Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02985/2015

<u>THE IMMIGRATION ACTS</u>

Heard at Glasgow	**Decision & Reasons Promulgated**
on 18 August 2015	**On 21 August 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

YAN CHEN

<u>Appellant</u>

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation:</u>
For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

<u>DETERMINATION AND REASONS</u>

1. The appellant is a citizen of China, born on 20 September 1984. He sought asylum in the UK, basing his case on his association with Falun Gong and breach of family planning policy. His case is no longer pursued in the second respect.

2. The respondent's reasons for refusing the claim are set out in the 17 page letter dated 4 February 2015.

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3. First-tier Tribunal Judge P A Grant-Hutchison dismissed the appellant's appeal by determination promulgated on 27 April 2015.

4. The appellant sought permission to appeal to the Upper Tribunal on the following grounds:

<u>Ground 1 – Error in dismissing real risk due to Falun Gong association</u>

2. The FTT accepts at paragraph 13 that a Falun Gong practitioner may be subject to persecution in China and if such a person has come to the attention of the authorities he is likely to be persecuted. However, the FTT considers the credibility of the appellant and finds at paragraph 14:

> "The appellant contends that he first saw a friend undertaking exercises and that on searching the internet he realised that he was practising Falun Gong. The respondent replies that the appellant on his own account the authorities have blocked the official Falun Gong website and he could only read material about the persecution of Falun Gong followers and therefore questions how he could have recognised the exercises. It is a fair question to which the appellant has no reasonable answer. What is of considerably more significance however is the limitations of the appellant's knowledge about the practice of Falun Gong. During his asylum interview he gave answers about the history of Falun Gong which was consistent with the objective evidence. If the appellant's evidence of the practice was limited only to a censored website then his limited knowledge of the actual exercises would be understandable. The appellant has stated that he was not formally taught Falun Gong and that he learned what he knows from a book and a DVD. He has also stated that he attended several gatherings of some 8 practitioners. Indeed this would have to be his contention, otherwise he would be unlikely to have come to the attention of the authorities. The objective evidence shows that verses are chanted before the exercises. The appellant at his asylum interview and in his oral evidence before me knew nothing about such chants. There is no explanation as to why he nor any of the practitioners attending the gathering knew anything about the chanting of said verses. It is also more than a little strange that the appellant has only displayed a very basic knowledge of 3 out of the 5 basic exercises of Falun Gong. It is also of considerable significance that the appellant has not actively sought out fellow practitioners whilst in the UK … He has applied for asylum and officially disclosed that he is a practitioner – why then would he not join with other practitioners in a country where the practice is legal."

3. … the FTT has erred in law:

(i) By arriving at a finding which is unsupported by the evidence. The FTT relies on the reasoning as to how the appellant could have identified the exercises as Falun Gong if the website was blocked. However, the FTT acknowledged that the appellant had a book, DVD and leaflet. The FTT has erred in failing to exercise anxious scrutiny and assess whether the appellant was able to identify the exercises from those items as Falun Gong. The FTT has thus reached a finding which is not supported by the evidence.

(ii) By arriving at apparent contradictory and unclear findings and failing to resolve those. The FTT finds that, "*What is of considerably more*

significance however is the limitations of the appellant's knowledge about the practice of Falun Gong. During his asylum interview he gave answers about the history of Falun Gong which were consistent with the objective evidence. If the appellant's experience of the practice was limited only to a censored website then his limited knowledge of the actual exercises would be understandable." It is not clearly exactly what the FTT means in reaching these findings and appears to find on one view that the appellant's knowledge of Falun Gong was consistent with the country information but fails to make clear what weight is placed on that;

(iii) By arriving at a finding which is unsupported by the evidence. The FTT notes that there is no explanation as to why he nor any of the practitioners attending the gathering knew anything about the chanting of said verses. However, the appellant did explain, as recorded at paragraph 8(d), that the DVD did not have any verses to chant and thus there was an explanation as to why there was no chanting. The FTT has thus reached a finding which is unsupported by the evidence as there was an explanation tendered;

(iv) By arriving at a finding without assessing the evidence and whether that supports the finding. The FTT finds that it is more than a little strange that the appellant has only displayed a very basic knowledge of three out of the five basic exercises of the practice of First-tier Tribunal. However, the FTT has not assessed the appellant's evidence as recorded at paragraph 8(d), namely whether it is still strange in light of the fact that the appellant did not have access to any material to remind himself of the movements and he was only interested in the fifth movement. The FTT has arrived at a finding without assessing the explanations proffered and without exercising anxious scrutiny;

(v) The FTT has asked a rhetorical finding without exercising anxious scrutiny on the evidence. The FTT asks, "*why then would he not join with other practitioners in a country where the practice is legal."* However the appellant gave evidence as noted in paragraph 8(c) he was frightened that his personal details would be disclosed to the Chinese authorities. The FTT has thus reached a finding without exercising anxious scrutiny;

(vi) If the foregoing are well-founded the remaining findings in relation to the appellant's Falun Gong case are not sufficient for the appeal to be dismissed. Reliance on section 8 of the Asylum & Immigration (Treatment of Claimants etc) Act 2004 is not sufficient where the FTT accepts the country information supports the appellant's fear of persecution and the fact that there is no warrant should be treated as a neutral factor having regard that there is no or insufficient evidence to show that the police will always leave a warrant.

