

Date: 20001211

Docket: IMM-932-00

BETWEEN:

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SHU PING LI, CHUN XIANG CHEN, SHI QIU XIE,

JIAN AN ZHANG, YI WANG, JIA CHUN KE,

XIU HUI CHEN and QI LIN

Applicants

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.:

INTRODUCTION

[1] These reasons arise out of an application for judicial review of a decision of the Convention Refugee Determination Division (the "CRDD") of the Immigration and

Refugee Board wherein the CRDD determined the applicants not to be Convention refugees within the meaning attributed to that phrase in subsection 2(1) of the *Immigration Act*¹. The applicants' hearing before the CRDD took place at Vancouver on the 15th and 16th of December, 1999. The reasons for decision of the CRDD are dated the 4th of February, 2000.

BACKGROUND

[2] The CRDD summarized the background to the applicants' claims in its reasons in the following terms:

All the claimants allege that they left China illegally and were transported by one of four human smuggling ships from China to arrive off the coast of British Columbia in the summer of 1999.

At the time of their departure, all [the applicants] were 18 years of age or younger and travelled to Canada without a parent or guardian. All are now in the care and custody of the British Columbia Ministry of Families and Children.

Although each claimant presented his own evidence, ultimately all the claims relied on the same factual foundation and submissions.

...

At the commencement of the hearing the panel agreed to counsel's suggestion that the panel adopt a statement of facts common to all the claimants. That statement is reproduced *verbatim*.

Statement of Non-contentious Facts For the purposes of these particular refugee claims, the following facts have been stipulated to by the Immigration and Refugee Board, Convention Refugee Determination Division and by the Claimants: 1. Claimants are all currently 18 years of age or under **and** were under 18 years of age when they left the People's Republic of China ("China").

2. Claimants are all citizens of the [sic] China.
3. Claimants are all from the [sic] Fujian province in China.
4. Arrangements were made for these Claimants to be smuggled out of China illegally.
5. In approximately July 1999 the Claimants illegally exited China. They were taken out to and aboard a ship waiting for them off China's shores. The Claimants were on board the ship transporting them for approximately two months until the ship arrived in Canadian waters at the end of August 1999.
6. The Claimants all arrived in Canada unaccompanied by adult family members or other legal guardians. As such, the Director of Family and Child Services, designated pursuant to s. 91 of the *Child, Family and Community Service Act* ("CFCSA"), is the guardian of these unaccompanied minors pursuant to s.29(3) of the *Family Relations Act* ("FRA").
7. If returned to China, these Claimants may be subject to penalties for illegal exit from China and may be at increased risk of being sent again in order to pay deposits their families may owe the smugglers and fines imposed on them by the Chinese government.
8. These Claimants fear being imprisoned and beaten by authorities if they are

forced to return to China. They also fear that their incarceration may be prolonged or indefinite if the fines imposed on them are in excess of what their families are able to pay.

There was no evidence that any of the claimants left China with the intention of claiming refugee status upon arrival in Canada. There was no evidence that any of the claimants intended to bring themselves to the attention of Canadian Immigration officials upon or after arrival in Canada. Without exception they stated at the hearing that they came to North America, at least in part, to work.

Other common aspects are that all the claimants are relatively poorly educated, have been underemployed, come from poor families, and had few prospects in China. [some citations omitted]

[3] In the last paragraph of extensive reasons, the CRDD wrote:

Before concluding, the panel would like to point out that overall the claimants were forthright and engaging young men who all face a grim reality in China. They endured extreme hardship and very real danger to come to North America with the hope of economic betterment. However, their circumstances do not fall within the scope of relief offered by the Convention definition [the definition "Convention refugee" earlier referred to in these reasons].

[4] While the CRDD summarized at some length the evidence before it with respect to each of the eight applicants, I am satisfied that the foregoing constitutes sufficient background for the purpose of these reasons.

THE CRDD'S SUMMARY OF THE GENERAL EVIDENCE BEFORE IT, ITS ANALYSIS AND ITS CONCLUSION

[5] Under the heading "GENERAL EVIDENCE", the CRDD considered a report by Dr. J. Don Read and the transcript of the evidence Dr. Graham Johnson given at an earlier hearing before the CRDD, respectively a Professor of Psychology and a Professor of Sociology.

