

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2007 1204 JR**

**BETWEEN**

**Y. L.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND DENIS LENIHAN SITTING AS THE REFUGEE APPEALS TRIBUNAL**

**RESPONDENTS**

**JUDGMENT of Ms. JUSTICE M.H. CLARK, delivered on the 7th day of October, 2009.**

1. This is an application for *certiorari* of the decision of the Refugee Appeals Tribunal (RAT) dated 27th June, 2007, affirming the recommendation of the Refugee Applications Commissioner that the applicant should not be declared a refugee. Leave was granted to contest the said decision by Cooke J. on 13th February, 2009, on two grounds:

(1) That the contested decision failed to consider and to make a finding upon the applicant's claim to fear persecution if returned to China on account of his having applied for asylum in this State.

(2) That the contested decision contains no adequate statement of reasons as to why the applicant claims to fear persecution on account of his activities as a Falun Gong practitioner was rejected as not being credible.

2. Mr. Brendan Kilty, S.C., appeared for the applicant with Mr. Paul O'Shea, B.L. The respondent was represented by Mr. Anthony Moore, B.L., and the hearing took place in the High Court on 23rd July, 2009.

**Factual background**

3. The applicant is a citizen of China who arrived in Ireland in or about the month of January 2001 on a six-month student visa which prohibited him from engaging in any employment during that period. At the expiry of his six month visa, he remained on in the State illegally and took up employment and has been here ever since. It is clear that at some stage, his presence in the country came to the attention of the Immigration authorities. He was notified that the Minister intended to make a deportation order in July 2005, and he was served with what is colloquially known as the "three options" letter. He was invited to make representations as to why he should not be deported. No response was received from the applicant to this letter – he says he sent the letter back to the Department of Justice. On 13th October 2005, he was served with notice of a deportation order made in respect of him on 31st August, 2005, and he was told to prepare himself for deportation not later than 17th November, 2005.

4. The applicant applied for asylum on the date of his proposed deportation, claiming that he did not know anything about the asylum process until then. The essence of his application for asylum was that he feared persecution in China, owing to his activities in the Falun Gong movement, since 1997. In his ASY 1 Form, he claimed that he had arrived in Dublin Airport on 16th January, 2001, having paid a travel facilitator 4,000 RMB. On that form, he stated that his reasons for seeking asylum were "social reasons". His application for asylum was dated 22nd November, 2005, which was the same day on which he was due to report for deportation. The applicant's ASY-1 Form records that the following information was collected at his preliminary s. 8 interview:-

"This applicant has been in this country for five years. He was due for deportation today, 22/11/2005, but was advised by his friends to apply for Asylum. This applicant states that he cannot go back to China for social reasons."

5. On both his ASY-1 Form and questionnaire, which he completed on 30th November 2005, the applicant said he was born in December 1978. No mention of association with or adherence to the Falun Gong was made on his ASY-1 Form. On his questionnaire, he said his religion was Falun Gong. He described that he had thirteen years of education and was a Master of traditional Chinese medicine and described a period of employment as a "major surgeon" in a children's hospital in a city in China. He described having had a heart attack, which required several years of effort on his part before he was recovered. He claimed that in 1997, he began to practice Falun Gong and entered a new beginning. On 25th April, 2000, police came to his house and asked him to accompany them to the police station. They gave him no information as to why he was being requested to go to the police station. He then discovered that he was asked to make a statement agreeing to cut himself off from Falun Gong and to guarantee not to practise Falun Gong from that moment. If he did not agree to sign the statements, he would not be able to practise as a "major Doctor" and his parents could lose their jobs. He said that he could not cut off the relationship with his Master, who was "much closer than my father", so he refused to sign the statement. The policemen then changed their attitude and told him that if he continued to practise Falun Gong, his relatives would be involved. He was then told that he would be taken to a place from where he would not be released until he stopped practising. He was put in Ma Gia Educational Infirmary for two and a half weeks, where he was held in an iron cage with other Falun Gong practitioners. The police officers used an electric stick to hit his head leaving a

scar; they used a lighter to burn his toes and they used a chemical substance to wash his stomach causing a stomach condition which he has until now. He was put into handcuffs and fetters and put in the position known as the Tiger Chair where the soft tissue in his left knee joint was damaged and an iron whip was used on his shoulders and legs. Finally, on the 24th May 2000, he signed a statement declaring that he would no longer practise Falun Gong and his family had to hand over 100,000 Yuan in bail money so he could be released. His injuries were treated by his family and he recovered quickly. The family arranged that he would get a passport from the Police Bureau and obtained a visa from the local higher education authority. He claimed that it was only when the Irish Embassy "*wanted to send me home and then I wanted to apply for refugee in order to gain human rights protection*". He feared imprisonment and brainwashing if returned to China. He claimed that he had no way of making a living because "*I practised Falun Gong before and I was fired by my unit*".

