FEDERAL COURT OF AUSTRALIA

NAEB v Minister for Immigration& Multicultural & Indigenous Affairs

[2004] FCAFC 79

MIGRATION – appeal from primary judge dismissing application for judicial review of Refugee Review Tribunal decision – whether the Refugee Review Tribunal asked the wrong question when considering whether the consequences of a return to the People's Republic of China would constitute persecution of the appellant – whether proper question was why the appellant would modify his practice of Falun Gong - whether question would reveal the appellant had a well founded fear of persecution

PROCEDURE – new ground of appeal raised – whether appropriate for Court to entertain ground where based on an authoritative determination of the High Court delivered between decision of primary judge and hearing of appeal.

Appellant S395/2002 v The Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112; (2003) 78 ALJR 180; [2003] HCA 71 distinguished

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

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 77 ALJR 1088

H v Minister for Immigration and Multicultural Affairs (2000) 63 ALD 43; [2000] FCA 1348 cited

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559

VACC v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 74 cited

NAEB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 909 OF 2003

NORTH, DOWSETT AND LANDER JJ

MELBOURNE (HEARD IN SYDNEY)

30 MARCH 2004

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 909 OF 2003

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	NAEB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	NORTH, DOWSETT AND LANDER JJ
DATE OF ORDER:	30 MARCH 2004
WHERE MADE:	MELBOURNE (HEARD IN SYDNEY)

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

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BETWEEN:	NAEB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	NORTH, DOWSETT AND LANDER JJ
DATE:	30 MARCH 2004
PLACE:	MELBOURNE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

NORTH AND LANDER JJ

1 The appellant is a national of the People's Republic of China (PRC). He arrived in Australia on 24 July 2000, and applied for a protection visa on 27 August 2001. A delegate of the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs, refused the application, and the appellant sought review before the Refugee Review Tribunal (the Tribunal). On 24 September 2002, the Tribunal affirmed the decision of the delegate. The appellant then sought judicial review, and this application was dismissed by Jacobson J on 11 July 2003. Before the Court is an appeal against his Honour's judgment.

the decision of the tribunal

2 The Tribunal, first, set out the claims made by the appellant in a written statement in support of his application for a protection visa. He claimed to have taken up the practice of Falun Gong in the PRC in 1995, and to have practised three times per week. In 1997, the practice of Falun Gong in the PRC was made illegal. One day he was arrested for practising Falun Gong in a park. Thereafter he practised at home. After arriving in Sydney, he practised between 6 and 8 am every morning.

3 The Tribunal, then, summarised the evidence given by the appellant at the hearing. He claimed that he was dismissed from work because of his involvement with Falun Gong. He said that prior to 1999 he practised every day at the Workers Cultural and Leisure Centre. He gave some explanation of the practice of Falun Gong. He claimed that he practised regularly at Darling Harbour.

4 The appellant said that he was not arrested in the PRC for practising Falun Gong, but after the end of 1998 when the practice was banned, he practised at the homes of different people. He claimed that the Public Security Bureau (PSB) sent him a letter in October 1999. The letter was sent to an old address, and consequently, did not reach him. Had he reported to the police as required by the letter, he would have been required to renounce his belief in Falun Gong in writing. The appellant was asked by the Tribunal why he delayed his departure from the PRC until July 2000. He replied that he wanted to wait for the completion of an investigation into allegations of corruption at work made against him, but denied that this was the reason for refusal of a clearance to leave the PRC. Rather, he claimed the refusal of a clearance to leave the PRC related to his practice of Falun Gong.

5 The Tribunal, then, put to the appellant certain discrepancies between the written statement submitted in support of his application, and the evidence he had given at the hearing. For instance, in the statement he had said that he had been arrested in the PRC, whilst at the hearing he said that he had never been arrested.

6 The Tribunal, next, set out information from independent sources including Human Rights Watch, the US State Department, and the Department of Foreign Affairs and Trade concerning the situation of the practice of Falun Gong in the PRC. For instance, it set out the following passage:

'According to the U.S. State Department's Country Reports on Human Rights Practices for 2000 and 2001 (PRC 2001, 2002) the Government's harsh propaganda campaign against Falungong [sic], begun in 1999, has continued. Since it was banned in July 1999, mere belief in the discipline (and since January 2001, even without any public manifestation of its tenets) has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment. Although the vast majority of practitioners detained since 2000 have been released, those identified by the Government as "core leaders" have been singled out for particularly harsh treatment. More than a dozen Falungong [sic] members have been sentenced in prison for the crime of "endangering state security," but the great majority of Falungong [sic] members convicted of crimes by

courts since 1999 have been sentenced to prison for “organising or using a sect to undermine the implementation of the law,” a less serious offence. However, most practitioners have been punished administratively. Although firm numbers are impossible to obtain, many thousands of individuals are serving sentences in re-education-through-labour camps. Other practitioners have been sent to facilities specifically established to “rehabilitate” practitioners who refuse to recant their belief voluntarily. There were numerous credible reports of abuse and even killings of Falungong [sic] practitioners by the police and other security personnel, including police involvement in beatings, detention under extremely harsh conditions, and torture (including by electric shock and by having hands and feet shackled and linked with crossed steel chains). Various sources report that since 1997 approximately 200 or more Falungong [sic] adherents have died while in police custody.

