1997. He stated the PSB was acting outside the law in telling them not to practise in the park so one hundred of his fellow practitioners went to the local reception department of the municipal government to complain about the unreasonableness of the PSB. He stated that they continued to practise Falun Gong but from May 1997 his work unit told him to examine himself. The [appellant] could not think of anything

to report. The [appellant] stated he had an uncle in Nanching City, who since his retirement, had been a training member of a sub-branch of Falun Gong in Nanching. His uncle invited him to go to Nanching where he had found a job for the [appellant] when he learnt of his problems. In July 1997 the [appellant] stated he gave his resignation letter to his work unit. In August 1997 he arrived in Nanching City and worked in the Nanching Hotel as a chef.

The Tribunal asked the [appellant] to state what motivated him to get his passport and leave China for Australia. He replied that in January 1999 the municipal government held a meeting and decided they should monitor or keep under surveillance the activities of Falun Gong. He was told this in February 1999 by a fellow practitioner, [deleted], who is also a refugee applicant before the Tribunal, and whose father held a high position in the Party and in the government in Nanching. He met [deleted] in May or June 1998.

The Tribunal asked the [appellant] if he was mistreated by the authorities when he was detained. He stated that he had been mistreated since the 22 July 1999 when the government suppression started. The authorities had a list of practitioners. He used to help his uncle organise Falun Gongpractitioners' gatherings. On a Sunday afternoon in July 1999 four men from the Civil Administration Bureau came to his uncle's house, where the [appellant] was living. They asked the [appellant] and his uncle to accompany them to talk about Falun Gong. There was a police van outside and they were taken to a detention centre. They were told to write about Falun Gong, its members and its organisation and recruitment. They were asked to write false stories about Falun Gong. After a night's detention his uncle fell ill because he was in his seventies and was taken to hospital. The [appellant] says he was detained for four days. He was asked to inform on other practitioners and to give an undertaking. He did not repent and continued to practise Falun Gongin the detention centre. Eventually he wrote a statement of undertaking but did not inform on others. He made this statement because he was mistreated and 'beaten up every day'. On being asked about being assaulted the [appellant] stated:

> 'On the second night of my last day at the detention centre the other detainees started to beat me up. They had told me to bend and they put a bucket of water on my back. They did this to me for two hours.'

These fellow detainees were not Falun Gong practitioners – they also beat him up. The Tribunal asked whether the PSB assaulted him. He stated that on the third day a PSB officer came to conduct a trial of him. He asked the [appellant] how his self-examination had gone and told the [appellant] to write out everything he knew. He wrote that he practised openly and had done no wrong and questioned why he should be afraid of anything. The PSB asked him why he was being so arrogant. He was handcuffed and had his arms twisted and was given electric shocks and was beaten with a stick. This went on for an hour on the third day. He was refusing to repent and stop practising Falun Gong and he refused to give false examples of what harm Falun Gong does to its practitioners. He was punched once later in the evening when he

again refused to repent and he was told he would continue to be assaulted until he repented. He was given some medical attention because he was bleeding from the corner of his eye and returned to detention. On the fourth day his aunt came to visit him. She told him Falun Gong practitioners' properties had been taken away by officials. The PSB released him that day on bail upon him making a statement of undertaking not to practise Falun Gong.

The Tribunal asked him if he told the PSB about who had introduced him to Falun Gong.

He replied:

> 'No, I didn't tell them that. I just wrote a statement of undertaking saying that in future I will not practise Falun Gong'.

The Tribunal asked him why he made the undertaking. He replied he made the undertaking because he wanted to visit his uncle and was worried about his aunt whom he wanted to look after. He said he would not have been released if he had not made the statement. The Tribunal asked the [appellant] if he was in his job at the time he was detained. The [appellant] stated he had already been suspended from work at the hotel at the time he was detained.