[6] With respect to Dr. Read's report, the CRDD wrote:

Unfortunately Dr. Read's report begins on a false premise. He states

...it is my opinion that the research literature on child refugees, legal and illegal, driven by war, ethnic or religious persecution or *poverty*, may cautiously but profitably be extended to the repatriation context.

The definition of a Convention refugee *does not* encompass economic migration or eventual repatriation following it as a basis for a valid claim. [emphasis in the original]

[7] The CRDD concludes that Dr. Read's report does not assist the claimants "...*vis-à-vis* the Convention definition."

[8] The CRDD noted two elements of the testimony of Dr. Johnson, the first to the effect that out-migration from Fujian province has been happening for "...a couple of

centuries.", and the second the concept of "filial piety" with respect to which the CRDD noted that Dr. Johnson does not say that the concept is dependant on the age of the various family members.

[9] The CRDD then went on to consider responses to information request that were before it relating in particular to the treatment of illegal migrants from Fujian province by authorities in China on return of the illegal migrants to that country. The CRDD concluded:

The conclusions I reach are that the claimants, with one exception, would be subject to a short period of incarceration upon return, and would be fined varying and negotiable amounts. I do not accept that they would be subject to long periods of administrative or criminal detention.

The one claimant whose history is different than the others is Xiu Hui Chen ... who failed once before in his attempt to leave China. It is of note that his evidence confirms the reports of Drs. Chin and Kwong as to treatment upon return.

[10] The CRDD then went on to reflect briefly on the United Nations Convention on the Rights of the Child², to which 177 nations were States Parties as of the 15th of February, 1996 and which was signed by Canada on the 28th of May, 1990 and ratified on the 13th of December, 1991, and two provisions of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. With regard to the former, the CRDD noted:

The ages of the claimants when they left China were from 15 to 18. None of the children were of "tender years". While their age dictates that their cases be given careful scrutiny and consideration, it does not dictate that they must be viewed necessarily as involuntary participants in an attempt to gain entry into North America by extra-legal means.

With regard to the UNHCR Handbook , the CRDD quoted Articles 61 to 64 with regard to the issue of illegal departure and the distinction between purely economic migrants and those who migrate for a number of overlapping reasons. The CRDD did not itself appear to draw any conclusions from the quoted Articles.

[11] After briefly summarizing the observations before it made by the Refugee Claims Officer, the CRDD then turned to the submissions of counsel for the applicants. It is within the context of its summary of counsel's submissions that much of the analysis of the CRDD can be found. It summarized counsel's arguments with respect to all eight applicants in the following terms:

- the government of China systematically discriminates against the people of Fujian province;
- the claimants were all children when they left China;
- the claimants could not [have] given meaningful consent to leaving China in the manner they did due to their age and the cultural phenomenon of "filial piety";
- children cannot consent to being trafficked.

[12] The CRDD noted:

For counsel, the issue is the involuntariness of the claimants' actions. It is clear that all the claimants wanted to leave China. It appears that all but one initiated discussions on the topic within their families. None gave evidence that they resisted migration or were forced to do so against their will. Almost all said without hesitation that they would try to leave again if returned to China.

However, counsel argues that their "consent" to leaving was not meaningful. There was a lack of volition on the part of each claimant due to their age and the concept of "filial piety", a culturally driven phenomenon. In my view filial piety is culturally neutral - neither good nor bad. Filial piety does not appear to be age dependent but rather dependant on the relative position of an individual within a family.

Counsel further argued that children have the right to be protected against human trafficking, and that they cannot consent to it. Trafficking in human beings is indeed a criminal act, but being the victim of crime is not persecution in the Convention sense of that word.

The decision to leave must be viewed within its cultural context. Out-migration from Fujian for economic reasons is a longstanding tradition. It is a decision distinct from the choice of the means.