By the end of 2001, the government had essentially eliminated public manifestations of the movement. According to press reports, after January 2001, when alleged Falun Gong practitioners set themselves on fire in a protest in Tiananmen Square, the Government launched a massive anti-Falungong [sic] propaganda campaign and initiated a comprehensive effort to round up practitioners not already in custody, and sanctioned the use of high pressure indoctrination tactics against the group in an effort to force them to renounce the Falungong [sic] Neighbourhood committees, state institutions (including universities), and companies reportedly were ordered to send all known Falungong [sic] practitioners to intensive anti-Falungong study sessions. Even practitioners who had not protested or made other public demonstrations of belief reportedly were forced to attend such classes. Those who refused to recant their beliefs after weeks of intensive anti-Falungong [sic] instruction reportedly were sent to re-education-through-labour camps, where in some cases, beatings and torture were used to force them to recant their beliefs; some of the most active Falungong [sic] practitioners were sent directly to re-education-through-labour camps. These tactics reportedly resulted in large numbers of practitioners signing pledges to renounce the movement.’

7 In the next section of the decision, the Tribunal set out its findings and reasons, and commenced as follows:

‘It is clear from the independent material referred to above that some Falun Gong practitioners in the PRC face serious human rights abuses, including arrest, detention, and physical mistreatment. In determining what fate the applicant might meet if he were to return to the PRC it is necessary, first of all, to assess his account of his circumstances prior to his departure from the PRC, and also his current practice of Falun Gong.’

8 In the following paragraphs, the Tribunal discussed the discrepancies between the appellant’s written statement and his evidence given at the hearing, and concluded:

‘I consider that the inconsistencies between his written statement and his oral evidence, together with the nature of his attempts to explain these inconsistencies, show the applicant to be an unreliable witness who has not told the truth in relation to his circumstances.’

9 Then the Tribunal examined the evidence of the appellant's attendance at the public practice of Falun Gong in Sydney, and found:

'I have serious doubts as to whether, even before that time, the applicant attended as often as he claimed.'

10 Following this finding, the Tribunal addressed the appellant's knowledge of Falun Gong, and, after making allowance for the difficulty which the appellant might have experienced in explaining complex concepts through an interpreter, the Tribunal concluded:

'…given my overall views as to the applicant's credibility, and given that the level of his commitment to the practice of Falun Gong, as demonstrated by his failure to attend public practise sessions for over three months, is far less than he claims, the deficiencies in his evidence in this particular area is consistent with a finding that the applicant's dedication to Falun Gong is not as great as he claims.'

11 A general conclusion was then stated as follows:

'I am prepared to accept that the applicant has had some involvement with Falun Gong, either in the PRC or in Australia, or both; however, I am satisfied that the applicant is not terribly familiar with Falun Gong, and that he has not practised publicly for over three months, if not more. I do not accept that the applicant is a dedicated, committed, or regular practitioner of Falun Gong.'

12 Next, the Tribunal considered the appellant's situation in the PRC before his departure. It rejected the appellant's claims that he had been arrested for the practice of Falun Gong, and also rejected his claim to have received a letter from the PSB to attend the police station. The Tribunal continued:

'I am of the view that the applicant's statement that he never practised Falun Gong publicly after it was banned in July 1999 is the truth, and consider that this is consistent with my finding that he is not a committed follower of Falun Gong at all. In these circumstances I am satisfied that there is no real chance that adverse consequences would flow to the applicant from his practice of Falun Gong prior to his departure from the PRC.'

13 Then, the Tribunal rejected the appellant's claim that he had been dismissed from work because of his practice of Falun Gong and found that his dismissal related to the allegations of corruption made against him. It also rejected the claim that the appellant had difficulty in obtaining a passport because of his practice of Falun Gong.