6. The applicant attended for interview at the Office of the Refugee Applications Commissioner (ORAC) on 16th February, 2006, where he had the assistance of an interpreter. It was determined at the interview that the applicant was not a major surgeon but rather, an osteopath who did not operate. He explained that he first practised Falun Gong after his heart attack and had been practising for four years in China. He did not practice at first in Ireland because of his fears that the Chinese Embassy would be watching. Although he saw people carrying out Falun Gong exercises in the street, he was not sure if they were genuine or representatives of the Chinese Embassy. He said that he took up Falun Gong again about a month before the interview "to build himself up for the interview" and he carried out his exercises in the back garden where he lives. He did not practise during the four years that he lived in Waterford because of fears that his boss would report him to the Embassy. He was unaware that there was a Falun Gong practice session in Waterford every Thursday, and he agreed with the interviewer that it was strange to have taken up the practice of Falun Gong at the time of his deportation. He explained that he was stressed and would rather die than go back to China. He repeated his allegations of torture and demonstrated scars on his arm and his head. He explained that his parents had organised his Passport in the middle or end of May, 2005, and was unable to explain how his Passport was dated as having been issued in April, 2005, apart from explaining that it must have been backdated and that "anything can be done in China".

7. The applicant said that he left China to apply for asylum in Ireland, but when he got here, he did not know how to apply. He said Chinese eyes were watching everyone here and that when he was asked by an Immigration Officer in Tramore about his visa, he did not tell them anything about the Falun Gong. He explained that his GP had referred him to SPIRASI (a non-profit, humanitarian organisation that works with survivors of torture) but that he had never taken any medication because Falun Gong practitioners do not take medication. He explained that his delay in leaving China (considering that his visa was issued on 17th November, 2000) was because he was part of a group and it took time to assemble documents for the group. He said that after his release from detention in China, he did not stop practising Falun Gong, but he was only doing meditations, not practising, and was unable to cross his legs due to the injuries which he had sustained. He had been given DVDs and videos by the Irish Association of Falun Gong relating to treatment meted out to practitioners who are detained in China. The footage was taken after he left China. At that stage, he had not joined that association, but said he had many friends in the association with whom he shared experiences and thoughts.

8. The applicant explained that when he got to Ireland safely, he felt relief and did not care about Falun Gong. He did not practise on his own in private because he did not have enough space to do so. He was afraid that he would be found out and that it would have repercussions for his parents and his grandmother in China. He stated that he was always worried about being found out and he was even worried that the contents of the s. 11 interview would be sent in a report to the authorities in China. He stated again that the Embassy has eyes everywhere and records the coming and going of people into the ORAC offices.

9. The applicant was then asked about leadership people in the Falun Gong movement, about exercises and about the Falun Gong flag. At the interview, he actually sat down and crossed his legs but had to be assisted to a standing position. The interview notes record that he was in severe pain. He engaged in conversation while carrying out the movements which were recorded as having been carried out nervously. At the end of the interview, he stated that it would affect his life radically if he was not allowed to stay and that he wished to stay here and give his medical skills to the Irish people. He had been taught not to lie and to be kind and truthful and tolerant with other people, which was a feature of Falun Gong and he hoped that the Irish Government would provide him with protection.

### **The ORAC decision**

10. It was accepted in the s. 13 report compiled in respect of him in April 2006, that the applicant was from China, but it was identified that major credibility issues as to whether he had ever been a Falun Gong follower surfaced during the s. 11 interview. The issues identified in the s. 13 report may be summarised as:-

(1) He stated that the date on which the Falun Gong was made illegal was the 25th April, 1999, as opposed to 22nd April, 1999.