In my view, the claimants left the way they did because it was the only means available to them. It is not overly speculative to assume that poor, unescorted adolescents would have difficulty leaving China by `legal' means. Likewise, one can assume they would have great difficulty in entering Canada `legally'. Neither reality is discrimination amounting to persecution.

[13] The CRDD then briefly discussed potential embarrassment to the government of China by reason of the publicity surrounding the arrival of boat loads of persons from China on the shores of British Columbia in the summer of 1999 and dismissed it as a factor that might impact on the treatment that the applicants would receive if returned to China.

[14] Under the heading "PENALTY FOR ILLEGAL DEPARTURE", the CRDD noted the decision of the Federal Court of Appeal in *Valentin v. Canada (Minister of Employment and Immigration)*³ and quoted from the reasons for that decision at page 392 to the following effect:

Generally stated, the problem is the importance, in determining whether to grant refugee status, of the fact that the claimant may face criminal sanctions in his or her country for leaving the territory without authorization or for remaining abroad longer than his or her exit visa allowed.

and further at page 395:

Neither the international Convention nor our Act, which is based on it, as I understand it, had in mind the protection of people who, having been subjected to no persecution to date, themselves created a cause to fear persecution by freely, of their own accord and with no reason, making themselves liable to punishment for violating a criminal law of general application. I would add, with due respect for the very widely held

contrary opinion, that the idea does not appear to me even to be supported by the fact that the transgression was motivated by some dissatisfaction of a political nature ... because it seems to me, first, that an isolated sentence can only in very exceptional cases satisfy the element of repetition and relentlessness found at the hear[t] of persecution, *but particularly because the direct relationship that is required between the sentence incurred and imposed and the offender's political opinion does not exist.* [underlining added by me, italics by the CRDD]

[15] The CRDD then reasons:

Counsel's arguments that *Valentin* should not be applied in this case are not persuasive. The age of the claimants, the voluntariness of their actions, and the relative severity of the penalty for illegal departure can all be taken into account while applying the principles found in *Valentin*. The claims now being considered are not so dissimilar from those considered in *Valentin* such that the principles set out therein would not apply.

In my view, it would be a distortion of the definition of Convention refugee to conclude that persons who exit their country of nationality illegally for primarily economic reasons can successfully claim refugee status because they then face penalties for their departure. If that were the case, one would be hard pressed to identify any citizen of China who would not be entitled to international protection for any reason as long as they arranged to leave China illegally.

[16] The CRDD then very briefly considered the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*⁴, where Madame Justice L'Heureux-Dubé wrote at paragraph 70, page 861:

Nevertheless, the values reflected in international human rights law [such as the *Convention on the Rights of the Child*] may help inform the contextual approach to statutory interpretation and judicial review.

[17] The CRDD would appear to summarily dismiss the relevance of the *Baker* decision in the following terms:

The issue in the *Baker* case was the method by which a visa officer exercised his discretion in assessing an application for a Minister's Permit. The jurisdiction of the Convention Refugee Determination Division of the Immigration and Refugee Board is confined to the interpretation of a rule of law and does not include an exercise of discretion. While the panel must insure that the rights of the claimants and their best interests in the process are respected, discretionary humanitarian relief is within the jurisdiction of others.

[18] With great respect, the CRDD appears to misapprehend the importance of the foregoing brief quotation from the *Baker* decision with regard to its mandate. I will have more to say on this point later in these reasons.

[19] In the result, and without further analysis, the CRDD dismissed the applicants' claims.

THE ISSUES

[20] In their memorandum of law and argument, the applicants state the sole issue on this application for judicial review in the following terms:

The issue to be determined in this application for ... judicial review is whether the tribunal erred in law by misconstruing "particular social group" and "persecution" thereby denying procedural fairness to the applicants by failing to address meaningfully their principal argument for entitlement to be found Convention refugees.

ANALYSIS

[21] For ease of reference, the relevant portions of the definition "Convention refugee" in subsection 2.(1) of the *Immigration Act* are quoted here:

2. (1) In this Act,

"Convention refugee" means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

...

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

« réfugié au sens de la Convention » Toute personne_:

a) 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_:

(i) soit se trouve hors du pays don't elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays,

...

