EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 52
P278/19

Lord Malcolm
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal

by

ZUO HUI XIE

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Winter; Drummond Miller LLP (for Katani & Co, Solicitors, Glasgow)
Respondent: A McKinlay; Office of the Advocate General

21 August 2020

[1] This is an appeal under section 27D(2) of the Court of Session Act 1988. In his petition for judicial review the appellant seeks reduction of a decision dated 24 December 2018 by which the Secretary of State for the Home Department (SSHD) refused to treat certain further submissions made by him as a fresh claim for the purposes of rule 353 of the immigration rules. Permission for the petition to proceed was refused by Lord Tyre and this was confirmed on an application for review of the refusal by Lord Drummond Young. They both

considered that the petition had no real prospect of success. In the present appeal the appellant challenges that view. The task for the Inner House is to consider the question of new, whilst extending respect to the view of the Lords Ordinary (*PA* v *Secretary of State for the Home Department* [2020] CSIH 34).

[2] The appellant is a Chinese citizen whose asylum application was originally refused in 2003. He claimed to be at risk of persecution in the event of return to China because of his practice of the Falun Gong religion. Falun Gong is a Chinese movement founded in 1992. Its adherents perform ritualistic exercises in order to gain physical and spiritual renewal. In 1999 the Chinese government proscribed the movement, which it regards as an "evil cult".

[3] In July 2003 an immigration judge refused the appellant's appeal against the SSHD's decision to deny him asylum ("the 2003 decision"). The immigration judge held that the appellant's evidence was unconvincing; his account of having had difficulties with the police in China was disbelieved. The appellant's appeal rights were exhausted in July 2003. He submitted fresh representations in 2011; these were refused in 2014.

[4] In April 2018 the appellant was discovered to be working illegally in a restaurant in Livingston. In October 2018, he made further submissions to the SSHD. Through his solicitors, he submitted a witness statement, 17 letters of support, copies of some case law, and a country guidance and policy note on the Falun Gong in China published by the SSHD in November 2016.

[5] The SSHD refused to treat the appellant's further submissions as a fresh claim under and in terms of immigration rule 353. The decision letter took as its starting point the 2003 decision. It concluded that the new information, taken together with the previously considered material, did not create a realistic prospect of success before an immigration

judge. Consideration was given to the country policy and information note ("the country guidance") submitted by the appellant. The decision maker noted in particular the discussion in *LL (Falun Gong - Convention Reason – Risk) China CG* 2005 UK AIT 00122. In that decision the tribunal found that the large majority of those who practised Falun Gong in China in privacy and with discretion did not experience material difficulties with the authorities. The risk of ill-treatment escalated significantly when a practitioner of Falun Gong took part in activities which were reasonably likely to bring him or her to the attention of the authorities. Such activities would include the public practising of Falun Gong exercises, the recruitment of new members, and the dissemination of information about the organisation. The decision letter went on to record that the appellant stated that he practised Falun Gong on his own and that no evidence had been provided to show that he did so in public. It was not accepted that the appellant would be subject to persecution by the Chinese authorities. The conclusion reached was that the appellant had not established a well-founded fear of persecution and that he did not qualify for asylum on the basis of his political opinion. He had not succeeded in establishing that he qualified for humanitarian protection or that his return to China would breach his rights under articles 2 or 3 of the European Convention on Human Rights.

[6] The conclusion of the decision maker was expressed as follows:

> "Careful consideration has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have a realistic prospect of success before an immigration judge in light of the reasons set out above, in particular:
>
> - It is not accepted the evidence you have now submitted would overturn the previous findings
>
> - Current case law and country guidance has been considered"

[7] In his oral submissions to this court Mr Winter concentrated on what he maintained was an error by the SSHD in refusing the appellant's application for consideration of the fresh submissions. He pointed out that the country guidance acknowledged that in cases where a Falun Gong practitioner would only practice in private on return and would not be subject to denunciation, the reasons for such "discretion" would need to be considered. The country guidance correctly observed that the Supreme Court had held in *RT (Zimbabwe)* v *SSHD* [2013] 1 AC 152 that a person may be at risk of persecution on the grounds of imputed political opinion and that it is nothing to the point that he or she does not in fact hold that opinion (Lord Dyson para 53). The perspective of the persecutor was determinative. Mr Winter submitted that the approach taken in the decision letter was inconsistent with this principle. It wrongly viewed Falun Gong through the prism of religion, whereas the Chinese authorities imputed the holding of a political opinion to those who practised it. There was a real prospect of showing that the country guidance demonstrated that those who are suspected of, or who are, practising Falun Gong are treated harshly and that such ill-treatment was not limited to members. The errors were material since had they not been made the appellant would have had a real prospect of showing that the practice of Falun Gong in China involved renunciation of a core human right. In terms of *RT (Zimbabwe)* and *HJ (Iran)* v *SSHD* 2011 1 AC 596, the appellant's inability to practice Falun Gong openly in China without the risk of being persecuted resulted in his being denied a core human right.

[8] We are not persuaded by Mr Winter's submissions. We consider that Mr McKinlay, who appeared on behalf of the SSHD, was correct to submit that there are two separate stages in the analysis. The first is to ask whether there was any evidence before the SSHD to show that the appellant would in fact be likely to be at risk of persecution if returned to

China. The second (and separate) question is whether the decision in *RT (Zimbabwe)* has any application in the circumstances of the present case.