The Tribunal then asked the [appellant] why he had stated in his written statement dated 3 February 2000 that 'they forced me to write the names of my introducers and all the members I knew, even some stories about Falungong caused people poor healthy, family broken and dead'. He replied that these matters are all set up in forms that they have in the detention centre. He was asked about his written statement in which he stated he hated lies and refused cheating so he "wrote five times and they were still not satisfied'. The Tribunal asked him if he disclosed the name of his introducer and he replied:

> 'Those questions were asked on the forms but I didn't do that'.

He went on to explain that he filled in the form five times but he did not give the names of anyone who introduced him to Falun Gong. He was asked what it was that he filled into the forms and he replied that he did not actually fill in the forms but just wrote on the back of the forms only his feelings for Falun Gong. He was asked why he did not mention in his written statement dated 3 February 2000 to the Department the abuse he had received. He replied:

> 'At the time I was in such a horrified mental state I didn't mention these things'.

He stated that he had omitted many things from his statement, including his feelings. The Tribunal asked the [appellant] if he had told his agent that he had been detained for four days. He stated that he had not told him as he was asked to write down his experiences. He was not good at expressing himself in words and he did not know where to start there was so much material. He considered himself well read but reading and writing are different. The statement had not been read back to him. He was told to give other details at interview.

The [appellant] stated he applied for his passport through his cousin, who worked for the information department of the PSB. His Australian visa was organised by [deleted]'s father. He only travelled on 5 January 2000 from China when he received his visa on 23 November 1999 as he was in Henan Province. After he was released the persecution of Falun Gong followers was intensified. He did not tell [deleted] about his detention because [deleted] was a bit abnormal and worried about it. The Tribunal asked the [appellant] what effect all this had had on his father. He replied:

> 'Since I was suspended from work from the hotel in 1997 my father tried to persuade me not to continue practising Falun Gong'.

The Tribunal asked the [appellant] if there were any ill effects on his father from him practising Falun Gong and the crackdown by the Chinese Government. The [appellant] replied:

> 'No, no bad effects on him'.

The Tribunal then asked the [appellant] if he was quite sure. He replied:

> 'Yes'.

The Tribunal then put to the [appellant] his written statement dated 3 February 2000 with his signature on it in which he had said: 'My father got very serious cerebral concussion and was sent to hospital due to the sudden incident and my mother worried every day'. The [appellant] replied:

> 'Yes, that was true'.

The Tribunal asked for an explanation of his earlier evidence that there were no ill effects on his father. He stated:

> 'I was saying that when I practised Falun Gong at home I was not affecting my father'.

The Tribunal discussed this matter further with the [appellant] seeking a clearer explanation without success.

The Tribunal discussed a letter dated 15 November 2000 provided to the Tribunal by the [appellant] from his landlord in Wahroonga which states that the [appellant] practices Falun Gong in a nearby park every day and encourages him and his family to benefit from its practice.

The [appellant] has stated that his uncle has had no adverse attention from the PSB since has had a stroke and is half paralysed.

The Tribunal asked the [appellant] what he feared about returning to China. He replied that many people who practised Falun Gong had been sent to labour camps or psychiatric hospitals. The [appellant] stated he had been helping his uncle to organise Falun Gong gatherings. He stated he could not practise Falun Gong in the privacy of his own home as you have to listen to cassettes which make sounds and rewards are given to informants. The Tribunal asked the [appellant] about Falun Gong practices and asked him to name the main ones. He named several exercises with some hesitation and demonstrated them with difficulty.

The [appellant] stated he thought he left Nanching City in early September 1999 with [deleted]. [Deleted] had the right side of his forehead bandaged and he had been beaten in a police station. The [appellant] and [deleted] hid in a hotel in a town, Jianshu, for three months before going to Shanghai on 2 January 2000. A close friend of [deleted]'s father gave them their passports in Shanghai."

35 The Tribunal perceived some inconsistencies in the appellant's accounts and said that it did not accept all of his claims. However it did accept that the appellant is, and has been, a practitioner of Falun Gong. It did not accept that he had any role as an organiser of Falun Gong activities or that he had been detained, or mistreated in the course of that detention, by reason of his association with Falun Gong.