14 The passage which followed is (the critical passage) of central importance to this appeal:

'In these circumstances, I am satisfied that there is no real chance that the applicant would encounter consequences amounting to persecution, as a Falun Gong

practitioner, if he were to return to the PRC. There is no evidence before me to suggest that the applicant has ever breached the laws in relation to the public practice of Falun Gong, or that there could have been any basis, after the banning of Falun Gong, for the authorities to take action against the applicant in this regard. It also appears fairly improbable that the authorities would even be aware that the applicant was a Falun Gong follower. **However, even if they were aware of this, I am of the view that the most likely, and most serious, consequence for the applicant would be a request that he renounce his belief in Falun Gong. Since, <u>for the reasons set out above,</u> I do not accept that the applicant is a dedicated follower of Falun Gong at all, I do not consider that such a requirement would constitute persecution. In any case, the independent evidence suggests that the applicant would be able to continue to carry out exercises in private, as he has done here for the last three months, if he wished to do so, after his return to the PRC.** I am satisfied that the applicant's claimed fear of persecution in the PRC on account of his adherence to Falun Gong is not well founded.'

(emphasis added)

the new ground of appeal

15 The Amended Notice of Appeal filed on the 29 October 2003 raised a number of grounds, which were not pressed at the hearing of the appeal. In essence, the appellant relied on only one ground at the hearing of the appeal. That ground had not been raised before the primary judge. It depended on the application of the majority judgments in the High Court decision of *Appellant S395/2002 v The Minister for Immigration and Multicultural Affairs;* (2003) 203 ALR 112; (2003) 78 ALJR 180; [2003] HCA 71; (S395/2002) which was determined on 9 December 2003, that is, after the decision of the primary judge in this case. In those circumstances, Mr Bromwich, who appeared as counsel for the respondent, did not oppose the Court entertaining this argument even though the argument had not been raised before the primary judge. It is generally undesirable for parties to leave it to the appellate stage to raise arguments for the first time. The practice has been prevalent in appeals relating to protection visa applications, and has attracted criticism from the Court: *VACC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74; *H v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 43; [2000] FCA 1348. However, a party will be permitted to rely on an argument not raised below where it is expedient in the interests of justice for the argument to be raised.

16 In the present case, the fact that the respondent did not oppose that course is a significant factor in favour of the Court permitting the argument to be raised. Further, the circumstance that an authoritative determination of the High Court was delivered between the decision of the primary judge and the hearing of the appeal, and that the High Court judgment reversed a line of established authority of the Federal Court, make it appropriate for the Court to entertain the argument.

the appellant's argument

17 The appellant's argument focused on the reasoning of the Tribunal in the sentences in bold in the critical passage at [14] above. The Tribunal there considered whether the consequences of a return to the PRC would constitute persecution of the appellant. The most serious consequence which the Tribunal found would eventuate was that the appellant would be required to renounce his belief in Falun Gong. The Tribunal found that the appellant would, however, be able to continue to carry on Falun Gong exercises in private. The Tribunal implicitly concluded that the appellant would renounce his Falun Gong beliefs in writing, and would practice, if at all, in private. The appellant contended that the Tribunal erred in law by adopting this process of reasoning.

18 The appellant contended that the Tribunal approached the case by asking the question whether the appellant would be able to continue his practice of Falun Gong in the PRC, in a way which satisfied the appellant, and determining that, as he could do so, he did not have a well founded fear of persecution. It was submitted that the Tribunal asked the wrong question. The proper question had to address the reason why the appellant would modify his practice of Falun Gong and why that would satisfy him. If that question had been asked, so the appellant argued, it would have revealed that the appellant would have modified his conduct out of fear of the serious consequences which would flow if he had failed to do so. The Tribunal accepted the dangers of the open practice of Falun Gong in the PRC. This is indicated by its lengthy reference to the US State Department country information set out at [6]. Having accepted this evidence, had the Tribunal asked why the appellant would have complied with the requirements of the authorities of the PRC, the Tribunal would have concluded that he would have acted from fear of the consequences of failing to comply with the requirements of the authorities. His conduct would have been forced on him and would not have resulted from an exercise of free choice. The Tribunal would then have concluded that the appellant had a well founded fear of persecution.

19 The appellant's argument derived from the majority judgments in *S395/2002*. The Tribunal, in that case, determined that an homosexual man in Bangladesh fell within a particular social group. It found that homosexuals in Bangladesh could not live openly without the risk of serious harm. But the appellant had lived discretely, and had therefore not suffered harm in the past. The Tribunal found that he would live discretely in the future if returned to Bangladesh. Consequently, it reasoned, the applicant would not suffer serious harm and, thus, did not have a well-founded fear of persecution in Bangladesh if he were returned. McHugh and Kirby JJ said at [43]:

'The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious

beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. **In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the threat of harm.** In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly.'

(emphasis added)

20 And at [53] and [54] their Honours said:

'The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh.

It follows that the Tribunal has constructively failed to exercise its jurisdiction and its decision must be set aside.'