(2) He did not give a credible explanation for the discrepancy between the date on which his Passport was issued (April, 2000) and the date on which he claimed to have first applied for it (May 2000);

(3) The fact that he did not apply for asylum until after he had been served with the deportation order was found not to be a coincidence;

(4) The fact that the applicant claimed that he was persecuted because he was a member of the Falun Gong, and yet did not practise Falun Gong when he was in Ireland, where he could have practised legally and without fear. Also, the fact that he said that when he arrived that he felt relief and did not care about Falun Gong ("I thought I was safe") was not indicative of the attitude of a practitioner. He said he only began practising again to build himself up for the interview. It was found not credible that a genuine Falun Gong practitioner would practise openly in China but not practise in Ireland.

(5) One of the reasons which he gave for not returning to China was that his Passport had expired. He also implied that the Chinese Embassy had people watching Chinese nationals arriving at the asylum centre and were photographing them.

11. Essentially, it was found that while there was no dispute that Falun Gong is persecuted in China, the applicant was not a Falun Gong practitioner. While he had displayed a basic knowledge of Falun Gong at interview, this information is readily available on the Internet and most health food shops carry brochures on Falun Gong practice. He made an error in the drawing of the Falun Gong symbol which he corrected after the lunch recess at the interview. The authorised ORAC officer concluded that Falun Gong was no longer an issue as the applicant had ceased practising by his own admission. The officer found that the applicant came to Ireland for reasons other than asylum. The case generally was found to lack credibility.

12. Appended to the s. 13 report was a letter dated 13th December, 2005, from a GP in Church Street Clinic, Wicklow, to the Centre for the Care of Survivors of Torture at SPIRASI. The letter indicates that the patient had alleged that he had been persecuted and tortured in China, and stating that he had numerous scars on his body. The GP indicated that he wished to refer the patient for counselling which "*would be beneficial in addressing psychological issues*". He made no findings and expressed no view in that letter.

13. Of some significance is a news article from the BBC Monitoring Service online which was appended to the s. 13 report. The article sets out the terms of the announcement made by the Ministry of Civil Affairs in China in 1999, banning six activities by the Falun Gong group, which activities may be summarised as:

- (i) Hanging Falun Gong advertisements;
- (ii) distributing Falun Gong propaganda;
- (iii) assembling for the purpose of promoting Falun Gong activities;
- (iv) engaging in activities such as assemblies, parades or demonstrations for the purpose of protecting and advertising Falun Gong;
- (v) inciting the public to disturb social order by fabricating or distorting facts or spreading rumours; and
- (vi) organising, linking up or commanding activities or contesting relevant government decisions.

14. The BBC article records that the Ministry text stated:

"Those whose acts of violating the above rules constitute a crime shall be held accountable for their crime; and if their acts do not constitute a crime, they shall be disciplined or punished according to law."

15. As will become apparent, this document is of particular relevance because reliance was placed upon it by the applicant at the hearing of the substantive application for judicial review in support of his second ground for impugning the decision.

### **The Appeal**

16. The Refugee Legal Service (RLS) lodged a Notice of Appeal to the RAT on behalf of the applicant in which it was stated that he was seeking asylum on grounds of his religion and his membership of a particular social group. The RLS made various submissions with respect to the s. 13 report, but none of the submissions related in any way to the treatment of failed asylum seekers on return to China, which would later become an issue in the case. Three Country of Origin Information (COI) documents were appended - an article from '*The Epoch Times International*', a report from the Falun Gong Human Rights Working Group and an Amnesty International report. Those COI reports deal generally with the persecution of Falun Gong practitioners in China, but do not refer to the situation of failed asylum seekers who are returned to China.

17. An oral hearing took place on the 16th April, 2007, at which the applicant was represented by counsel. It is unfortunate in this case that no attendance note of the hearing is before the Court and the Court is reliant on the summary of evidence contained in the RAT decision. It appears from that summary that the applicant asserted at the oral hearing that in addition to his fear of persecution as a Falun Gong practitioner, he feared persecution if returned to China as a person who had (unsuccessfully) applied for asylum in another country.

18. A negative decision issued from the RAT on 27th June, 2007. It is that decision that is challenged in these proceedings.