36 Minds may differ as to whether the material identified by the Tribunal as the grounds for not accepting those parts of the appellant's claims was in any degree significant. As a matter of law adverse determinations on credibility based on speculation or conjecture, and not on material on which such a conclusion is reasonably open, may vitiate the ultimate determination of the Tribunal. Further, it may be said that minor inconsistencies or admissions that reveal nothing about the grounding of an appellant's fear for his safety are not an adequate basis for an adverse credibility finding against an applicant for asylum. (See: *Gao v Attorney General of the United States* (2002) 299 F.3d 266(U.S. Court of Appeals for the Third Circuit).)

37 In this case perhaps it may be said that the conclusion of the Tribunal that some of the claims of the appellant were not to be accepted was reasonably open although not a conclusion made preponderant by the material.

38 The issue which arises on appeal is whether the decision of the Tribunal correctly interpreted or applied the relevant law.

39 The Tribunal said that the appellant could evade the risk of persecution by practising Falun Gong "privately". Such a risk of persecution could not be said to be eliminated by the Tribunal determining that the appellant may save himself from harm by refraining from engaging in acts that were no more than the exercise of a universal right but were regarded by Chinese authorities as acts of dissent or as "counter-revolutionary" conduct. (See : *Wang v Minister for Immigration and Multicultural Affairs* (2000) 179 ALR 1; *Farajvand v Minister for Immigration and Multicultural Affairs* [2001] FCA 795; *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132.) If the Tribunal had based its conclusion on the above statement its decision would have involved an error of law. However, the Tribunal went on to qualify the earlier finding that it was satisfied that the appellant is a practitioner of Falun Gong by stating that it "did not accept" that the appellant was a "committed" practitioner of Falun Gong. The Tribunal stated that the appellant would not risk persecution by practising Falun Gong, "even privately".

40 On one view such a further finding of fact on the part of the Tribunal may be thought to have been a strained or contrived finding at the margin of the material before the Tribunal. Nonetheless, if it may be said to have been a positive finding of fact reasonably open to the Tribunal no question of misapplication of the relevant law to the facts found by the Tribunal could arise.

41 I have some doubt as to the nature of the finding made by the Tribunal. On the one hand, it appears to be a finding that the appellant will be amenable to foregoing the manner of practise of Falun Gong he would otherwise engage in if that were what was necessary for him to avoid persecution. If so, the Tribunal would have erred in its understanding of the relevant law in finding that the appellant did not have a well-founded fear of persecution.

42 On the other hand, having regard to the context of the Tribunal's reasons as a whole, the intent of the Tribunal appears to have been to convey a positive finding that the appellant was, or is, a "fair-weather" follower of Falun Gong and that whilst in China he had demonstrated no commitment to the practise of Falun Gong. Such a finding, although apparently inconsistent with the earlier finding, and the facts relied upon for the further finding not identified, could support a conclusion that the appellant did not have a well-founded fear that he would suffer persecution in future. As Sedley LJ said in *A v Secretary of State for the Home Department* [2002] EWCA Civ 1171 (Court of Appeal) at [2], [14] and [17]:

"…the evidence in the view of all three of the decision-makers demonstrated that [the appellant] could continue to practise Falun Gong in private, as she had done before leaving China, in relative safety.

…

[The] attack [on the tribunal's reasoning] is…on the ground that it indicates an erroneous view that it was sufficient to negative real risk if it could be said that the applicant could safely practise Falun Gong both in private and alone. As to this…the surrounding material…makes it clear that this is, at worst, an infelicitous piece of phrasing in a decision which explicitly upholds and adopts the adjudicator's own findings. Those findings are clearly that the applicant could safely practise Falun Gong either alone or in company, provided always that it was done, **as it always was done**, away from the eyes of the authorities. The source of the phraseology of the Immigration Appeal Tribunal may well lie in paragraph 90 of the adjudicator's findings which, towards the end of that paragraph, reads:

> 'Although I accept that she is a Falun Gong practitioner, I do not accept that her rights to practise Falun Gong were inhibited in China, inasmuch as she was able to do so privately and with a group in a dilapidated house, without ever being caught.'