21 Gummow and Hayne JJ said at [87] to [88]:

'The primary judgeand the Full Court understood the Tribunal as finding that "[i]t is only if a homosexual couple force Bangladeshi society to

confront their homosexual identity that they will encounter problems". That may be accepted. Both the primary judge and the Full Courtheld further, however, that the finding about how the appellants were likely to live on their return to Bangladesh supported the Tribunal's finding that the appellants' fears of persecution were not well founded. That is, the primary judge and the Full Court both read the Tribunal's reasons as finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity.

This reveals the error made by the Tribunal. **The Tribunal did not ask whythe appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution.** That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is not possible to "live openly as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that " Bangladeshi men can have homosexual affairs or relationships, provided they are discreet". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.'

(emphasis added)(footnotes omitted)

22 In relation to political and religious persecution, Gummow and Hayne JJ had earlier said at [80]:

'If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. **But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question.** And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.'

(emphasis added)

consideration

23 Resolution of this appeal depends upon the proper reading of the Tribunal's reasons. If the Tribunal accepted that the appellant would modify his conduct, but failed to ask whether that would have occurred as a result of the threats of serious harm to the followers of Falun Gong, the case would fall within the reasoning of the majority judgments in S395/2002.

24 But in our view, the Tribunal did not follow such a path of reasoning. The Tribunal introduced its reasoning by acknowledging that some Falun Gong practitioners face serious human rights abuses. It then embarked on an examination of the commitment to Falun Gong which the appellant had established. The Tribunal generally formed an adverse view of the appellant's reliability. Then, it examined the extent of the appellant's practice of Falun Gong in Australia. It found that he had exaggerated his attendances at Falun Gong exercise sessions. It also found that the appellant's explanations of Falun Gong beliefs were vague, although it discounted his responses on the subject because of the difficulty which he faced in explaining abstract concepts through an interpreter. The Tribunal also found that the appellant had not been arrested in the PRC for practising Falun Gong, and had not been asked by the PSB to attend a police station in relation to his practice of Falun Gong. Nor, the Tribunal found, were his difficulties in obtaining a passport to do with his practice of Falun Gong.

25 All of these considerations led the Tribunal to the view that the appellant was not a committed follower of Falun Gong. The Tribunal found that he was not very familiar with Falun Gong, and his practice was limited. It found only that he had "some involvement".

26 In the underlined sentence in the passage in bold at [14] relied upon by the appellant, the Tribunal incorporated all its previous reasoning to support the conclusion that the requirement of the authorities of the PRC of the appellant to renounce Falun Gong would not constitute persecution. The previous reasons explained why the Tribunal did not regard this requirement as persecution of the particular appellant. The substance of these reasons were that he so lacked commitment to Falun Gong that it would not trouble him to renounce his belief. Similarly, his limited commitment to Falun Gong meant that if he were confined to the practice of Falun Gong in private, his beliefs and practices would not be compromised in a significant way. Viewed in this way, the Tribunal did ask why the appellant would renounce Falun Gong, or practice Falun Gong in private if returned to the PRC. Whilst he may not have done so if the authorities in the PRC did not impose the requirements, the Tribunal found that his compliance with those requirements resulted from his lack of commitment to Falun Gong, not from a fear of the consequences threatened by the authorities. Thus understood, the reasoning in this case does not exhibit the error identified in the majority judgment in *S395/2002*.

27 Having determined that the Tribunal did not fall into legal error as alleged by the appellant, it is not a function of the Court to canvas the merits of the view reached by the Tribunal. Nonetheless, it might be thought that there would be few cases in which the Tribunal could find that a person had an involvement with Falun Gong yet that involvement was so limited that the person would comply with the requirements imposed by the authorities of the PRC without suffering persecution. It may be that the better analysis of such cases is that the person's level of commitment is so low that they simply do not fall within the relevant particular social group. In any event, this appeal must be dismissed with costs.

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

Associate:

Dated: 29 March 2004

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 909 OF 2003

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	NAEB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	NORTH, DOWSETT AND LANDER JJ
DATE:	30 MARCH 2004
PLACE:	MELBOURNE (HEARD IN SYDNEY)

REASONS FOR JUDGMENT

DOWSETT j:

FACTS

28 I have read the reasons prepared by North and Lander JJ. As to the facts of the case, I wish to add a reference to one further passage from the Tribunal's reasons at AB 82-83 as follows:

'The Australian Department of Foreign Affairs and Trade (DFAT) assessed in 2001 that "known Falungong [sic] activists" were likely to be subjected to monitoring by authorities on return to [China]. It added that whether they were further penalised by the Chinese authorities was largely determined by the extent of their compliance with Chinese law, which banned Falungong-related [sic] activities … .

