



RPD File # / No. dossier SPR V99-02950

Private Proceeding
Huis clos

Claimant(s)

Demandeur(s) d'asile

XXXXXXXXXXXXXXXXXX

Date(s) of Hearing

Date(s) d'audience

July 31, 2002

Place of Hearing

Lieu de l'audience

Vancouver, BC

Date of Decision

Date de la décision

January 7, 2003

Panel

Tribunal

Kurt Neuenfeldt

Claimant's Counsel

Conseil du demandeur d'asile

Warren Puddicombe
Barrister & Solicitor

Refugee Protection Officer

Agent de la protection des réfugiés

Nil

Designated Representative

Représentant désigné

XXXXXXXXXXXX

Minister's Counsel

Conseil du ministre

Cindy Comrie

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This is a re-determination of the refugee claim of XXXXXXXXXXXX. Mr. XXXX is a citizen of China. He left China on XXXXX 1999 and arrived in Canada on 13 August 1999. He travelled on one of several decrepit fishing boats that arrived off the coast of British Columbia in that year.

The claimant was born on XXXXX 1984. He was 14 years old when he left China. He was 15 years old when the first hearing of the Convention Refugee Determination Division¹ (CRDD) of the Immigration and Refugee Board was held in late 1999 and when a positive decision was made in regard to his claim on 20 April 2000. Mr. XXXX was 17 years old when this re-determination hearing took place. As of the date of this decision, he is 18 years old.

The panel that found Mr. XXXX to be a Convention refugee summarised the evidence of the claimant in its decision.² In his evidence Mr. XXXX stated that he was pressured to leave China for North America by his family, particularly his father. Because his father wished him to go, the claimant felt he must do so, despite his own reluctance. He added that if he were returned to China and his father told him to make a second journey, he would go again because he felt obligated to fulfil his father's wishes.

The plan was that Mr. XXXX would find work in North America and remit funds to his family. In the original panel's decision, the claimant's father and family were found to be the agents of persecution.

The original panel also found that as there were many state officials complicit in the smuggling business, there was no assurance that the claimant would be able to secure state protection.

The key to the decision was the panel's finding that the claimant lacked volition when he came to Canada, and that he might feel compelled by his father to try again if he were returned to China.

¹ Now the Refugee Protection Division of the Immigration and Refugee Board.

² The decision in Mr. XXXXX claim (CRDD V99-02926, Baldwin, Vanderkooy, April 20, 2000) was given at the same time as the decision in Mr. XXXXXXX. Both claimants were under the age of 18 at the time of their combined decisions. Both indicated they had been forced to leave China against their will. Mr. XXXX did not

Leave for judicial review of the CRDD decision was sought and obtained by the Minister of Citizenship and Immigration. In a decision rendered on the XXXXXX 2001, the Federal Court Trial Division³ ordered the case should be sent back to the Board for re-determination by a differently constituted panel.

In its decision, the Federal Court Trial Division reviewed the facts in the claim of Mr. XXXX. Those facts are repeated here.

[3] The Respondents are citizens of the People's Republic of China ("China"). They were among the many Chinese people from Fujian province who travelled in dilapidated boats to the coast of British Columbia in the summer of 1999.

[4] The Respondents' boat departed from Fujian on June 12, 1999, and arrived in British Columbia on August 13, 1999. Because they were minors when their boats arrived, the Respondents were taken into the custody of the provincial Director of Family and Child Services while their Convention refugee claims were processed. At the time of the Decision on April 20, 2000, XXXX was 15 and XXX was 17 years of age. By coincidence, both young men have the same birthday. XXXXX, 2000, XXXX turned 16 and XXXX became 18.

[5] The Respondents' refugee claims were heard together with the refugee claims of 22 other minor applicants from the Fujian boats. A "Statement of Non-contentious Facts" was filed with the Board. It showed that:

- all the claimants were under 18 years of age
- all were citizens of China
- all were from Fujian province
- all were smuggled out of China illegally
- all arrived in B.C. by boat in August of 1999
- none of the claimants were accompanied by an adult family member or legal guardian
- all claimants, if they were returned to China, would be subject to fines and imprisonment for their illegal exit from China
- all the claimants feared being imprisoned and beaten by Chinese authorities if they were sent back
- all the claimants feared that they would be incarcerated for a prolonged or an indefinite period because their families would be unable to afford to pay the fines required to secure their release

[6] The Board heard the 24 refugee claims during a six-day period in November and December 1999, and in April 2000. The Board accepted only the Respondents' claims. In contrast to the other minor applicants, who indicated that they agreed with their parents' decisions to send them to Canada, the two Respondents testified that they were sent against their will.

