

Federal Court



Cour fédérale

Date: 20090611

Docket: IMM-5505-08

Citation: 2009 FC 603

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SHUFENG WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated December 2, 2008, wherein the applicant was determined to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act* setting aside the decision of the Board, rejecting the applicant's claim and referring the matter back to a differently constituted Board for determination in accordance with such directions as the Court considers appropriate.

Background

[3] Shufeng Wang (the applicant) is a citizen of the Peoples Republic of China. He claims refugee protection because he fears persecution because he is a Christian and was a member of an underground Christian church in China.

[4] The applicant and his friend bought a business together in March 2005, in which the applicant invested all his family savings. Within two months, the business failed and he lost everything. His wife was very upset with him, and he became depressed and suicidal.

[5] The applicant's friend, Mr. Zhidong Zhang, came to visit and spread the Gospel to applicant. The applicant began to believe in the teachings that Mr. Zhang shared with him, and shortly thereafter started to attend the underground church with Mr. Zhang in June 2005. He was baptized by Pastor Jinrui Sun in February 2006.

[6] The applicant came to Canada on September 17, 2006 for the International Congress of Traditional Medicine. In October 2006 he received a call from his wife that the police in China

came to his home to search it and threatened her to call him back to China and turn himself in. The applicant also heard from his wife that the underground church was raided and his Pastor and two members were arrested. The applicant subsequently made his claim for refugee status on October 17, 2006.

Board's Decision

[7] The Board rejected the applicant's claim for refugee protection. Although the applicant is a Christian, he did not satisfy the Board that there would be a serious possibility that he would be persecuted, or that he would be subject to a danger of torture or a risk to his life, or a risk of cruel and unusual treatment or punishment by any authority in China.

[8] The Board found that the applicant was credible, and that the applicant was a practicing Christian in China, and continues his practice of Christianity in Canada.

[9] The Board found that although persecution of Christians in China does exist, the applicant's subjective fear is not supported by the documentary evidence. The Board found that mere members of house churches are not targeted. Rather, the Board found that the documentary evidence supports his finding that it is mainly leaders and pastors of churches that are subject to persecution.

[10] The Board also found that the applicant did not provide any evidence to support his claim that attending a registered state church would put the Chinese Government and the Communist Party above God.

[11] The Board found that there is not an impediment to the applicant practicing his religion in the Patriotic church, and no evidence that he would face persecution if he did so.

Issues

[12] The applicant raises the following issues:

1. In determining that the applicant was a genuine practising Christian in China but that his fear of persecution in that country was not objectively supported by the documentary evidence, did the Board err in basing its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

2. In finding that there was no impediment to the applicant being able to practise his faith freely in the government sanctioned church (Patriotic Church), did the Board err in basing its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[13] I would rephrase the issues as follows:

1. What is the standard of review?

2. Did the Board err in basing its decision on erroneous findings of fact: that his fear of persecution was not supported by the evidence; and that he would be able to practice his faith freely in the Patriotic Church?

Applicant's Submissions

[14] The applicant submits that the Board erred by making two determinative erroneous findings of fact that are not supported by the documentary evidence.

[15] The Board made selective use of the documentary evidence by disregarding portions of the evidence that supported the applicant's claim.

[16] Relying on selective documents and portions of documents, the Board found that the arrests made by police in China were concentrated on church leaders and prominent members, not ordinary members such as the applicant.

[17] The Board failed to mention why it did not rely on or consider the contradictory evidence:

Ordinary underground church members can also easily become targets of official crackdowns. Once a person has been rounded up in a church raid, he will be known to local officials, who will also mark him as a recidivist if he pops up in future raids. Leaders require followers, and if ordinary Christians are too intimidated to turn up for religious gatherings, the leaders can't accomplish much. So where Christianity is regarded as a problem, ordinary practitioners are considered an integral part of the problem.

[18] The applicant submits that the Board misconstrued the evidence before it. The Board cited the US Department of State: *International Religions Freedom Report 2007*, to say that house church leaders are the focus for arrests. However, in the same document the evidence states:

House churches report that local authorities frequently disrupted meetings of friends and family in private homes and arrested participants on the grounds that they were participating in illegal gatherings.

[19] The Board also erroneously found that the applicant would be able to practice his faith at the Patriotic Church in China. This finding is contrary to the evidence before the Board in the Response to Information Request No. CHN102494.E.