[22] Before the CRDD, counsel for the applicants urged that the applicants were members of a particular social group, that group being children from Fujian province, a province of China that the evidence before the CRDD indicated was economically under- developed and a source of out-migration over a long period of years. Counsel could have added, but did not, that the applicants had further characteristics in common, those being that they were all from poor families, they all had little education and they all faced the depressing prospect of little opportunity to rise above the level of poverty in Fujian province. Against the guidance provided by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*⁵, I am satisfied that counsel's urging that the applicants were members of a "particular social group"

warranted more serious consideration and analysis than was provided by the CRDD on the ground that the applicants could be considered to be members of a group defined by an innate or unchangeable characteristic, that is to say their ages at the time they left China, under eighteen, thus making them "children" within the meaning of Article 1 of the Convention on the Rights of the Child.⁶

[23] As members of a particular social group so defined, counsel urged that the applicants were persecuted by virtue of their being "trafficked" on the basis of arrangements made between their parents and human smugglers. Further, counsel urged, the applicants could not "consent" to being "trafficked", whether or not they were of "tender years", when the international human rights instruments relating to children and suppression of the traffic in persons are read together and generously interpreted, as I am satisfied they should be.

[24] Against such submissions, and taking into account international human rights instruments to which Canada is a signatory in the interpretation of the definition "Convention refugee", counsel urged before the CRDD that the applicants had been persecuted on the basis of a Convention ground and, by reason of the debts incur by their families in favour of the traffickers and the further debts that their families would likely incur as a result of fines imposed on the applicants and their families by reason of their illegal departure from China, the applicants had a well-founded fear, both subjectively and objectively, that they would again be trafficked if they were returned to China, and are thus "Convention refugees".

[25] Before this Court, counsel for the applicants urged that the CRDD simply failed to address this argument and in so doing denied the applicants procedural fairness to which they were entitled.

[26] I accept without reservation the argument of counsel for the applicants. Earlier in these reasons, I reviewed at some length the reasons for decision of the CRDD and, based on that review, I am satisfied that the CRDD either failed to comprehend the applicants' principal basis for claiming Convention refugee status or, if the CRDD did comprehend the argument, it simply ignored it in deciding as it did. Whichever may be the case, I am satisfied that the CRDD erred in a reviewable manner in simply failing to address the principal basis of the applicants' claims to Convention refugee status. That is not to say that the decision of the CRDD to deny Convention refugee status to the applicants might not have been reasonably open to it. It is simply to say that, on the basis of the analysis that it engaged in, the decision that it reached was simply insupportable because it ignored the principal basis of the applicants' claims.

CONCLUSION

[27] In the result, this application for judicial review will be allowed. The decision of the CRDD that is under review will be referred back to the Immigration and Refugee Board for rehearing and redetermination by a differently constituted panel, taking into account the values reflected in international human rights law as aids to help inform the contextual approach to interpretation of the definition "Convention refugee" in subsection 2(1) of the *Immigration Act*, on the particular facts of this matter.⁷

CERTIFICATION OF A QUESTION

[28] At the close of the hearing of this matter, I reserved my decision and undertook to distribute reasons and to provide counsel with an opportunity to make submissions on certification of a question. These reasons will now be distributed. Counsel will have to the close of business on the 29th of December, 2000, to exchange and file submissions on certification of a question.

J. F.C.C.

Ottawa, Ontario

December 11, 2000

¹ R.S.C. 1985, c. I-2.

² Adopted by resolutions no. 44/25 of the General Assembly of the United Nations on 20 November 1989.

³ reflex, [1991] 3 F.C. 390.

⁴ 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817.

⁵ 1993 CanLII 105 (S.C.C.), [1993] 2 S.C.R. 689.

⁶ See the *Ward* decision, *supra*, at page 739 where the Court identifies "groups defined by an innate or unchangeable characteristics as a possible category of "particular social group".

⁷ See *Baker v. Canada (Minister of Citizenship and Immigration)* *supra*, footnote 4, and endnote 8 to the Guidelines issued by the Chairperson of the Immigration and Refugee Board relating to child refugee claimants: procedural and evidentiary issues.