New evidence was given at the second hearing. The claimant alleged that his father beat him on several occasions in China, perhaps 10 times. When asked why he did not mention these beatings

appear for the redetermination of his claim along with Mr. XXXXX. His claim was therefore severed from that of Mr. XXXX. Mr. XXXXX claim was latter declared abandoned.

³ *M.C.I. v. XXXXXXXX* (F.C.T.D., no. IMM-XXXXX), XXXXXXXX, 2001.

in his Personal Information Form (PIF)⁴ or during his previous hearing, he answered that he never had been asked about it. In considering this new evidence, the panel has applied the Guidelines issued by the Chairperson of the RPD, "Child Refugee Claimants: Procedural and Evidentiary Issues." Those guidelines state:

In determining the weight to be given, the panel should consider the opportunity the child had for observation, the capacity of the child to observe accurately and to express what he or she has observed, and the ability of the child to remember the facts as observed. These factors may be influenced by the age, gender and cultural background of the child as well as other factors such as fear, memory difficulties, post-traumatic stress disorder and the child's perception of the process at the CRDD.

The claimant was 14 years old when he left China. He was 15 years old when his first refugee claim was held. His second hearing was held when he was 17 years old. He had able counsel throughout his dealing with the Immigration and Refugee Board.

At all material times, he was an adolescent, not a child of tender years. The claimant was able to recount the pressure allegedly put on him by his father to leave China and that he felt bound to comply with his father's wishes. He alleged the pressure was so inexorable that there was no point in protesting. The key issue in the claim has always been the treatment the claimant allegedly received from his father. To state that he was never asked if his father beat him is in my view disingenuous. The claimant's treatment by his father is what the claim is about. His explanation for the late production of the evidence is inadequate. I give the new evidence no weight.

In its review of the first CRDD decision, the Court made the following observations:

[7] The Board's only mention of the Respondents' social group was made in the following terms:

The basis of the claim presented by you is that you have a well-founded fear of persecution due to your membership in a particular social group - that is counsel - minor children who are sent from China into servitude and who fear incarceration upon return due to their illegal exit.

[8] The Board concluded that the Respondents' parents were the agents of persecution because they forced their sons into situations of systemic hardship. The Board also recognized that the Convention definition of a refugee is forward-looking, and that the Board must conclude that the Respondents faced more than a "mere possibility" of persecution if returned to China. The Board

⁴ Exhibit 1.

concluded that it "cannot be sure that you would not be subjected to continuing family coercion" and possibly be again sent on another boat.

[9] The Board also concluded that the Respondents could not avail themselves of state protection, because the law in China often relegated the punishment of minors to the family unit. Moreover, the documentary evidence revealed that numerous state officials and authorities are involved in human smuggling from China and Fujian province. Therefore, particularly in Fujian province, the Board found that there would be no assurance that state protection would be available.

[10] The Board also rejected the possibility of an internal flight alternative ("IFA") because the Respondents would be turned over to Chinese authorities if they were sent back, and then released into the custody of their families on payment of a fine. The Board noted that the Respondents would have "little opportunity" to relocate.

In its decision, the Court described the main issue in the following terms:

Did the Board err in concluding that the Respondents were members of a particular social group, namely "minor children who are sent from China into servitude and who fear incarceration upon return due to their illegal exit?"

The Court then went on to review the definition of "particular social group" as set out in *Ward* and *Chan*. It stated:

[11] The Crown did not take issue with the principle that children can constitute a particular social group. However, the Crown said that the Board erred in defining the social group in terms of the persecution being suffered by the Respondents.

[12] The leading case on the meaning to be assigned to a particular social group is *Canada (A-G) v. Ward*, [\[1993\] 2 S.C.R. 689](#). At p. 739, the Supreme Court of Canada described the following three categories of social groups:

- a. groups defined by an innate or unchangeable characteristic (i.e. gender, linguistic background and sexual orientation);
- b. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association (i.e. human rights activists; and
- b. groups associated by a former voluntary status, unalterable due to its historical permanence (i.e. because one's past is an immutable part of the person)

[13] In none of these categories is the social group characterized or defined by the persecution suffered by its members. Indeed, in *Ward*, at p. 729, the Supreme Court indicated that social groups should not be identified to include victims of persecution.