... According to DFAT, the current situation for Falun Gong practitioners is as follows:

> Although Chinese authorities officially consider falungong [sic] to be an 'evil cult' ... which promotes 'anti-human, anti-social and anti-scientific' superstition, they are more concerned by the ability of falungong [sic] members to organise themselves and to propagate falungong [sic] beliefs. Laws banning falungong [sic] are aimed at preventing the formation and public assembly of groups and the use of public means (books, videos, leaflets, mass media etc.) to promote falungong [sic]. The authorities are less likely to consider an individual member who practises alone and in private (should such a person come to their attention), and who does not actively propagate falungong [sic] as a 'core' or 'diehard' member. As we have previously reported, 'core' members are more likely to be subject to legal penalties.
>
> Treatment of falungong [sic] practitioners is likely to differ from province to province, and even from city to city, as a consequence of the considerable discretion available to law enforcement and judicial authorities across China. As a broad generalisation, treatment of detainees across the board is likely to be worse in those provinces where the legal system is weakest and/or levels of economic development are low." '

29 I make the following observations concerning this extract:

- The reference to '*monitoring'* of *'known Falungong* [sic] *activists'* presumably relates to Falun Gong activists who *'return'* to China and fear persecution on account of their activities whilst outside of China.
- The passage implies that returning persons will not be penalized in China for activities outside of China but will be penalized if they practise Falun Gong in China, such practice being banned.
- The passage referring to persons being *'less likely'* to be considered by the authorities to be *'core'* or *'diehard'* members (who are *'more likely to be subject to legal penalties'*)does not address the objective likelihood that a practitioner of either kind will suffer persecution. The passage merely compares the relative likelihood of such persecution as between persons practising in private on the one hand and *'core'* or *'diehard'* practitioners on the other.

THE TEST

30 The appellant's entitlement to a protection visa is to be assessed by asking whether:

'... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [he was] 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... '.

31 Thus the Tribunal was obliged to decide whether:

- the appellant feared that he would be persecuted in China for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- whether such fear was "well-founded".

32 Although there was some suggestion in argument that Falun Gong was a religion, the appeal proceeded on the basis that the appellant claimed to fear persecution by reason of his membership of a social group, namely those practising, or wishing to practise Falun Gong. The original departmental decision to refuse a protection visa was based upon the conclusion that the appellant had no fear of persecution or that, if he did, any such fear was not well-founded. The decision-maker did not consider whether any fear was of persecution for a Convention reason. The Tribunal appears to have accepted that the appellant had a subjective fear but concluded that it was not well-founded, again without considering which of the Convention reasons might be engaged. The material suggests that Falun Gong, at least in some manifestations, has characteristics typical of a religion. It seems also to have a political dimension, at least in China. I proceed upon the basis that fear of persecution for reason of religion, political opinion or membership of a social group may be in issue.

THE APPEAL

33 The appellant's argument on appeal focused almost entirely upon a distinction allegedly drawn by the Tribunal between the consequences of the private practice of Falun Gong and those of the public practice thereof. This focus appears to have been designed to demonstrate that the reasons of the majority of the High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 180 ("*Appellant S395*") dictate resolution of the appeal in favour of the appellant. This approach was not taken at first instance before Jacobson J, the decision in *Appellant S395* not having been published at that time. The grounds of appeal ventilated before us were virtually unrelated to his Honour's reasons. I do not accept that an appellant should automatically be permitted, on appeal, to raise a ground not raised below, even where he or she has become aware of its availability only because of a subsequent decision. It has long been the practice to require that all relevant points be taken at first instance. It is by no means uncommon for a point to be taken, even where there is authority to the contrary, if it is expected or hoped that such authority will, in due course, be reversed. Nonetheless, in the absence of any opposition to amendment, the appellant was permitted to add sub-par (B) to par 4 of his notice of appeal so that it now reads as follows:

'4 The learned primary Judge erred in not finding error of law going to jurisdiction on the part of the Tribunal in that the Tribunal engaged in asking the wrong questions at law appropriate to its jurisdiction.

Particulars

(A) ...

(B) The Tribunal has been consistently muddled as to the possibility of the Appellant practising Falun Gong in private to avoid sanctions. It is bad at law to say that the Appellant has the key to not being persecuted in his own pocket, that he has only to renounce his belief, or practise it in private. This runs hand in hand with another error that seems to equate "practice" of Falun Gong with, while living in Australia, with performing the practice in public.'

34 I doubt whether this descriptive approach to pleading is particularly helpful. In particular it leads to a failure to identify the alleged error of law going to jurisdiction. However, in the course of argument it became relatively clear that the appellant's assertion is simply that this case should be treated as being on all fours with *Appellant S395* and that the result should therefore be favorable to the appellant.

the decision in *APPELLANT S395*

35 The appellant submits that the majority view in *Appellant S395* has quite startling and wide-ranging consequences in that:

'... it is clear that it will not be appropriate to divide practices, sexual or religious, into public and private arenas, and assert that the possible "discreet" practice of that which is banned or attracts persecution will deflect an application for refugee status. The correct question for the Tribunal may not, if the practice is likely to attract persecution, distinguish between private and public practice.'