5. On 20 May 2015 a Judge of the First-tier Tribunal granted permission to appeal, considering it arguable that in reaching his adverse findings the judge failed to engage adequately with the appellant's explanations set out in particular at 8(c) and (d) of the determination, or failed to set out adequately why he did not accept those explanations.

6. Mr Winter submitted that the grant of permission went usefully to the core of the grounds. The judge recorded explanations given by the appellant at

paragraph 8, but in reaching his conclusions at paragraph 14 failed to resolve those points. The judge accepted at paragraph 13 that a Falun Gong practitioner who had come to the attention of the authorities was likely to be persecuted. Ground 3(i) identified a failure to assess the various sources from which the appellant might have learned about Falun Gong. The judge said at paragraph 14 that there was a fair question to which the appellant had "no reasonable answer", but the appellant had provided an answer. Ground 3(ii) identified an inconsistent finding. The judge did not make it clear what he made of this. The respondent accepted that the appellant gave various answers to questions at interview about Falun Gong which were largely correct. Ground (iii) showed that the appellant offered an explanation for why he did not know about the chanting of verses. Ground (iv) and (v) disclosed similar errors. While findings of fact were usually the province of the First-tier Tribunal, they could be displaced if they were insufficiently reasoned or if they disclosed a lack of anxious scrutiny. Mr Winter acknowledged that even if the criticisms were made out there was still the reasons given at paragraph 15. However, he pointed out that the judge did not find the absence of a warrant to be a decisive point on its own, because a warrant was not always left by the police, and although delay was relevant, it was also by itself insufficient. The determination should be set aside and a fresh hearing directed.

7. Mr Mullen in reply said that such explanations as the appellant had offered were partial and flimsy. He said that he had not learned much about Falun Gong but it remained odd that he knew as little as he did, that he had not tried to replace the book and DVD which he said he lost once he was in the UK, and that he had not sought to practise in the UK. The critical question was not how much he knew about Falun Gong either at interview or at the hearing but whether he was wanted by the Chinese authorities. His lack of interest in practising Falun Gong in the UK indicated that his level of interest was not such as to have attracted persecution. The judge's reasoning on whether he was satisfied that the appellant was a wanted man could not be faulted, and was dealt with at a number of levels. The lack of an arrest warrant was inconsistent with the appellant's account, taken along with the background information. Ongoing prolonged police interest in a person who was at best a minor practitioner of Falun Gong was unlikely. Delay arose not only while in France but over a period spent in Ireland and "more importantly", as the judge said at paragraph 15, in a delay of 2 years and 3 months in the UK. The judge noted the appellant's claim not to have understood asylum procedure and to have had reservations about costs, but said the difficulty about that was that his wife had sought asylum and he had lodged letters of support from individuals who had also sought asylum. It was to be expected that they would have had advised the appellant earlier. The appellant said that he did not practise in Falun Gong because he feared being reported to the Chinese authorities. There was no evidence to support a risk that Falun Gong practitioners in the UK, who were likely to be refugees at least in the broad sense, would report on such matters to the Chinese authorities.

There was no evidence of infiltration of Falun Gong groups in the UK by informers to the Chinese authorities. This was a poorly supported account which the judge had been entitled to reject. The grounds of appeal to the Upper Tribunal were in essence no more than a series of factual disagreements. There were no significant self-contradictions or omissions in the judge's findings.

8. Mr Winter in response submitted that the requirement of anxious scrutiny was in effect a duty to assess any factor which might tell in favour of an appellant. The crux of this case was that the appellant was recorded as giving various explanations which had not been factored into the conclusions reached. For example, the appellant's explanation for not practising Falun Gong in the UK had not been dealt with even as a matter of inference. The decision maker was bound to say whether the explanation given was accepted as valid, and why. Although the appellant's degree of knowledge of Falun Gong was not a decisive factor in itself, it was noticeable that at interview the appellant had given quite detailed and accurate answers showing a level of knowledge of the practise, and the Tribunal at least ought to have said what weight was to be given to that.

9. I reserved my determination.

10. In my opinion, the assessment of exactly how much or how little the appellant knew about Falun Gong, from which particular sources he derived that knowledge, and whether he explained any deficiencies in his knowledge, is a rather fruitless exercise. The appellant accepted that he did not know much about and had little involvement with Falun Gong. The fundamental questions were whether it was reasonably likely that in China he had come to the adverse attention of the authorities for that reason and whether they maintained an adverse interest in him as a result.

11. A judge, even when bound to exercise proverbial anxious scrutiny, does not have to deal line by line with every assertion, no matter how slight, which an appellant makes. The judge had the advantage of hearing and assessing the appellant's evidence. He was entitled to find him a less than impressive witness who knew little about Falun Gong. While the expression about why he would not join in the practise in the UK is rhetorical, it is plainly a finding that the appellant has no real interest. The appellant's explanation that he believed he would be at risk of being reported to the Chinese authorities if he practised Falun Gong in the UK is not explicitly rejected but it is plain, reading the determination fairly and as a whole, that the judge thought it feeble. I see no error in that.

12. Reading paragraphs 14 and 15 together I find them to be an adequate explanation to the appellant of why his claim to be wanted by the Chinese authorities for the practice of Falun Gong is not found probative, even to the lower standard. This was a patently weak claim. The judge's reasons for rejecting it have not been shown to be less than legally adequate, or otherwise legally flawed.

13. The determination of the First-tier Tribunal shall stand.

14. No anonymity order has been requested or made.

Upper Tribunal Judge Macleman
19 August 2015