[14] The Crown submits that the social group identified by the Board breaches this rule and says that the requirement that social groups be defined independently of the persecution suffered is necessary to prevent situations in which the mere fact of membership in the social group, rather than a well-founded fear of persecution, would lead to refugee status.

[15] Shortly after the Supreme Court of Canada's decision in *Ward*, the Federal Court of Appeal in *Chan v. Canada (M.E.I.)*, [1993] F.C.J. No. 742 QL^[1] dealt with a social group which was defined by the persecution of its members and said at paragraph 22:

This leads me to a fundamental objection to acceptance of the group of parents with more than one child who are faced with forced sterilization as a "particular social group". This group, it seems to me, is defined solely by the fact that its members face a particular form of persecutory treatment. To put it another way, the finding of membership in a particular social group is dictated by the finding of persecution. This logic completely reverses the statutory definition of Convention refugee in issue (wherein persecution must be driven by one of the enumerated grounds and not vice versa) and voids the enumerated grounds of content. The logic also conflicts with the rejection, in *Ward, supra*, of groups defined "merely by virtue of their common victimization as the objects of persecution" at page 729...

[16] Counsel for the Respondents did not disagree with the proposition that a social group cannot be defined on the basis of the common victimization of its members. Instead, he submitted that the Applicant was misreading the Decision and that, when the Board mentioned the social group in the terms set out in paragraph 7 *supra*, it was describing the Respondents' entire refugee claim and was not defining the relevant social group. As well, counsel noted that the social group proposed by the Respondents in counsels' written outline of their oral submissions before the Board was "the unaccompanied minor PRC claimants". Counsel advised that there was no discussion before the Board about the appropriate social group, and therefore no reason to think the Board had rejected the definition suggested by the Respondents.

[17] On balance, I have not been persuaded by the Respondents' submission. It seems clear from the language used by the Board that it did choose to define the relevant social group in a manner which was not suggested by counsel for the Respondents. Further, based on the decisions in *Ward* and *Chan*, I am satisfied that the Board erred and that the social group has not been properly defined. On this basis, the matter will be sent back for a re-determination by a differently constituted panel of the Board.

As this panel understands the decision, the Court found that the first panel erred by defining the social group the claimant belonged to by reference to the harm he feared. It did not accept the argument of the Respondent that the panel implicitly accepted the definition proffered in their submissions: "unaccompanied minor PRC claimants." The fact that the claimant suffered by victimization along with others was not sufficient to bring him within the purview of the Convention refugee definition.

The Court declined to deal with the argument that the claimant has a viable Internal Flight Alternative in China. Finally, the Court stated:

[19] Before closing, I wish to observe that, given the fact that the Respondents are nearing the age of eighteen years, and given that the definition of a Convention refugee is prospective, it seems to me that an assessment of the Respondents' refugee claims and the issues of state protection and an IFA must be made with an understanding of what, if anything, their ages will mean if they return to China. It may be that the Respondents will legally be adults and free of their parents' control by the time they return or soon after their return. In such circumstances, they may be able to ignore their parents and live and work in another part of China. On the other hand, Chinese people may never be free of parental control. Whatever the situation, I think the Board will need information about the existence and meaning of the age of majority in China before it can adequately address the Respondents' claims.

The Response to Information Request CHN38920.E specifically addresses the issue of the existence and meaning of the age of majority in China. Because of the importance of this issue, the Response is reproduced here in its entirety.

Specific information on the meaning of the "age of majority" and the age at which one is free from parental control in Fujian could not be found among the sources consulted by the Research Directorate. There is, however, some information available on the age at which an individual is no longer considered a minor, the age of criminal liability, the age at which an individual may marry, and age-specific labour laws.

According to China's state party report, dated 1 August 1995, to the United Nations Committee on the Rights of the Child:

... Article 2 of the [Protection of Minors] Act states: "A 'minor' is a citizen who has not attained 18 years of age." ...

The General Rules of Civil Law are an important piece of legislation protecting citizens' civic rights and interests.... Rule 11 states: "Citizens aged 18 or over shall be considered adults,... citizens aged 16 or over but not yet 18 whose income from labour constitutes their principal means of support shall be deemed to have full civil capacity." Rule 12 states: "Minors aged 10 and over have limited civil capacity, and may perform civic action consistent with their age and knowledge; ...minors aged under 10 have no civil capacity, and their legally designated representatives shall perform civic actions on their behalf."