36 It is also submitted that:

'The test of well founded fear of persecution … must disavow any division between public and private performance … '.

37 Such an approach would be difficult to reconcile with the views expressed by Gummow, Kirby, Hayne and Callinan JJ in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088. In that case at [22] – [23] Gummow and Callinan JJ identified a particular class as *'consisting of entrepreneurs and/or businessmen who publicly criticised law enforcement authorities for failing to take action against crime or criminals*.*'* At [46] Kirby J took a similar approach. At [95] Hayne J agreed with the reasons of Gummow and Callinan JJ. Clearly, public (as opposed to private) conduct may be a criterion for identifying group membership. The appellant has misunderstood the effect of *Appellant S395*.

38 The majority view in that case must be seen in light of the evidence which was before the Tribunal and its findings. It found that the appellants were homosexuals and that in Bangladesh, homosexual men are a particular social group for the purposes of the Convention. The evidence indicated that members of such group are subjected to discrimination and violence. However Bangladeshi men may have homosexual affairs or relationships *'provided they are discreet'*. In other words, the evidence established:

- conduct capable of being characterized as persecution;
- directed against members of a particular social group, namely homosexual males;
- which persecution might be avoided by being discreet.

39 The evidence was not that persecution was limited to "indiscreet" homosexual males, nor was it established that "discreet" homosexuality would not lead to persecution.

40 The views of the majority in *Appellant S395* demonstrate that care must be taken in seeking to determine refugee status where the evidence discloses that the likelihood of persecution may depend upon whether relevant future conduct by an applicant will occur in public or private. It is therefore necessary to examine closely the way in which the Tribunal dealt with that aspect of this matter.

41 The private/public dichotomy may be relevant to a number of aspects of claimed fear of persecution by reason of membership of a social

group. Firstly, as is demonstrated in *Dranichnikov*,public conduct may be a criterion of such membership. Secondly, the need to conceal one's conduct as a group member may itself be persecutory. Thirdly, the discriminatory conduct said to constitute persecution may only be incurred, or its nature may vary, if the applicant's conduct as a member of that group is public rather than private or "discreet". Fourthly, private conduct may be less likely than public conduct to attract the attention of potential persecutors. These observations also apply, *mutatis mutandis*, to claims based on religion or political opinion.

FEAR OF PERSECUTION

42 Two aspects which were dealt with by the Tribunal were not pursued before us. Firstly, the Tribunal considered whether the appellant would, if he returned to China, be persecuted for conduct which occurred prior to his departure from China. Secondly, the Tribunal addressed the question of whether, if he returned to China, there was a risk of persecution on account of his conduct in Australia. Much of the discussion at AB 85-86 concerns these matters. The Tribunal concluded that for factual reasons, persecution on account of either aspect of the appellant's conduct was unlikely. I do not understand the appellant to rely upon either aspect for the purposes of this appeal. As I understand it, he now asserts only fear of persecution should he, upon his return, practise Falun Gong in China. Nonetheless his past behaviour may be relevant to that claim.

43 I do not understand the appellant to assert that it would constitute persecution if he were denied the opportunity to practise Falun Gong in public in China. In the appellant's written submissions (par 12) it is conceded that Falun Gong teachings permit practice in private. However it is submitted that the Tribunal erred in holding that forced renunciation would not amount to persecution, that such a conclusion is *'inappropriate cheese paring'* because *'… being required to give up one's beliefs is at the core of the definition of persecution'*. This submission again raises the question of which Convention reason is engaged. It also blurs the distinction between forced public renunciation and private practice. The Tribunal disposed of the matter at AB 86. It identified the possibility that, if his adherence to Falun Gong were discovered, the appellant might be compelled to renounce his beliefs. It then concluded that as he was not a dedicated follower of Falun Gong, such a requirement would not constitute persecution.

44 In *Appellant S395* at [40], McHugh and Kirby JJ said:

'Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it.'

45 Thus the Tribunal was obliged to determine whether the treatment which the appellant faced would amount to persecution. The Tribunal

concluded that it would not. That was a factual matter. The conclusion does not demonstrate jurisdictional error.

Convention Reasons

46 The appellant claims to have been a practitioner of Falun Gong since 1995. As I have said, the appeal proceeded upon the basis that the relevant Convention reason was membership of a social group. The evidence seems not to have established any formal system for identifying membership of any group of Falun Gong practitioners or adherents, other than by practice or perhaps, adherence to its teachings without practice. It is not clear whether the appellant asserted that he wished to practise in public, but if so, the Tribunal rejected his claim. It considered that his history of practice in Sydney (where there was no penalty for public practice) demonstrated that he did not wish to practise in public. This view was fairly open.