[20] The applicant relies on the finding in *Song v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1668, wherein Mr. Justice Russell found, on similar facts, that the Board erred by making erroneous findings of fact regarding the ability of that applicant to practice his religion freely in China. At paragraph 71, Mr. Justice Russell states:

The Board asserts that "[t]here is no evidence that registered church members are constrained from practicing their religion freely." Yet there was ample evidence before the Board that religion is not practiced freely within registered churches in China and that members of underground churches are persecuted. This is not a question of a mixed bag of contrary evidence that has to be weighed and assessed by the Board. A China Aid article cited by the applicant makes it clear that "the state is the heard of the Church" and that "religious messages are to be made 'compatible with socialism.'" This means that "Pastors are discouraged from preaching about Jesus' divinity, miracles or resurrection, so that believers and non-believers can be united together to build a prosperous Socialist China":

As a result, more and more believers abandoned TSPM churches and began meeting in their homes. Most Christians are now in house churches. They preach, worship and evangelize, risking the loss of jobs and homes, arrest, imprisonment, torture and death....

Respondent's Submissions

[21] The respondent submits that according to *Florea v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 598 (C.A.); *Ortiz v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1163; and *Ali v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 242, the Board is presumed to have taken all of the evidence into consideration, whether or not all the evidence has been cited in the reasons. The Board does not err by failing to refer to all of the evidence.

[22] The Board reviewed and accepted the applicant's subjective fear of persecution; the Board also accepted that the persecution of Christians does exist in China. However, the Board did not conclude that there was any source in the documentary evidence to provide support of a serious possibility of an objective fear of persecution.

[23] The respondent submits that the Board did not err when it found that the applicant did not provide any evidence that he would not be able to practice his faith because the Patriotic Church places the government above God. The respondent quotes from the report cited by the applicant that:

[i]nformation on whether the Chinese Patriotic Churches (either Catholic or Protestant) pledge their loyalty to the Chinese Communist Party first, as opposed to God or Jesus, could not be found among the sources consulted by the Research Directorate.

Analysis and Decision

[24] **Issue 1**

What is the standard of review?

The standard of review for a decision based on fact finding is reasonableness. As I stated in *Diaz v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 1543 “[F]actual findings attract a high standard of deference”. In numerous pre-*Dunsmuir* decisions, this Court has held that the appropriate standard of review was patent unreasonableness (*Soosaipillai v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1349), which has collapsed to the standard of reasonableness” as in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9.

[25] Mr. Justice Blanchard in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 8 at paragraph 16, found that findings related to the risk of persecution and country conditions are subject to the standard of patent unreasonableness. He quotes the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100:

On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s.

18.1(4)(d)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at paragraph 4.

In *Dunsmuir* above, the Supreme Court taught that if there is adequate jurisprudence determining the standard of review, then no analysis is required. *Dunsmuir* above, also reduced the three standards of review into two standards: reasonableness and correctness.

[26] Therefore, in this case, on matters of the Board's findings of fact with regard to the risk of persecution and country conditions, the appropriate standard of review is reasonableness.

[27] The Supreme Court stated in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, at paragraph 59:

There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[28] **Issue 2**

Did the Board err in basing its decision on erroneous findings of fact: that his fear of persecution was not supported by the evidence; and that he would be able to practice his faith freely in the Patriotic Church?

I agree with Mr. Justice Russell on this issue. There are factual similarities to *Song* above, to the extent that the same conclusions can be drawn. The Board has clearly made erroneous findings of fact, with complete disregard to the documentary evidence before him.

[29] The quote cited above by the respondent, is contrasted by the sentence prior to that particular statement. The report states that the Chinese government has in fact cut off contact between the clergy of the Catholic Church and the Vatican. This proves the statement following that the information regarding the Chinese Patriotic Churches is not available. Furthermore, the statement following the sentence cited above by the respondent, the Response to Information Request No. CHN102494.E states:

According to the US *International Religious Freedom Report 2006*, in certain areas of China, the relationship between registered and unregistered churches is "tense" (US 15 Sept. 2006, Sec. 3). The report notes that, for example, divisions are thought to exist within and between the official Protestant church and unregistered house churches concerning issues related to doctrine

[30] The respondent is reading the reports as selectively as the Board did. As such, I do not accept this argument and I reject the Board's findings as unreasonable given the conflicting documentary evidence. The Board was compelled to address the conflicting evidence and it did not (see *Flores v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 565).

[31] The application for judicial review is therefore allowed and the matter is referred to a different panel of the Board for redetermination.

[32] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[33] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The following provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 are pertinent.

<p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p>97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p>(a) to a danger, believed on substantial grounds to exist, of</p>	<p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire,</p>
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torture within the meaning of Article 1 of the Convention Against Torture; or

d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5505-08

STYLE OF CAUSE: SHUFENG WANG

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 25, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: June 11, 2009

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