### **The RAT decision**

19. The format of the decision is different from the usual and it is shorter than other decisions which follow a format of quoting extensive tracts of law frequently not applicable to the case in hand. Under the heading "*The Applicant's Claim*", the Tribunal Member noted that the applicant said at the hearing that he was born in 1968, and not 1978, as was stated on his asylum application. The Tribunal Member summarised the applicant's claim as follows:-

*"If he was to return to China he said that he would be persecuted on the account of his activities in China and on account of the fact that he had now applied for asylum in this country. Therefore, he said the government would target him on account of what he had said about them in his asylum application."*

20. The Tribunal Member noted that the applicant said at the oral appeal hearing that he started practising Falun Gong in 1990, although in his questionnaire, he said that he had become involved in 1997. He noted that the applicant did not apply for asylum in Ireland until November 2006, and said he did not know about the asylum process until then although he admitted that he had made contact with some other members of the Chinese community who were actively involved in the Falun Gong movement from the time he came to Ireland in 2001.

21. The Tribunal Member then set out various legal principles relating to the definition of a refugee, the burden and standard of proof, credibility, the assessment of facts and circumstances, acts which may amount to persecution and the reasons for persecution. Under the heading "*Analysis of the Applicant's Claim*", he stated that the facts were as already

outlined in the decision. He said it was helpful to summarise “some of the most salient points” of the applicant’s claim, noting:-

- ☐ He claimed to have become involved in the Falun Gong sometime in the late 1990s in China;
- ☐ He was arrested and ill-treated by the authorities in April, 2000;
- ☐ His parents made arrangements for his release in April or May, 2000;
- ☐ He left China on 16th January, 2001 and came to Ireland;
- ☐ He studied in Ireland after obtaining a six-month visa;
- ☐ He was served with a deportation order in November, 2005;
- ☐ He applied for asylum after being served with the deportation order;
- ☐ He may have been working after his student visa expired;
- ☐ He appears well educated and claimed he only learned about the asylum process after spending approximately 5 to 6 years in Ireland.

22. The Tribunal Member stated that the last factor, “*in itself must question the credibility of the applicant’s claim and also the wellfoundedness of the claim in question.*” He found that if the applicant had felt that he was being persecuted in China, he would have applied for asylum at an earlier stage. He felt entitled to take cognisance of what the applicant had done since he came to Ireland – he did not practice Falun Gong for a period of four years. The Tribunal Member concluded:-

*“Obviously, he could have practised Falun Gong in this country without any hindrance from the authorities and the fact that he did not practise Falun Gong for a period of four years after coming to this country must be a significant factor and must go to the wellfoundedness of the overall credibility of his claim.”*

23. The Tribunal Member noted that the applicant had submitted a SPIRASI report, based on an initial evaluation carried out on 18th July, 2006 (i.e. after the oral hearing). The Tribunal Member said this was over six years from the time the applicant said he was tortured in China. He accepted that the SPIRASI doctor found a number of scars on the applicant’s body and he said he took the contents of the report into account, but that it was difficult to come to the conclusion that the scars were as a result of torture on account of his Falun Gong activities. The only medical report that is before the Court is the previously mentioned non-committal letter written by the applicant’s GP to SPIRASI in December, 2005. No SPIRASI report is before the court and it is not clear if the report to which the Tribunal Member refers was a medico-legal report or a counsellor or psychologist’s report compiled after the oral hearing. In any event, it does not appear that anything turns on this.

24. As was noted at para. 1 above, the applicant was granted leave to challenge the RAT decision on two grounds which may be summarised as:-

A. Failure to give reasons; and

B. failure to consider and to make a finding upon the applicant’s fear of persecution as a failed asylum seeker returned to China.

25. The arguments made in respect of each of these grounds will be considered in turn.

#### **A. Failure to give reasons**

26. Mr. Kilty S.C., counsel for the applicant, argued that an objective reading of the RAT decision shows that there is a lack of clarity in the reasoning expressed as to why the applicant was not believed. He submitted that a decision maker must at least give a gist of the reasons for his decision, and he argued that the Tribunal Member failed to do so in this case. He argued that an applicant should be able to understand why his application was being refused and the court should be able to understand those reasons in order to deal with an application for judicial review. He relied on *O’Donoghue v. An Bord Pleanála* (Unreported, High Court, Murphy J., 5th March, 1991) and *Faulkner v. The Minister for Industry and Commerce* (Unreported, Supreme Court, 12th December, 1996).