47 Given the Tribunal's rejection of much of the appellant's evidence and its conclusion that he was not a dedicated, committed or regular practitioner of Falun Gong, one might doubt whether he was in fact a member of any identifiable group. However the Tribunal accepted that he *'... had some involvement with Falun Gong, either in* [China] *or in Australia, or both … ',* suggesting that he was, at least, a member of an amorphous "group" of Falun Gong adherents, which group included persons having only peripheral interest in the subject and/or practising in a sporadic way. I will proceed upon the basis that he claimed fear of persecution for such group membership. On that basis, it is probably unnecessary to say anything more about Falun Gong as a religion or as involving political opinion.

EVIDENCE OF PERSECUTION

48 The evidence summarized in the reasons of North and Lander JJ and the passage from DFAT cited above demonstrate that persons practising Falun Gong have been persecuted in China over many years, and that since July 1999 such practice has been banned. Practitioners have been punished pursuant to the criminal law or 'administratively', that is, by periods of re-education in labour camps or other compulsory 'rehabilitation' programs. There is evidence of the use of torture against Falun Gong adherents and of their deaths in custody. The Tribunal observed at AB 81 that:

'By the end of 2001, the government had essentially eliminated public manifestations of the movement.'

49 The evidence does not suggest that any particular degree of commitment to Falun Gong is necessary in order to attract the adverse attention of the Chinese authorities, although the DFAT material suggests that 'core' members are 'more likely' to be subject to legal penalties than individual members who practise alone and in private. As I have said, that comparison

says nothing about the objective chance of persecution of a member who practises in private.

50 The Tribunal's views as to the way in which the appellant would practise Falun Gong upon his return to China, or refrain from so doing, were relevant to its assessment of both his claim to fear persecution for a Convention reason if returned to China and whether that claim was well-founded. The Tribunal concluded that the appellant had not practised Falun Gong in public in China after it was banned in 1999. The Tribunal also noted that whilst resident in Sydney, he had, in effect, forgone public practice. He claimed that he could not afford the cost of public transport to and from the Chinese Gardens at Darling Harbour where he had previously participated in such practice. "Public practice", in this regard, seems to have involved participation with other practitioners. The Tribunal concluded that he could have participated in public practice groups at locations closer to his home, had financial considerations been the real reason for his not going to Darling Harbour. This view led the Tribunal to conclude that the appellant was satisfied to practise in private in Sydney and would be similarly satisfied if he returned to China. This conclusion was not based upon any assumption that the appellant would or should behave "reasonably" in China, having regard to the risk of persecution, but upon his conduct in Sydney. The possibility that he would choose private practice in China because he feared persecution if he practised in public did not arise.

The tribunal's decision

51 The core of the Tribunal's reasoning appears in the paragraph immediately preceding the heading *'Conclusion'* at AB 86 as follows:

'In these circumstances, I am satisfied that there is no real chance that the applicant would encounter consequences amounting to persecution, as a Falun Gong practitioner, if he were to return to [China]. There is no evidence before me to suggest that the applicant has ever breached the laws in relation to the public practice of Falun Gong, or that there could have been any basis, after the banning of Falun Gong, for the authorities to take action against the applicant in this regard. It also appears fairly improbable that the authorities would even be aware that the applicant was a Falun Gong follower. However, even if they were aware of this, I am of the view that the most likely, and most serious, consequence for the applicant would be a request that he renounce his belief in Falun Gong. Since, for the reasons set out above, I do not accept that the applicant is a dedicated follower of Falun Gong at all, I do not consider that such a requirement would constitute persecution. In any case, the independent evidence suggests that the applicant would be able to continue to carry out exercises in private, as he has done here for the last three months, if he wished to do so, after his return to [China]. I am satisfied that the applicant's claimed fear of persecution in [China] on account of his adherence to Falun Gong is not well founded.'

52 Much of this passage relates to the appellant's conduct prior to his leaving China. The Tribunal appears to have concluded that the appellant has

a subjective fear of persecution should he practise Falun Gong in China. As much is implicit in the final sentence of the above extract. However it concluded that his fear was not well-founded because:

- He would probably practise in private.
- The authorities would probably not be aware that he was a Falun Gong follower.
- The evidence suggested that the appellant would be able to practise in private in China as he had done for the three months prior to the Tribunal's decision.
- Should the authorities become aware of his private practice, the most serious consequence would be a request that he renounce his belief in Falun Gong. This would not amount to persecution for reasons which I have previously outlined.

53 Both the third and fourth conclusions are based upon the assumption that private practice of Falun Gong will not attract adverse consequences save that, in the event of exposure, it may lead to forced renunciation. The evidence seems not to have supported such assumptions. The country information suggested that private practice is banned and has been punished when detected. Private practice will certainly be less likely to lead to persecution than public practice, but as I have observed, that says nothing about whether fear of persecution for private practice is well-founded.