Article 5 of the Marriages Act states: "The marriageable age for boys shall be not less than 22 years, and for girls, not less than 20 years."...

...Article 28 of the Protection of Minors Act states: "No organization or individual may employ a minor aged under 16 years except as provided by State regulations. Any organization or individual that, in accordance with the relevant State regulations, employs a minor aged between 16 and 18 years must comply with State regulations regarding the type and duration of work, arduousness of the work and safety measures, and may not assign such minor to excessively heavy, toxic or harmful work or to dangerous occupations." (UN 1 Aug. 1995).

Regarding criminal liability, the same report states:

Article 14 of the Penal Code states: "Any person who, having reached the age of 16, commits a crime shall bear criminal responsibility. Any person who, having reached the age of 14 but not the age of 16, commits homicide, inflicts serious injury, commits robbery, arson, habitual theft or other crimes seriously disrupting social order shall bear criminal responsibility. [...] Any person who, having reached the age of 14 but not the age of 18, commits a crime shall be given a lighter or mitigated punishment."

Under the Penal Code, a juvenile offender aged between 14 and 18 may legally be sentenced to life imprisonment for a particularly serious crime. The Code also states, however, that if an offender serving a life sentence shows signs of repentance or merit, the sentence may be reduced...(1995).

Further information on the meaning of the age of majority, particularly from a cultural perspective, could not be found among the sources consulted by the Research Directorate.

The age of majority in China is 18. Mr. XXXX, by Chinese law, is now a person of full capacity. The specific cultural implications of this fact were not identifiable in the Response to Information Request. What is clear, however, is that the claimant at 18 is no longer a child.

ANALYSIS

Extensive submissions were filed by counsel for the claimant and by the Minister's Representative.⁵ These materials have all been reviewed in coming to this decision.

In beginning the analysis of the claim, it must be repeated that the claimant is no longer a child as defined in the *Immigration and Refugee Protection Act* or in the *Convention on the Rights of the Child*. Counsel for the claimant states in his submissions at page 10, footnote 2:

For the purposes of these submissions: (1) the international definition of a child as a person under 18 years old is used; (2) the relevant time for determining

⁵ Claimant's submission received 20 August 2002, Minister's submissions received 30 August 2002 and claimant's reply filed 6 September 2002.

whether the person is a child is the age of the person at the time she or he was subject to being trafficked out of the PRC.

With respect, the question is not whether the claimant was persecuted in the past but whether he faces a reasonable chance of persecution in the future.

Counsel suggests that the claimant is a member of the particular social group of children.⁶ Given the change of status, the social group the claimant now belongs to can best be described as “adults who were formerly unaccompanied minor PRC claimants.”

As per the direction of the Federal Court, I must assess the refugee claim and the issues of state protection and an IFA with a clear understanding of what, if anything, his age will mean if he returns to China in the future. Counsel argues that any consent given to being re-trafficked as an adult would be vitiated by the duress inflicted by his family and the fines and debts he faces. Counsel for the Minister argues that the claimant was smuggled, not trafficked, to North America, and was therefore not subject to persecution. She bases her argument on the decision of a CRDD panel in *P.G. (re) C.R.D.D. No 150*. The panel in that decision determined that a minor Chinese claimant would not be subject to debt bondage upon arrival in the US and was therefore not exploited when being sent to North America. Counsel for the claimant argues that the panel was wrong in fact and in law, in that the analysis of the term “exploitation” by the panel ignored the provisions of the *Supplementary Convention on the Abolition of Slavery*. That Convention defines debt bondage as:

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Counsel for the claimant argues that the his client was exploited and was therefore trafficked.

In my view, whether the claimant was exploited and trafficked when he was a child is not determinative of whether he would be exploited or trafficked sometime in the future when an adult. If the claimant were to leave China illegally in the future of his own volition, he would, given all the circumstances of his background, be smuggled, not trafficked.

⁶ Submissions, page 10, second to last paragraph.

I do not agree with the argument that the claimant would be compelled to return to North America at the behest of his father or family because of the concept of filial piety. In my view, as stated in the decision of E.N.D. (Re),⁷ “filial piety” is a culturally neutral concept, not dissimilar from the Judeo/Christian admonition that children honour and obey their parents. It does not make adult Chinese sons and daughters mindless automatons.

The claimant alleged that he did not want to leave China. As the panel understands the evidence, he told no one of his reticence, but felt compelled to go. The panel does not find the evidence of the claimant that he was regularly beaten by his father credible.