27. Mr Kilty argued that the reasons given for rejecting the applicant related to minor matters, and complained that the Tribunal Member failed to make any reference to the fact that the ORAC officer had accepted that the applicant was in severe pain when he was performing movements nervously at the s. 11 interview. He submitted that this showed that the ORAC officer accepted that the applicant had been tortured. Mr. Kilty also complained that the Tribunal Member failed to take account of the applicant’s explanations for not returning to China – i.e. that his Passport had expired and that he would have to go to the Embassy to obtain a new passport and to explain the circumstances of his being returned home.

28. Anthony Moore B.L., counsel for the respondents, argued that adequate reasons were given in the analysis of the applicant’s evidence and that the decision should be analysed as a whole. Mr Moore urged the court to take account of the timing of the applicant’s asylum application and the many discrepancies in the applicant’s account. He relied on the decision of Birmingham J. in *E.M.O. v. The Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 170.

#### **The court’s assessment of the first ground**

29. Having considered the Tribunal Member’s decision as a whole, the court is satisfied that although the language used by the Tribunal Member to express his decision was undeniably sparse, his reasons for rejecting the applicant’s appeal

were clear. While the style of decision writing might be criticised, the conclusions which he drew from the "salient facts" outlined in his decision clearly indicate that the Tribunal Member rejected the applicant's personal credibility because of those facts. He did not accept that a follower of Falun Gong who risked all to practice in China would not do so in Ireland. Nor did he accept that a person who left China because of persecution would fail to apply for asylum when he arrived and not do so for five or six years. These facts raised in his mind the legitimacy of the applicant's claim that he is a follower of Falun Gong and these were the reasons why the appeal failed.

30. Equally, the court is satisfied that on the facts, the reasons for which the applicant's appeal was rejected were reasonable and rational on the basis of ample evidence before the Tribunal Member. The undisputed facts were that the applicant arrived in the State in January, 2001, on a six-month visa and did not make an application for asylum until November, 2005, one month after being notified that he was to be deported, and seemingly, on the day on which he was to report to the GNIB. He was four years in the State when he applied for asylum, yet even then, he did not mention Falun Gong or any past or future persecution, stating instead "social reasons" for seeking asylum. Only when his questionnaire was filled in a week after his ASY-1 form did he provide an account of his experiences in China as a Falun Gong practitioner.

31. Unfortunately for the applicant, inconsistencies were identified in his evidence by the Tribunal Member and it is clear that there were many other inconsistencies apart from those which the Tribunal Member enumerated. The most serious inconsistencies were outlined by the Tribunal Member i.e. that the applicant gave different dates of birth at the ORAC and RAT stages, and he gave different dates for when he commenced following the Falun Gong movement: at his ORAC interview and in his questionnaire, he said that he first took up the practice of Falun Gong in 1997, after his heart attack, but told the RAT at his oral hearing that it was in 1990. The Tribunal Member ignored other inconsistencies and relied very plainly on the applicant's failure to apply for asylum and his non-practice of Falun Gong for more than five years.

32. As was pointed out by the respondents, the applicant had claimed that his support of Falun Gong was so strong that even when his job and his parents' jobs were threatened, he resisted signing a document indicating that he would stop his practice of Falun Gong. He only signed the document after weeks of torture. He said that he was arrested on 25th April, 2000, detained for two and half weeks and was not released from detention and torture until 24th May, 2000, yet his Passport was issued on 10th April, 2000. He said it must have been backdated but provided no explanation for why this should have been done. His student visa for Ireland was dated November, 2000. He came to Ireland in January, 2001, eight months after his asserted date of release from detention in China, but said that he knew nothing about asylum. He did not renew his student visa because it was too expensive. He continued working for years until detected as an unlawful immigrant. It was only after a deportation order had been made in respect of him, and after his friends had advised him to apply for asylum, that he made contact with the Refugee Applications Commissioner.

33. The relevant features of the applicant's immigration history were highlighted in the s. 13 report compiled in respect of him, where negative credibility findings were made. The Tribunal Member was entitled to rely on these features of the applicant's account to reach a negative view of credibility. On the applicant's own evidence, once he came to Ireland, he forgot about Falun Gong. He said that until one month before his ORAC interview in February, 2006, he did not practice Falun Gong, even in private.

34. In conclusion, although it may, perhaps, have been preferable if the Tribunal Member had expressed his reasons with less economy of words, there is no lack of clarity in the decision as to why the appeal failed. This challenge to the validity of the RAT decision fails.