…

As to the larger question, whether it is open to the United Kingdom decision-maker to say that an asylum seeker can be safe from…persecution so long as he or she constrains his or her practices, this does not arise at all in the present case. The applicant has never sought and has manifested no intention in the future of seeking to practise Falun Gong, whether alone or with others, in public. It is her custom of practising it in private, albeit in company, as well as sometimes alone, which the fact finders have concluded carries no appreciable risk of persecution…Nor does the evidence seem to me to begin to establish that Falun Gong would, but for persecution, present a more public face. If anything, it suggests rather the contrary in the case of the applicant and her group." (Emphasis added.)

> 43 The Tribunal said it had had the opportunity to assess the appellant during a lengthy hearing. The extent to which the truth of the depth of the appellant's commitment to the practise of Falun Gong in China could be determined in a hearing of approximately two hours conducted through an interpreter may be a matter of debate. As stated in *N989/01A v Minister for Immigration & Multicultural Affairs* [2002] FCA 434 at [10]:

"The Court has drawn attention from time to time to the need for the Tribunal to exercise caution before it makes any adverse finding on the credibility of an applicant for refugee status, bearing in mind, in particular, the difficulties that such an applicant may be experiencing, not the least amongst which may be the problem an applicant has in conveying the applicant's case adequately to the Tribunal where the applicant does not speak English and relies upon the services of an interpreter. In such a case statements, questions and answers were all subject to a choice of words in English according to the judgment of the interpreter and may be expressed as a summary or a paraphrase of words used in another language by the applicant. In such circumstances it is not unknown for apparent inconsistencies to appear. (See: W375/01A v Minister for Immigration and Multicultural Affairs [2002] FCA 379 at [17] – [19].)"

(See also: *WAIZ v Minister for Immigration & Multicultural Affairs* [2002] FCA 1375.)

> 44 However, if the Tribunal's reasons are read with benevolence perhaps a finding that the appellant had no commitment to the practise of Falun Gong in China, grounded on the Tribunal's assessment of the appellant as a witness, was reasonably open, although not compelling. (See: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.)
>
> 45 However, was there nonetheless an error of law involved in the Tribunal's decision by reason of its failure to consider the correct question raised by the material before it? The Tribunal was not authorised to make a decision that failed to consider and determine the proper issues to be decided. (See: *Craig v South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 per McHugh, Gummow and Hayne JJ at [76] – [83].)
>
> 46 It was an important part of the appellant's case that a consequence of the repressive measures taken against followers of Falun Gong by Chinese authorities was the denial to him of access to employment. He said that he had been "fired" from his position as a hotel chef after Falun Gong was denounced as a reactionary organisation and that, thereafter, nobody dared to hire him. That detriment, suffered for reason of political opinion, may constitute persecution for the purpose of the Convention. (See: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per McHugh J at 430-431).
>
> 47 The following comments in the Court of Appeal in *He v Secretary of State for the Home Department* [2002] EWCA Civ 1150 are equally pertinent to this case:

"[Counsel] accepts that where a Government makes it impossible for anyone of a particular social group to obtain employment then, at the least , it is necessary for a Tribunal to show reason why this does not amount to persecution. Since the refusal of permission does not show any such reason it follows that, even if what is stated in such a refusal could be treated as incorporated in the determination, it would not be adequately reasoned.

The Tribunal does not expressly engage with the question whether there is a real risk that this treatment would be repeated on his return. The reports indicate that things, if anything, have got worse rather than better. In consequence, if the treatment, which one must assume was meted out to the immigrant in the past, amounts to persecution, there is a case for saying that there is a real risk that it will be meted out to him if he is returned and thus that he will be persecuted. The Tribunal does not expressly address this case.

The Tribunal's reasoning appears to be that there are a lot of Zhong Gong members and it cannot be that the majority of them are persecuted otherwise there would have been more reference to this in the reports. However in itself this is not enough to exclude the immigrant from being in a minority which runs a real risk of persecution. His past treatment is at least of a level which requires the Tribunal to

address the question whether or not its repetition would amount to persecution. It did not do so."