Again, however, the issue is whether he would be in a different situation should he face pressures to leave China in future. In my view, given his status as an adult, there is no impediment for him to refuse to leave a second time. He is a very different person today than he was as a 14 year old when he left China. If he did decide to leave China, I have no reason to conclude that it would not be his decision to do so.

The claimant filed an amended PIF⁸ on 11 July 2002, which addresses the expanded grounds of refugee protection under the *Immigration and Refugee Protection Act*. The claimant alleges he is a Convention refugee because of his membership in a particular social group, “children.” He also claims protection as a person in danger of torture, within the meaning of Article 1 in the *Convention Against Torture*. He specifies “pain and suffering on the basis of intimidation, coercion and/or discrimination with the acquiescence of a public official.” He also claims protection as a person who faces a risk to life or a risk of cruel and unusual treatment of punishment, specifying “risks arising from being returned to China and the punishment I will receive from the authorities and the risk which arise from being trafficked.” The Minister’s Representative argues that the new grounds under section 97 of the *Immigration Act* do not apply to the claimant.

The issue of the claimant’s status – child or adult – has already been dealt with in this decision. In section 97(1)(b) of the *Immigration and Refugee Protection Act*, the issue is whether the claimant faces a risk to life or a risk of cruel and unusual treatment or punishment should he be

⁷ [2002] C.R.D.D. No. 22, paragraph 27.

⁸ Exhibit 6.

returned to China. In my view, he would not. The prison conditions in China are not those in Canada. However, the preponderance of the evidence indicates that he would be incarcerated, if at all, for a relatively short period of time in Spartan but adequate facilities. His incarceration would occur because he had violated a law of general application. He may be fined, but again the fine would not be so onerous as to be cruel and unusual punishment in itself. The penalties he would suffer, if any, would be inherent or incidental to lawful sanctions in Chinese law.

Based on the same documentation, I also find that there is insufficient evidence to conclude that the claimant would be subjected to torture within the provisions of section 97(a). I make this finding applying the evidentiary standard in *Adjei*.⁹ Given this finding, it is unnecessary to consider whether the evidentiary standard to be met by the claimant is a higher one as suggested by the Minister's Representative.

The Federal Court has directed the panel to consider the issue of state protection, given the claimant's current age. Now that the claimant is an adult, what would be the reaction if he sought state protection if any party tried to force him into being smuggled out of China a second time? Again, the matter must now be considered in light of the fact that the claimant is an adult. I find no cogent evidence to suggest that the claimant would not be able to seek the protection of the state should he need to. The Chinese government does not as a policy support illegal migration. The preponderance of the documentary evidence is that the government is now actively discouraging such activity. Corruption of some state officials is not an indication that no state protection would be available to this claimant should he seek it out. Given his background and experience, it not unreasonable to expect the claimant to do so.

One of the issues this panel needs to consider is whether this claimant could live away from his parents. Does he have a viable internal flight alternative, assuming he were subject to persecution? The issue is whether he is confined to his family residence as a result of the household registration (*hukou*) system. A Response to Information Request, CHN32624.E, dated 8 September 1999, reviews the situation as of 1999.¹⁰ It states in part:

⁹ *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; (1989), 7 Imm. L.R. (2d) 169 (C.A.).

¹⁰ Referred to in Exhibit 9.

The Government places some restrictions on freedom of movement. The effectiveness of the Government's household registration/identification card system, used to control and restrict the location of individual residences, continued to erode. The "floating population" of economic migrants leaving their home areas to seek work elsewhere in the country is estimated to be between 80 and 130 million.

The Response to Information Request goes on to note:

The hukou system still has some meaning but with open markets for virtually everything, it is far less powerful than in the past. Its main value is in letting children go to school.

In my view, the huge "floating population" and current importance of the hukou indicate that the claimant would not be unduly restricted from seeking employment and housing away from his parent's household. Given his age, education and experience, I do not find that it would be unreasonable to expect him to relocate in China.

DECISION

For the foregoing reasons, I find that XXXXXXXXXXXX is not a Convention refugee nor is he a person in need of refugee protection. I therefore reject his claim.

"Kurt Neuenfeldt"

Kurt Neuenfeldt

January 7, 2003

Date

KEYWORDS - LAWFUL SANCTION - RISK TO LIFE AND RISK OF CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT - NEGATIVE - MALE - MINORS - CHINA