[9] On the first issue we are satisfied that there was no evidence to show that the appellant was at any material risk of persecution. There was no suggestion that he practised Falun Gong in public. The country guidance was that those who practised individually, like the appellant, were not subject to persecution by the authorities in China. The decision letter cited paragraph 2.3.13 of the country guidance which stated:

> "In that regard decision makers must note that the Tribunal in *LL* specifically found that Falun Gong meditation and exercises can be carried out alone or with a few friends in private, and that there does not appear to be any duty or pressure on a Falun Gong practitioner to proselytise, even though some plainly do. The Tribunal endorsed the earlier view expressed by the Court of Appeal in *L (China)* that 'We are not prepared to accept that authoritarian pressure to cease the practice of Falun Gong in public would involve the renunciation of core human rights entitlements' (para 36)"

[10] The reference in this passage to *L (China)* is a reference to the decision of the Court of Appeal in *L (China)* v *Secretary of State for the Home Department* [2004] EWCA Civ 1441 in which it was accepted on behalf of the Secretary of State that on appropriate facts a member of Falun Gong might be held to have a well-founded fear of persecution in China on the grounds of imputed political opinion. The issue is a fact sensitive one.

[11] The country guidance concluded its analysis of risk by stating that since pressure from the authorities to cease the practice of Falun Gong in public would be unlikely to constitute a breach of human rights, a practitioner concealing his or her activities would not on that account fall within the scope of the Refugee Convention (para 2.3.14).

[12] In our opinion, the facts of the present case, as they were presented to the SSHD in the fresh submissions claim, came nowhere close to supporting the contention that the appellant would face a material risk of persecution on return to China. We are satisfied that

the facts of the case were properly assessed by the SSHD. The combined effect of the appellant's own evidence taken along with the country guidance was that (a) he would not practice Falun Gong in public, but would do so only in private; and (b) persons practising Falun Gong in private, such as the appellant, were not likely to be subject to persecution by the Chinese authorities. The appellant put forward no evidence that he would be treated differently to any other person who practised Falun Gong only in private. He submitted no evidence that there was any reason, peculiar to his individual circumstances, to show that his private Falun Gong activities would expose him to any significant risk of persecution. It follows that the SSHD was entitled and in our view correct to hold that there was no evidence to show that the appellant would be at risk on return to China. We can find no error of law in the approach taken to this question in the decision letter. Accordingly, it follows that the appellant had no reasonable prospect of success on a rehearing of his case in the light of the additional submissions.

[13] The second issue concerns the applicability of the principle recognised by the Supreme Court in *RT (Zimbabwe)*. In our view this is irrelevant in the circumstances of the present case.

[14] In addressing this aspect it is important to note that Mr Winter did not suggest that the practice of Falun Gong was objectively a political activity. He relied only on the perception of it as such by the Chinese authorities.

[15] We do not consider that pressure from the authorities to cease practising Falun Gong in private could constitute interference with a core human right. As a matter of common sense we do not see how having to refrain from participating publicly in a non-political activity like Falun Gong (whatever view the authorities may take of the activity) could be said to provide a basis for claiming interference with the freedom to hold a political belief.

[16] In our opinion, the circumstances are not at all analogous to having to conceal one's sexuality (cf *HJ (Iran)*) or to having to pretend that one held political beliefs when in fact one had none in order to appease an oppressive regime (cf *RT (Zimbabwe)*). Whilst there is undisputed evidence that the Chinese authorities perceive Falun Gong as a political movement, it appears to us that there was no material before the SSHD to justify the view that it truly amounts to a political activity. We agree with what was said by the Asylum and Immigration Tribunal in *LL* at paragraph 36:

> "Our second conclusion is that the essential benefit of Falun Gong to an individual comes from the practice of meditation and Qi Gong exercises, which can be carried out alone or with a few friends in private. It appears to have some spiritual dimension. There does not appear however to be any duty or pressure on a Falun Gong practitioner to proselytise, even though some plainly do. We therefore endorse the view expressed by the Court of Appeal in paragraph 33 of their judgment in this case that 'We are not prepared to accept that authoritarian pressure to cease the practice of Falun Gong in public would involve the renunciation of core human rights entitlements'".

[17] In our opinion, that conclusion applies to an even stronger extent in the present case given that the appellant's evidence was that he practised Falun Gong only in private. The fact that a person, such as the appellant, may choose to conceal certain behaviour or beliefs, which do not on an objective analysis amount to expressions of political opinion, cannot amount to an infringement of any core human right. We therefore reject the principal argument advanced by Mr Winter.

[18] Mr Winter also submitted that the decision letter was deficient because it made no reference to paragraph 2.3.9 of the country guidance. This explained that the Chinese authorities were reported to have instructed neighbourhood committees to denounce Falun Gong members. The difficulty for the appellant is that there was nothing advanced on his behalf which tended to suggest that he was at any risk of being denounced to the Chinese authorities because of his private practising of Falun Gong. In these circumstances,

paragraph 2.3.9 of the country guidance was not relevant in the context of the appellant's case. The SSHD did not err in omitting to refer to that part of the country guidance.

[19] At the end of his oral submissions (but not in his written note of argument) Mr McKinlay invited us to express a view on the averments set out in paragraph 11 of the petition. These were to the effect that the SSHD had applied an incorrect test by referring in the decision letter to whether the further submissions "would" create a realistic prospect of success before an immigration judge. This was averred to set the standard at too high a level and to fail to reflect properly the test contained in immigration rule 353. Mr McKinlay explained that such averments were frequently advanced on behalf of petitioners and that it would be useful for there to be authoritative guidance on the point. It is important to note, however, that at the stage of the oral hearing before Lord Drummond Young Mr Winter did not insist on this branch of the case. Entirely properly, he took the same stance before us, both orally and in his written argument. In these circumstances, we do not think that it would be right for us to attempt to express any view on the point since it has not been insisted in or argued on both sides before us.

[20] For the reasons we have given we shall refuse the appeal and adhere to the interlocutor of Lord Drummond Young of 2 September 2019 refusing permission for the petition to proceed. We shall reserve all questions of expenses.