"Well-founded fear" – "a real chance"

54 In Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 389 Mason CJ said:

'I agree with the conclusion reached by McHugh J. that a fear of persecution is "well founded" if there is a real chance that the refugee will be persecuted if he returns to his country of nationality. … But I prefer the expression "a real chance" because it clearly conveys the notion of a substantial, as distinct from a remote chance, of persecution occurring and because it is an expression which has been explained and applied in Australia. … If an applicant establishes that there is a real chance of persecution, then his fear, assuming that he has such a fear, is well-founded, notwithstanding that there is less than a 50 percent chance of persecution occurring. This interpretation fulfils the objects of the Convention in securing recognition of refugee status for those persons who have a legitimate or justified fear of persecution on political grounds if they are returned to their country of origin.'

55 In the same case, McHugh J said at 429:

'… a fear may be well-founded for the purpose of the Convention and Protocol even though persecution is unlikely to occur. … an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 percent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded. But if there is a real chance that the

applicant will be persecuted, his or her fears should be characterized as “well-founded” for the purpose of the Convention and Protocol.’

56 In *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572-3, Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ said:

‘Chan is an important decision of this Court because it establishes that a person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 percent. But to use the real chance test as a substitute for the Convention term “well-founded fear” is to invite error.

> No doubt in most, perhaps all, cases arising under s 22AA of the Act, the application of the real chance test, properly understood as the clarification of the phrase “well-founded”, leads to the same result as a direct application of that phrase. … Nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. … Conjecture or surmise has no part to play in determining whether a fear is well-founded. A fear is “well-founded” when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 percent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation. In this and other cases, the Tribunal and the Federal Court have used the term “real chance” not as epexegetic of “well-founded”, but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well-founded even though the evidence does not show that persecution is more likely than not to eventuate.’

57 In *Appellant S395*, McHugh and Kirby JJ said at [58]:

“Whether members of a particular social group are regularly or often persecuted usually assists in determining whether a real chance exists that a particular member of that class will be persecuted. Similarly, whether a particular individual has been persecuted in the past usually assists in determining whether that person is likely to be persecuted in the future. But neither the persecution of members of a particular social group nor the past persecution of the individual is decisive. History is a guide, not a determinant. Moreover, helpful as the history of the social group may be in determining whether an applicant for a protection visa is a refugee for the purpose of the Convention, its use involves a reasoning process that can lead to erroneous conclusions. It is a mistake to assume that because members of a group are or are not persecuted, and the applicant is a member of that group, the applicant willor will not bepersecuted. The central question is always whether this individual applicant has a “well-founded fear of being persecuted for reason of … membership of a particular social group”.’ (Original emphasis.)

58 Similarly, Gummow and Hayne JJ observed at [72]:

'It is well established that the Convention definition of "refugee" has subjective and objective elements. Does the applicant fear persecution for a Convention reason (the subjective element)? Is that fear well founded (the objective element)? The fear will be well founded if there is a real chance that the applicant would face persecution for a Convention reason if the applicant returned to the country of nationality.'

The correct question

59 The appellant's case is that the Tribunal failed to ask itself the correct question. Although the ground of appeal is somewhat confusing, the appellant's point seems to be that pre-occupation with the distinction between public and private practice led the Tribunal into error in determining whether the appellant's fear was well-founded, keeping in mind that such test requires only that there be a real chance of persecution. The Tribunal certainly identified this test at AB 75. It accepted that the appellant had some interest in Falun Gong and had some history of practising it. It also accepted that if he returned to China, he might continue to practise in private. The key to the Tribunal's treatment of the matter lies in the following sentences, at AB 86:

'It also appears fairly improbable that the authorities would even be aware that the applicant was a Falun Gong follower. However, even if they were aware of this, I am of the view that the most likely, and most serious, consequence for the applicant would be a request that he renounce his belief in Falun Gong.'

60 The Tribunal then found that forced renunciation would not amount to persecution. I have previously referred to this aspect of the matter.

61 It seems to me that the Tribunal addressed the possibility that the appellant might suffer persecution if he practised in private. It concluded that the consequences to him, if he did so and was exposed, would not amount to persecution. One may doubt the factual correctness of the Tribunal's analysis of the evidence. In particular, the evidence seems to demonstrate at least the chance of more serious consequences for those who practise in private. Nonetheless it cannot be said that the Tribunal asked itself the wrong question.

Orders

62 In those circumstances, the appeal must be dismissed with costs.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 29 March 2004

Counsel for the Appellant:	Mr S.C. Churches
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Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	24 February 2004
Date of Judgment:	30 March 2004