(Per Schiemann LJ at [26] - [28].)

"…The applicant's contention was that neither he, nor it would seem any member of his sect, could secure employment. If that were so, a serious issue arose which had to be specifically addressed as to whether that amounted to persecution for a Convention reason. The Immigration Appeal Tribunal did not address that question specifically because it swept together all the assumed facts; and therefore did not have a sufficiently clear perception of the particular implications of the matters in relation to employment.

Further, although it is correct that the ultimate question is the situation that will face the applicant on his return, once it had accepted evidence such as there is in this case of a particular persecutory behaviour that took place when the applicant was still in his home country, the Tribunal needed specifically to address the question of whether that particular behaviour will continue on his return. It is not enough to say in the face of such evidence, as the IAT did here, that general evidence shows that there is no significant danger of persecution. That general evidence may be enough to establish the point of no persecution in the context of employment, but that point must be made good by at least some specific reasoning. That did not happen in this case."

(Per Buxton LJ at [38]-[39].)

> 48 The Tribunal made no finding on the appellant's lack of employment, or on the cause thereof, and accordingly did not address at all the question whether there was a real risk that denial of employment would continue if the appellant were returned to China. It follows that ground for review of the Tribunal's decision arose under the Act in either s 476(1)((b) (lack of jurisdiction); s 476(1)(c) (lack of authority); or s 476(1)(e) (error of law). (See: *Yusuf* per Gleeson CJ at [10], McHugh, Gummow and Hayne JJ at [76]-[83].)
>
> 49 The appeal must be upheld and the matter remitted to the Tribunal for determination according to law.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate:

Dated: 15 November 2002

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 131 OF 2002

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NACR OF 2002 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BEAUMONT, LEE & KIEFEL JJ
DATE:	15 NOVEMBER 2002
PLACE:	SYDNEY

REASONS FOR JUDGMENT

KIEFEL J:

50 I am in agreement with the reasons of Beaumont J and the orders proposed by his Honour. I wish to add the following comments on matters which were raised with counsel for the respondent during argument on the appeal.

51 The reasoning of the Tribunal was that the appellant is, and has been, a practitioner of Falun Gong, but that he is not a committed one. He was not more involved, at an organisational level, as he had claimed. It was not persuaded that he had come to the notice of the authorities before he left China. This finding was made by reference to a number of aspects of his evidence and findings of credit with respect to them, and to the fact that he was able to leave the country. Many aspects of his evidence about the

authorities knowing of him and his involvement with Falun Gong were regarded as implausible or unacceptable. In particular, the Tribunal expressed itself as *"not satisfied"* that he had been detained or mistreated, as he had claimed. I do not consider that this conveys any uncertainty on the part of the Tribunal, such as would require it to give further consideration to the prospect that the events may have occurred: see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 575-6; *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, 241. In context, the Tribunal was rejecting his account and finding him not to be credible.

52 There remained at this point the question whether an ordinary practitioner of Falun Gong would face a real chance of persecution if they returned to China. It seems to me that the Tribunal approached the matter in two alternative ways. In the first place it did not accept that the appellant was committed to Falun Gong and therefore likely to practise, so as to bring himself to the attention of the authorities. He was therefore not likely to suffer from persecution. Even if he did practise, the Tribunal went on, information from the Department of Foreign Affairs and Trade was that ordinary practitioners of Falun Gong would be able to practise in private without a real chance of being persecuted. Whilst this might amount to a limitation upon his practice it did not, the Tribunal considered, amount to persecution.

53 In my view the Tribunal was not in error in its approaches or in the conclusions it reached. Its finding, in relation to restrictions on public practice not amounting to persecution, is consistent with the meaning given to the term in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 388 and *Guo*, 570-571.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated: 15 November 2002

Solicitor for the Appellant:	The appellant appeared in person (with the assistance of an interpreter)

Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	28 August 2002
Date of Judgment:	15 November 2002