## **B. Failure to consider fear of persecution as a failed asylum seeker**

35. The applicant's second ground is that the Tribunal Member failed to consider his asserted fear of persecution on his return to China as a person who applied for asylum in another country. Mr Kilty submitted that it is clear from the RAT decision, that this was an argument made by the applicant at the oral hearing. He argued that this argument was supported on an objective basis by the BBC Monitoring Service article appended to the s. 13 report which, he argued, cast the net wide enough to demonstrate that a person who applies unsuccessfully for asylum in another country, claiming to be a Falun Gong practitioner and who is later returned involuntarily to China, may be at risk of persecution.

36. Mr. Moore argued that that it was not sufficient for the applicant to assert an irrational, subjective fear of such persecution without producing supportive evidence to show a well-founded fear on an objective basis. The applicant's Notice of Appeal made no reference to this argument; it was not raised at the s. 11 interview and did not appear in the applicant's questionnaire. Mr. Moore submitted that the court should take judicial notice of the very large numbers of Chinese present in Ireland which would indicate that the applicant's fears of the Chinese Government having eyes everywhere was irrational. He submitted that the applicant is placing a very strained interpretation on the BBC report by suggesting that it indicates that failed asylum applicants face a risk of persecution upon return to China.

37. Mr Moore suggested that the applicant's case could be dealt with on the basis of two different approaches: (i) that his claim to fear persecution as a failed asylum seeker could be dealt with on an application for subsidiary protection or (ii) by finding that he would have had to provide objective evidence to support his contention that such a person would be persecuted on return for a Convention reason. In this regard, he relied on the decision of Irvine J. in *Foli Vignon v. The Refugee Applications Commissioner* [2009] I.E.H.C. 268 (28th May, 2009). He further submitted that it is impermissibly circular to argue that an applicant can qualify as a refugee because he was found not to be a refugee and relied on the decision of the English Court of Appeal in *A.A. v. Secretary of State for the Home Department* [2007] 1 W.L.R. 3134 as authority for this submission.

## **The court's assessment of the second ground**

38. It is not disputed by the respondents in this case that the Tribunal Member failed to consider one element of the applicant's claim, namely, that he would be persecuted if returned to China as a person who had made an application for asylum in another country. The question for this court is whether the RAT decision is defective by reason of that omission.

39. At the outset, the court fully accepts that there may be circumstances in which a person, who has made an unsuccessful application for asylum, might face a risk of persecution upon return to his/her country of origin, purely because of such an attempted asylum claim. This was addressed in the decision of *Gidey v. The Refugee Appeals Tribunal*

(Unreported, High Court, Clark J., 26th February, 2008). There are countries in respect of which several objective authorities have advised that the very fact of seeking asylum abroad is deemed an act of treason and disloyalty to the ruling regime, and that failed asylum seekers are imprisoned if repatriated. There are clearly circumstances where such an asylum seeker may require somewhat different consideration, but those cases arise where it is established objectively that such persecution of failed asylum seekers occurs and where a Convention nexus can be established. Such cases present difficulties for bodies which have the task of determining asylum status where the applicant's story of persecution is rejected, but the applicant can objectively establish that he/she comes from a State which persecutes those who flee its borders. The court agrees with the views expressed by Irvine J. in *Foli Vignon v. The Refugee Applications Commissioner* [2009] I.E.H.C. 268, that in those circumstances, a failed asylum may, by the very fact of leaving his country, find that a political opinion is imputed to him. As the decision indicates, caution is required as it would be only too easy for an applicant to assert such a state of affairs:

*"The court is conscious that there is scope for asylum seekers to abuse the statutory asylum process by making an initial unfounded application for asylum and subsequently claiming a fear of persecution as a failed asylum seeker. The making of a self-serving, unfounded initial claim must, of course, not exclude any person from the protection of the Refugee Act 1996, but it seems reasonable that it be taken into account and accorded some weight by the decision-makers when credibility is being assessed. Indeed such a person might properly be called upon to explain why they deliberately exposed themselves to a risk of persecution by creating the conditions that would make them a failed asylum seeker. Moreover, given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown."*

40. I adopt that reasoning. The situation here is that the applicant's claim that he was persecuted in China as a follower and practitioner of the Falun Gong movement was rejected. It follows that he was not a person in need of international protection. He asserted, during his oral appeal, that the very fact that he made such a claim means that he will be persecuted if returned to China. It is not entirely clear whether it is claimed that this situation pertains to all and any failed asylum seekers no matter what persecution is alleged, or only if they allege they were persecuted adherents of Falun Gong. The applicant has merely asserted this claim, but it appears he has called no evidence to substantiate it, even though the burden of proof lies with the applicant at the appeal stage to show that he is a refugee pursuant to s. 11A (3) of the Refugee Act 1996, as amended. No explanation was advanced as to why the asserted fear was not expressed at an earlier stage. The only document relied upon at this judicial review hearing, was a BBC article appended to the ORAC s. 13 Report, which outlined the particular Falun Gong activities proscribed in 1999.

41. It seems to this court that if the applicant feared, that a consequence of his claim for asylum would be that he would be persecuted on his return, he could have returned to China voluntarily without making any asylum claim, or more important, he would have notified his legal advisers of his claim and evidence could have been called in support of his eleventh hour assertion. As noted above, the burden of proof was upon him before the RAT to show that he is a refugee.

42. The argument made before this Court relies solely on the BBC report, the contents of which are outlined at paragraphs 12 and 14 above. It does not appear that this argument was made at the appeal hearing where it is apparent that no information supporting the contention was furnished, nor was the existence of any possible supporting information adverted to. While the BBC report was included in the bundle of documents forwarded to the RAT by ORAC, no issue was taken in the Notice of Appeal in relation to the report which had been sourced and furnished by ORAC. Notwithstanding this state of affairs, the court is asked to attach a meaning to the BBC report which was never advanced before the Tribunal Member or at any stage prior to the oral appeal hearing. This is not a Court of Appeal. The court's jurisdiction is confined to reviewing the appeal before the RAT in terms of the fairness of the procedures followed, or to assessing whether there were any errors of law to determine whether a decision ought to be quashed.

43. While the applicant's second ground was sufficiently arguable for the purposes of leave, the arguments advanced before this court were simply too thin to establish that the decision of the Tribunal Member should be set aside. The argument now advanced by the applicant in support of his assertion is not convincing; the interpretation attached to the final statement in the BBC report relates to an absolute prohibition of any Falun Gong activities or support. The prohibition has every appearance of draconian law but it does not seem to have any relevance to the treatment of a failed asylum seeker.

44. The court accepts that had a compelling argument, supported by objective evidence, been made to the Tribunal Member, there would have been an obligation for the Tribunal Member to consider and reach a decision on the argument made. However, as no such argument appears to have been advanced, the applicant's challenge must fail. If objective evidence becomes available to support the assertion that failed asylum seekers are targeted on return to China, the applicant is not without remedy. If the Minister decides to refuse to give a declaration of refugee status to the applicant and proposes to make a deportation order in respect of him, he will be notified of the proposal to deport and he will be afforded an opportunity to make representations as to why he should not be deported pursuant to s. 3(3) of the Immigration Act 1999. The Minister is obliged to take into consideration any such representations before making a deportation order, and he would also be obliged to consider any new evidence when assessing whether the deportation of the applicant would contravene the prohibition of refoulement set out in s. 5 of the Refugee Act 1996.

45. Section 19 of the Refugee Act 1996, as amended, makes provision for the protection of the identity of asylum applicants. Section 19(1) provides that the relevant authorities must take "all practicable steps" to ensure that the identity of applicants is kept confidential. Section 19(2) provides that no matter likely to lead members of the public to identify a person as an asylum applicant shall be published in a written publication available to the public or be broadcast without the consent of that person. Section 19(3) establishes a criminal offence for those who contravene section 19(2). Information contained in the files held by the Minister for Justice and the statutory bodies tasked with determining refugee matters, is private information and not amenable to FOI requests. It is unreal to think that the authorities of a country known to persecute members of Falun Gong would be furnished with copies of an asylum seeker's file, other than in very exceptional circumstances indeed.

46. The applicant could return to China as one of many deportees who have overstayed the terms of their visa or who have infringed employment regulations. The issue of whether he ever applied for asylum need not arise as the vast majority of the large Chinese community present in this State do not apply for asylum.

47. It will also remain open to the applicant to make an application to the Minister under s. 17(7) of the Refugee Act 1996, for permission to be readmitted to the asylum process if he can first produce cogent, new evidence and secondly provide a reasonable explanation for his failure to put forward that evidence during his initial asylum application.

48. The application fails.